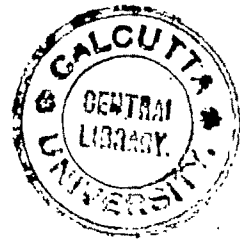


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* Deceased September 14, 1962.

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DAG HAMMARSKJOLD AND THE RELATION OF LAW TO POLITICS

BY OSCAR SCHACHTER

Of the Board of Editors

The sudden and tragic death of Dag Hammarskjöld on September 17, 1961, evoked throughout almost the entire world a sense of grief and loss that was without parallel in recent times. In the tributes paid him there was universal recognition of his extraordinary personal qualities: the depth and brilliance of his intellect, his strength of spirit, dedication, courage, and incredible stamina. He was that rare, indeed almost incomparable, combination of a man who could act with energy, boldness and consummate skill in meeting the harsh conflicts of our time, and at the same time could lead a life of inner contemplation and aesthetic experience. For those privileged to work closely with him, he had a contagious vitality and zest which, even in the most discouraging moments, inspired renewed effort. He brought to these personal qualities a tough-minded awareness of political realities and a talent for creative political innovation. The result was an era of international action in which the United Nations moved from the plane of words to that of deeds in facing some of the most perilous crises of this generation. It may well be that, with the death of Mr. Hammarskjöld, this era has come to a close, but it is not likely that its example will be forgotten.

While Dag Hammarskjöld's accomplishments have been justifiably regarded as essentially political and diplomatic, their implications for the development of international law merit special consideration. He regarded himself as a man of law, in part because of his formal legal training, in part, it seemed, because of his intellectual delight in the subtleties of legal analysis. There was also perhaps an element of personal sentiment in his attitude, for he had a manifest pride in his family's legal background and especially in the contribution made by his father, Hjalmar Hammarskjöld,¹ and his brother, Åke.² Much more important, however, than these considerations was the conviction, which he increasingly expressed, that the processes of law, and, as he put it, the principles of justice were crucial to the effort to avert disaster and to achieve a secure and decent international order. That this conviction went far deeper than the conventional homage

¹ Hjalmar J. L. Hammarskjöld, who was the Prime Minister of Sweden during the first World War, served as the Chairman of the Committee of Experts for the Progressive Codification of International Law of the League of Nations, and as President of the International Law Association.

² Åke Hammarskjöld was the Registrar of the Permanent Court of International Justice from 1922 to 1936, and a Judge of that Court in 1936-1937.

paid to the rule of law soon became evident to one who shared his professional interest. It was more than a belief in a distant goal; it inspired and influenced his actions from day to day, and it is not surprising that one of the first tributes paid him by an ambassador who knew him well was to describe him as "imbued with the spirit of law."

It may be asked whether the "spirit of law" or a belief in the value of the legal process can have much practical significance in an intensely political atmosphere such as that of the United Nations. There are, of course, many who answer in the negative; they see no meaningful application of law except in terms of an effective judicial system, and they regard references to "law" in a political body as no more than rhetorical flourishes without influence on actual conduct or policy. Hammarskjöld's beliefs and his practical actions were in a sense a challenge to this view, for they affirmed the importance of law in the United Nations while acknowledging the realities of power and political pressures. To demonstrate this more specifically, an attempt will be made to summarize, under four headings, what seem to be the fundamental conceptions of Hammarskjöld's approach to the relation of law and politics in contemporary international society. These conceptions, it will be seen, differ substantially from the traditional views of international lawyers and place in fresh perspective some of the pervasive dilemmas of international politics.

1. *Law as a Source and Basis of Policy*

Hammarskjöld made no sharp distinction between law and policy; in this he departed clearly from the prevailing positivist approach. He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and direction of collective action. This did not mean, of course, that he considered that legal precepts alone expressed the aims of states, or that they automatically determined the decisions of international bodies irrespective of other considerations. He recognized that, in international society as in domestic, legal norms are one class of many factors that enter into the process of decision-making. But, while acknowledging the influence of other factors, he laid stress on the binding character of the legal element, and consequently on the priority that should be accorded to it over other interests and claims. This was not merely a theoretical point of view: his record is replete with instances in which he found that the principles of the Charter, general and comprehensive as they are, provided sufficient guidance to enable him to resolve concrete controversies.³ Faced with conflict-

³ Some examples were mentioned by Mr. Hammarskjöld in a footnote to his lecture, "The International Civil Servant in Law and in Fact," given at Oxford University on May 30, 1961 (Clarendon Press). The footnote refers to the fact that the principles and purposes of the Charter are specific enough to have practical significance in concrete cases. It reads:

"1. See, for example, references to the Charter in relation to the establishment and operation of UNEF: U.N. doc. A/3302, General Assembly, Official Records, first emergency special session, annexes, agenda item 5, pp. 19-23; U.N. doc. A/3512, General

ing national demands and expectations, he relied on these principles and on other generally accepted legal concepts as a manifestation of the long-range major policies to which all governments had committed themselves. He did this not merely in deference to formal authority, but on the premise that the fundamental principles of the Charter and international law embodied the deeply-held values of the great majority of mankind and therefore constituted the moral, as well as the legal, imperatives of international life. In the main, he saw them "as a projection into the international arena and international community of purposes and principles already accepted as being of national validity."⁴

2. *Principles and Flexibility*

Hammar skjold's reliance on principles and legal concepts may appear to be at variance with the flexibility and adroitness that characterized much of his political activity; yet on reflection it will be seen that these apparently antithetical approaches were both essential aspects of a skilled technique for dealing with the specific problems which he faced. It is a technique that should be of special interest to the international lawyer, for it demonstrated that legal norms can be applied to novel situations without rigidity or blind conformity to precedent.

That Hammar skjold was able to do this may be attributed to three factors. One was that his own cast of mind and philosophic approach were congenial to the interplay between principles and contingent fact; he invariably sought for norms but he was equally mindful of the variety, flux and novelty of actual events. A second factor was his conception of his office. A fundamental tenet was that the exclusively international responsibility of the Secretary General implied above all a firm adherence to the principles of the Charter and other standards accepted as binding by Member States. Only through principled behavior could he fulfill his obligation of impartiality and avoid the risks of partisan and special pleading.

At the same time he realized that he was not a judge, called upon to pass judgment on the propriety of state conduct. He regarded himself essentially as a diplomat, a political technician who was required from time to time to deal with specific problems. The fact that these problems arose frequently in situations of crisis was the third factor influential in Hammar skjold's approach. For the element of "crisis" meant that there was strong pressure to meet the necessities of the particular problem and to avoid the adoption of formulae that might have unforeseen implications in future cases. It was this third factor that called for the "ad hoc" solution and the supple application of general rules.

Assembly, Official Records, eleventh session, annexes, agenda item 66, pp. 47-50. See also references to the Charter in relation to the question of the Congo: U.N. doc. S/PV. 887, p. 17; U.N. doc. S/PV. 920, p. 47; U.N. doc. S/PV. 942, pp. 137-40; U.N. doc. S/4637 A."

⁴ "Introduction to the Sixteenth Annual Report of the Secretary-General on the Work of the Organization, 1960-1961," in 8 United Nations Review 12-17, 34-35 (September, 1961), published by the U.N. Office of Public Information, OPI/79.

The technique of fusing these opposing elements into workable solutions cannot be easily described; it is more art than engineering and blueprints are not likely to be available. Certainly, an essential feature lay in the nature of the general rules which guided him. They were, in the main, principles derived from Articles 1 and 2 of the Charter; on that basis, they already commanded, in a psychological and political sense, high priority among the values formally accepted by the governments of the world. They were flexible in that they did not impose specific procedural patterns or detailed machinery for action; they left room for adaptation to the particular needs and the resources available for a given undertaking.

A good example is seen in the guiding principles which Hammarskjöld derived from the experience of the United Nations Emergency Force in Gaza, and which he summarized in a report to the General Assembly.⁵ He cautioned against a mechanical repetition of the UNEF formula, and indicated the factors which might require a different pattern in the future. However, he also considered that, by distilling the UNEF experience, it was possible to arrive at fundamental criteria which would provide standards and guidelines for future undertakings and consequently facilitate their adoption by the United Nations organs. It was not long before this was tested in the Security Council proceedings dealing with the request for military assistance in the Congo. The precise UNEF arrangement did not fit the Congo, but the guiding principles derived from that experience were advanced by the Secretary General and accepted by the governments as the constitutional basis of the United Nations operation in the Congo. The principles included that of non-intervention in internal political conflicts, the exclusion of the major military Powers from the Force, the international character and status of the Force, the independence of the United Nations in the selection of such troops, and the concept of good faith in the interpretation of the purposes of the Force.⁶ The fact that these principles had been formulated in advance enabled the Secretary General at the outset to clarify the legal and practical basis of the Force for the Congo and provided a strengthened foundation for action by the governments. General as these principles might appear to be when stated in the abstract, the experience in the Congo demonstrated that they could have effect in projecting specific policies to be followed and in restraining ill-considered measures.

It is also of significance in evaluating Hammarskjöld's flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of non-intervention, or that the notion of equality of states had to be considered in a context which included the special responsibilities of the great Powers. The fact that such precepts had contradictory implications meant that they could

⁵ General Assembly (XIII), Official Records, Annexes, Agenda Item 65, U.N. Doc. A/3943.

⁶ See U.N. Doc. S/P.V. 873, pp. 11-12. For a more detailed discussion of these principles, see Miller, "Legal Aspects of the United Nations Action in the Congo," 55 A.J.I.L. 1 (1961).

not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of the particular problem. Paul Freund gave eloquent expression to this idea in regard to the abstractions in American constitutional law:

These abstractions, arrayed in intransigent hostility like robot sentinels facing each other across a border, can become useful guardians on either hand in the climb to truth if they can be made to march together. Somehow the life blood of the concrete problem tempers the mechanical arrogance of abstractions.⁷

While this theme was not explicitly formulated by Hammarskjold, it runs through his statements and his actions. He recognized that there was inevitably a tension between principles and concrete needs; his actions showed that, by taking account of both, he sought to achieve "that combination of steadfastness of purpose and flexibility of approach which alone can guarantee that the possibilities which we are exploring will have been tested to the full."⁸

3. *The Relation between Law and Diplomacy*

Hammarskjold conceived of his office primarily in terms of diplomacy, a "quiet" diplomacy which he conducted, as Walter Lippmann observed, with "a finesse and courtliness in the great traditions of Europe." But the setting and purposes of that diplomacy were far from the traditional. In Lippmann's eloquent appraisal: "Never before and perhaps never again has any man used the intense art of diplomacy for such unconventional and novel experiments."⁹ Whether unconventional or traditional, diplomacy is normally regarded as separate from—indeed, some would say opposed to—the processes of law, and many have warned against mingling the two. Yet the experience of Hammarskjold indicates that this is an oversimplified view, and that a properly balanced combination of law and diplomacy may be an advantage, even at times a necessity.

The advantage of a legal basis is perhaps most evident when one considers the initial stage of a conciliation or good offices effort. It is apparent that a third party cannot enter the delicate terrain of inter-state controversy without having a *locus standi* acceptable to the parties directly concerned. Sometimes this is simply satisfied by the willingness of the parties to accept a friendly third-party intermediary; far more frequently, there are objections to any conciliation efforts, and influential groups within the states

⁷ 69 Harvard Law Review 803 (1956). The same conception of polarity is applied by Professor Myres S. McDougal in his many original contributions to international law. See, for example, McDougal and Feliciano, "Legal Regulation of Resort to International Coercion," 68 Yale Law Journal 1057 (1959), and other essays in *Studies in World Public Order* (Yale University Press, 1960).

⁸ Address delivered by Mr. Hammarskjold at the University of Chicago Law School, entitled "The Development of a Constitutional Framework for International Cooperation," in 6 United Nations Review 26-30 (June, 1960), published by U.N. Office of Public Information, OPI/37.

⁹ New York Herald Tribune, Sept. 21, 1961.

concerned (or perhaps external forces) may make it difficult for the governments to agree to a third-party "volunteer." However, when the third party is buttressed by firm legal authority—that is, when his *locus standi* rests on the rules and procedures to which that state has formally committed itself, that in itself becomes a cogent factor in overcoming resistance. Diplomatic intervention may then be viewed as part of generally accepted procedures agreed to by all states, and consequently involving no invidious connotation for the party to the dispute. Hammarskjöld had a profound appreciation of this aspect of peaceful settlement, and he therefore attached considerable importance to the grant of authority enabling him to enter into private discussions. He recognized in this respect the legal significance of the Security Council's responsibilities under the Charter, and he laid stress on the importance of a mandate by that organ in situations involving threats to the peace.¹⁰ In point of fact, most of his diplomatic activities, notably in the Middle-East, Africa and Southeast Asia, were undertaken on the basis of a mandate of the Security Council, bolstered in several cases by agreements of the parties themselves. Only rarely did he offer his good offices without a Security Council or General Assembly mandate, and these instances were limited to situations in which both sides desired his participation in preliminary discussions.¹¹

There is another, no less important, aspect of the relation between law and diplomacy which can be discerned in Hammarskjöld's diplomatic technique. An examination of his conciliation efforts shows that he relied to a considerable extent on establishing a common ground of principles to which both sides could adhere. An essential element in this process was to suggest general standards which had a legal quality, whether as an accepted norm of international law or as a rule which was implied by or closely related to a principle of law. The legal aspect was important in achieving acceptance because it endowed the proposed standards with the authority of pre-existing obligations and the character of a universal rule that would be applied equally in other cases. It thus implied that the solution to be reached would not diverge too sharply from the probable expectations of the states concerned, and for that reason was less likely to involve political difficulties. It also offered an assurance that the conciliation effort was carried out with objectivity and impartiality and therefore without discrimination against either side. Hammarskjöld's awareness of these factors is demonstrated by his frequent recourse to legal rules and precedents which, directly or by analogy, could be applied to the particular situation and accepted as guiding principles by the parties concerned. By a discriminating and skillful use of legal principles, he was thus able to further his diplomacy of conciliation and by its success to reinforce the effectiveness of law.

¹⁰ See address by Mr. Hammarskjöld to the Students' Association of Copenhagen, entitled "Do We Need the United Nations?", in 5 United Nations Review 22-26 (June, 1959), published by U.N. Office of Public Information.

¹¹ Introduction to the Fourteenth Annual Report of the Secretary General on the Work of the Organization, 1958-1959, U.N. Doc. A/4132/Add. 1, p. 3.

4. *Law, Power and Action*

Although Hammarskjold often stressed the imperative quality of legal norms, this did not mean that he regarded law as an autonomous force which develops and is applied independently of political and social factors. He preferred to view law not as a "construction of ideal patterns," but in an "organic sense,"¹² as an institution which grows in response to felt necessities and within the limits set by historical conditions and human attitudes. Placed as he was in the center of the political maelstrom, Hammarskjold could not but be keenly aware of the impact of power relations on the normative structure of international society. He was especially mindful of the fact that the constitutional pattern of the United Nations had been molded largely by the concentration of power in the two major blocs and by the deep conflict between them. He was equally aware of the extent to which internal instability and the demands for radical changes affected the application of existing rules of public order. But it was characteristic that he regarded these factors not merely as imposing limits on the use of law, but in a more positive sense as a challenge which called for creative attempts to find new norms and procedures. In making these attempts in new directions, Hammarskjold never lost sight of the limiting conditions; he always was conscious that he was nurturing an organic growth, not designing an ideal pattern.

He did not, therefore, attempt to set law against power. He sought rather to find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established. In the area of advancing technologies, such as atomic energy and outer space, he pursued efforts to develop new normative arrangements based on the acknowledged factors of interdependence. In the economic and social field, he stressed the mutual interest of the advanced states in combatting the debasement of living standards and human dignity in the impoverished countries of the world. In the most critical arena, the relation between the major power blocs, he devoted himself to seeking balanced arrangements based on the mutual interest of both blocs to survive in a world in which each possessed the power to destroy the other. He did not endeavor to enter directly into big-Power relations, nor in any way to mediate directly between them. But he found opportunities in the peripheral areas, especially in the "power vacuums" that arose in underdeveloped areas and which provoked external intervention and the inevitable counteraction by the other side.¹³ In these matters he sought to stave off the dangerous spiral of action and reaction by measures to fill the vacuums and create a viable economy and government by means of economic and financial aid, the building of governmental and administrative machinery, the provision of educational and technical training, and, even as in the Congo, by using armed force to maintain internal order. These measures, commonly de-

¹² See address of Mr. Hammarskjold referred to in note 8 above.

¹³ Introduction to the Fifteenth Annual Report of the Secretary-General on the Work of the Organization, 1959-1960, U.N. Doc. A/4390/Add. 1, p. 4.

scribed as "executive action," signified for Hammarskjöld a fundamental and decisive advance toward a more effective system of international co-operation, and they have been widely regarded as constituting a major feature of his political legacy.

Although these "operational" measures do not at first seem to be related to international law, it will be evident on reflection that they have an impact on the evolution of standards of international behavior, and the effective implementation of such standards. For it must be borne in mind that collective intervention of the kind described, based on United Nations principles, involves more than "action." It necessarily includes new conceptions of permissible and impermissible interference by individual states, and of the Charter obligations for mutual assistance and co-operation. Moreover, such measures constitute, as Mr. Hammarskjöld observed, practical means and techniques for bringing about compliance with international decisions and principles. They can, therefore, be regarded in a broader and more subtle sense, as a part of the enforcement or sanctioning machinery which is available to the international community to assure observance of its decisions. Viewed in these terms, such practical action will be seen as imparting a new dimension to the efforts to give vigor and efficacy to a normative structure based on the common interests of all peoples.

MR. HAMMARSKJOLD, THE CHARTER LAW AND THE
FUTURE RÔLE OF THE UNITED NATIONS
SECRETARY GENERAL *

BY ERIC STEIN

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[This article was completed in the summer of 1961 before Dag Hammarskjöld's tragic death. It was intended primarily to provide an account of Mr. Hammarskjöld's own concept of the legal-constitutional framework within which he performed his high office. The article is now offered—without modification—as a modest tribute to a man who has left an historic imprint on the development of international law and organization.]

The Government of the Soviet Union has claimed, in connection with the United Nations activities in the Congo, that Secretary General Hammarskjöld and his staff have taken upon themselves functions which are outside their competence and within the exclusive competence of the political organs of the United Nations, and that they have acted arbitrarily and not impartially. Consequently, that government insisted that Mr. Hammarskjöld be removed from his post and that his office be replaced by an elected triumvirate representing "the present three main groups of States." Finally, the Soviet Government has demanded that the United Nations Secretariat be reorganized on the same basis so that the three main groups of states are represented on an equal footing, because "while there are neutral countries, there are no neutral men."¹

However, the General Assembly voted by an overwhelming majority to continue the Secretary General's mandate in the Congo.² Such schemes

* The author wishes to acknowledge the research assistance in the preparation of the article rendered by Mr. John Palmer of the University of Michigan Law School.

¹ As examples of statements by Soviet representatives see: U.N. General Assembly, 15th Sess., Official Records, 869th Meeting, pp. 82-83 (1960) (by Chairman Khrushchev); Review of the Activities and Organization of the Secretariat, Report of the Committee of Experts appointed under General Assembly Res. 1446 (XIV), Appendix I (A/4776) (June 14, 1961), Separate Opinion by Mr. A. Roshchin, Soviet Expert, Appended to the Report of the Committee of Experts.

² On Sept. 19-20, 1960, the Fourth Emergency Special Session of the General Assembly adopted an African-Asian resolution (Res. 1474 (ES IV)) by vote of 70 to 0, with 11 abstentions, which in part "[R]equests the Secretary-General to continue to take vigorous action in accordance with the terms of the aforesaid resolutions [i.e., Security Council resolutions of July 14 and 22, and August 9, 1960] and to assist the Central Government of the Congo in the restoration and maintenance of law and order throughout the territory of the Republic of the Congo and to safeguard its unity, territorial integrity and political independence in the interests of international peace and security." U.N. General Assembly, 4th Emergency Spec. Sess., Official Records, Supp. No. 1, p. 1 (Doc. A/4510) (Sept. 20, 1960); *ibid.*, 863rd Meeting, p. 102 (Sept. 19, 1960).

for reorganization of the Secretariat as have been under consideration for some time do not contemplate radical structural changes and are oriented primarily toward assuring "more balanced geographical distribution," particularly for the newly admitted Member States. The three past Presidents of the General Assembly, whose opinions Mr. Hammarskjöld had sought, proposed in their report that the number of top echelon Under Secretaries for Special Political Affairs, who now serve as advisers to the Secretary General on special questions and are available for *ad hoc* assignments, be increased from two to five.³ Three of the eight members of the Committee of Experts established by the General Assembly have suggested that there should be three Deputy Secretaries General chosen by the Secretary General himself, "taking into account the main political trends in the world," who would be primarily concerned with political functions.⁴ The majority of the Committee recommended a new recruitment formula with greater stress on geographic representation to be applied basically within the present organizational framework.⁵ But there is no evidence that the triumvirate concept has gained substantial support outside the Soviet orbit.

Mr. Hammarskjöld's official position on the Soviet proposals and allegations is set forth amply in the records of the Security Council and of the General Assembly.⁶ But in a recent unofficial address, he expressed a

On April 15, 1961, a resolution reaffirming the United Nations operation in the Congo was adopted by vote of 60 to 16, with 23 abstentions. U.N. General Assembly, 15th Sess., 985th Meeting, Doc. A/P.V. 985 (1961) (Provisional). The resolution (Res. 1600 (XV)) provided in part:

"[The General Assembly . . .] Considers it essential that necessary and effective measures be taken by the Secretary-General immediately to prevent the introduction of arms, military equipment and supplies into the Congo, except in conformity with the resolutions of the United Nations. . . ." A separate vote was taken on the retention of the words "by the Secretary-General." The vote, viewed as a vote of confidence in the Secretary General, was 83 to 11, with 5 abstentions, in favor of retaining the specific reference to the Secretary General. *Ibid.*

³ The Organization of the Secretariat at the Under Secretary Level, Report to the Secretary General by three past Presidents of the General Assembly: Mr. Lester B. Pearson (Canada), President of the Seventh Session, Prince Wan Waithayakon (Thailand), President of the Eleventh Session, and Dr. Victor Beland (Peru), President of the Fourteenth Session, in Report of the Committee of Experts (note 1 above), Annex I, p. 15.

⁴ *Ibid.* at 16.

⁵ *Ibid.* at 24-25.

⁶ For example, after Mr. Khrushchev's statement to the General Assembly on Sept. 23, 1960, Mr. Hammarskjöld stated before that body:

"[T]his is a question not of a man but of an institution. Use whatever words you like, independence, impartiality, objectivity—they all describe essential aspects of what, without exception, must be the attitude of the Secretary-General. . . . [I]f the office of the Secretary-General becomes a stumbling block for anyone, be it an individual, a group or a government, because the incumbent stands by the basic principle which must guide his whole activity, and if, for that reason, he comes under criticism, such criticism strikes at the very office and the concepts on which it is based. I would rather see that office break on strict adherence to the principles of independence, impartiality and objectivity than drift on the basis of compromise. . . ." U.N. General Assembly, 15th Sess., Official Records, 871st Meeting, p. 95 (Sept. 26, 1960).

personal philosophy of his high office and described the dilemma faced by an international civil servant charged with controversial political functions.⁷ His statement offers an admirable basis for a more general discussion of the rôle of the Secretary General in the performance of such functions.

MR. HAMMARSKJOLD ON THE LAW

It is only logical that Mr. Hammarskjold should have wished to reassure himself in the first place that his concept of the Secretary General's office reposed on a sound legal foundation. The institution of a permanent international civil service, Mr. Hammarskjold recalled, represented an important advance beyond the traditional diplomatic conference serviced by national staffs which were seconded by the participating governments. The League of Nations Covenant provided simply for a "permanent Secretariat" headed by a Secretary General to be appointed by the Council with the approval of the Assembly;⁸ from this broad and indefinite language Sir Eric Drummond, the first Secretary General of the League, evolved the concept of a truly international service founded on two basic principles: the principle of international composition (the best qualified men selected with

See also U.N. Security Council, 16th Year, Official Records, 935th Meeting, Doc. S/P.V. 935 (Feb. 15, 1961) (Provisional), for Mr. Hammarskjold's reply to a Soviet demand for his resignation in the aftermath following the death of Mr. Lumumba. On June 30, in a comment on the Report of the Committee of Experts (note 1 above), Mr. Hammarskjold stated:

"As to the proposal that the Secretariat be composed of equal numbers of nationals of three political groups of States, the Secretary-General observes that many of the States included in one or the other category may not wish to be thus labelled. Apart from this, it is obvious that such a proposal runs counter to the Charter. Secretariat representation that would be determined by political or ideological groupings would be unrelated to geographical distribution. Nor could it be justified on grounds of equity." U.N. Doc. A/4794, p. 11 (June 30, 1961).

"The International Civil Servant in Law and in Fact," Address by U.N. Secretary-General Dag Hammarskjold at Oxford University, May 30, 1961, U.N. Press Release SG/1035 (May 29, 1961). For other expressions of Mr. Hammarskjold's philosophy, see Hammarskjold, "Towards a Constitutional Order," in *Perspectives on Peace 1910-1960*, p. 65 (Carnegie Endowment for International Peace, 1960); Introduction to the Annual Report of the Secretary General on the Work of the Organization, June 16, 1959-June 15, 1960, U.N. General Assembly, 15th Sess., Official Records, Supp. No. 1A (A/4390/Add. 1) (1960); Introduction to the Annual Report of the Secretary General on the Work of the Organization, June 16, 1960-June 15, 1961, U.N. General Assembly, 16th Sess., Official Records, Supp. No. 1A (A/4800/Add.1) (1961).

⁸ Art. 6 of the Covenant of the League of Nations provides:

"1. The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required.

"2. The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly.

"3. The secretaries and staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council.

"4. The Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council. . . ." See also Arts. 7, 11 and 15.

due regard to broad geographic representation) and the principle of independence and international responsibility, which found its legal expression in the Regulations⁹ requiring the officials to act with the interests of the League alone in view and prohibiting them from receiving instructions from any external authority.

The third major idea which, according to Mr. Hammarskjöld, Sir Eric transplanted from the British Civil Service to the international realm was that the international Secretariat must be solely an administrative organ eschewing political judgments and actions. On the assumption that there should exist at all times a higher political authority with the capacity to take political decisions, the non-partisan civil servant administrator could not take sides in any political controversy and, accordingly, he could not be given tasks requiring him to do so. Those who have listened to the numerous statements of the two successive United Nations Secretaries General in the General Assembly will be surprised to learn that the League Secretary General never addressed the Assembly of the League, and in the Council he tended to speak as hardly more than a secretary of a committee. While Sir Eric Drummond and others played a rôle behind the scenes, acting as a confidential channel of communications to governments engaged in a dispute, this rôle was never extended to taking action in a politically controversial case that was deemed objectionable by one of the parties.

The Charter of the United Nations, Mr. Hammarskjöld pointed out, accepted as a legacy of the League the principle of international composition of a permanent Secretariat¹⁰ and incorporated almost verbatim the League Regulation on its independence and international responsibility.¹¹

⁹ Art. 1, par. 1, of the Staff Regulations of the League of Nations states:

"1. The officials of the Secretariat of the League of Nations are exclusively international officials and their duties are not national, but international. By accepting appointment, they pledge themselves to discharge their functions and to regulate their conduct with the interests of the League alone in view. They are subject to the authority of the Secretary-General, and are responsible to him in the exercise of their functions, as provided in these Regulations. They may not seek or receive instructions from any Government or other authority external to the Secretariat of the League of Nations." Aufrecht, *Guide to League of Nations Publications* 440 (1951).

¹⁰ U.N. Charter, Art. 101, pars. 1 and 8, provides:

"1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

"3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

¹¹ U.N. Charter, Art. 100, provides:

"1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

"2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

But when it came to the definition of the functions and authority of the Secretary General, the Charter broke new ground.

Article 97 refers to the Secretary General as "the chief administrative officer";¹² even if some might give a normative and limiting significance to these words, any doubt as to the political rôle of the Secretary General is dispelled by Article 99,¹³ which confers upon him the authority to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." This authority, Mr. Hammarskjöld continued, has been interpreted by legal scholars as carrying with it, by necessary implication, a broad discretion to conduct inquiries and to engage in informal diplomatic activity in regard to any matter which may threaten the peace.¹⁴ Moreover, Article 98¹⁵

Mr. Hammarskjöld suggested that the League experience with the German Nazis and Italian Fascists demonstrated the desirability of including in the Charter an exact obligation along the lines of Art. 100. Mr. Hammarskjöld also pointed out that a proposal in the Preparatory Commission in London that appointments of officials should be subject to the consent of the Member government of which the candidate was a national was rejected by a great majority and the Commission stressed that the Secretary General "alone is responsible to the other principal organs for the Secretariat's work." Preparatory Commission of the U.N., Report, p. 86 (PC/20) (1945). Mr. Hammarskjöld believed that the description in Art. 97 of the Secretary General as "the chief administrative officer of the Organization"—a phrase not found in the Covenant, though probably implicit—makes it an explicit constitutional requirement that the administration shall be left to the Secretary General. Cf. also Art. 105 providing for granting officials of the Organization necessary privileges and immunities which, Mr. Hammarskjöld pointed out, reinforces the principle of exclusive international responsibility and independence of the Secretariat from national pressures.

¹² U.N. Charter, Art. 97, provides: "The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization."

¹³ U.N. Charter, Art. 99, provides: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."

¹⁴ For examples of a broad interpretation of the Secretary General's political powers, see: A. Ford, in Wortley, *The United Nations—The First Ten Years* 84-85 (1957); Schwebel, *The Secretary-General of the United Nations* 24-30 (1952); Nicholas, *The United Nations as a Political Institution* 153-154 (1959); Ross, *Constitution of the United Nations* 104 (1950); Bailey, "The Secretary-General of the United Nations," 17 *The World Today* 2 (Jan., 1961); Lauterpacht, *International Law and Human Rights* 187 (1950); Kunz, "The Legal Position of the Secretary-General of the United Nations," 40 *A.J.I.L.* 786, at 790-792 (1946); Simmonds, "'Good Offices' and the Secretary-General," 29 *Nordisk Tidsskrift for International Ret* 330, at 336-340 and 342-343 (1959); Kopal, "K pokusům o změnu postavení, struktury a dělby funkcí Rady bezpečnosti, Valného shromáždění a generálního tajemníka v soustavě OSN," 8 *Právníké štúdie* 470, at 492-493 (Bratislava, 1960); Virally, "Vers une Réforme du Secrétariat des Nations Unies?," 15 *International Organization* 236 (1961); *id.*, "Le Rôle Politique du Secrétaire Général des Nations Unies," 4 *Annuaire Français de Droit International* 360 (1958).

But see Kelsen, *The Law of the United Nations* 304 (1950). Prof. Kelsen's viewpoint is criticized in Schwebel, "The Origin and Development of Article 99 of the Charter," 28 *British Year Book of International Law* 371, at 380, note 2 (1951). Specifically on the Secretary General's power to investigate, see note 41 below. Judge

provides not only that the Secretary General "shall act in that capacity" in the meetings of the principal United Nations organs, but that he "shall perform such other functions as are entrusted to him by these organs"—a provision absent from the Covenant. It entitles the General Assembly and the Security Council to entrust the Secretary General with tasks involving the execution of political decisions even when this would bring him—and with him the Secretariat and its members—into the arena of possible political conflict.

This new concept, Mr. Hammarskjöld pointed out, is of American origin, the United States having laid aside an earlier idea that the Organization should have both a President and a Secretary General in favor of a single officer combining the political and executive functions of a President with the administrative functions previously accorded to a Secretary General. This concept is a reflection, in some measure, of the American chief executive officer, who is not simply subordinated to the legislative branch but is constitutionally responsible for the execution of legislation and for carrying out the authority derived directly from the Constitution. Consequently, Article 98, entitling the Assembly and the Security Council to entrust the Secretary General with tasks going beyond those of "the chief administrative officer . . . opens the door to a measure of political responsibility which is distinct from the authority explicitly accorded to the Secretary-General under Article 99 but in keeping with the spirit of that Article." This means that the Secretariat, unlike the non-political civil service, may be forced to take stands of a politically controversial nature, but must do so on an international basis without departing from the basic concept of "neutrality"—wholly uninfluenced by national or group interests or ideologies. "In fact Article 98, as well as Article 99, would be unthinkable without the complement of Article 100 strictly observed in letter and spirit."

As in so many other instances, the legislative history of the Charter articles dealing with the Secretary General does not throw much light on the intended scope of his political rôle. One fact, however, is brought out with unmistakable clarity. From the early days of the planning memoranda written in the Department of State through the preparation of the Dumbarton Oaks proposals to the San Francisco Conference, it has been understood that the Secretary General should be given a more important political rôle than his predecessor in the League. In the early draft "Constitution" the State Department planners would have the "General Secretary" act as permanent non-voting chairman of the Executive Council with independent authority to summon the Council, bring before it any

Krylov refers to the Secretary General as "a political figure" ("politichesky deyatel"), Krylov, *Materialy k Istorii Organizatsii Ob'edinennykh Natsii* at 56 (1949).

¹⁵ U.N. Charter, Art. 98, provides: "The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization."

threat to peace, and appeal directly to the parties concerned.¹⁶ During the period when it was contemplated that the new organization would have both a "president"—an elder statesman of the caliber of Roosevelt or Churchill—and a "Director General," the political and administrative functions were not clearly separated.¹⁷ It was argued at the time that in a political organization of states, there was no place for an individual with authority in his own person except "to run the machine." Others contended that the office of the president as mediator would serve as a unifying force, representing the "general interest" of the entire world and providing a focus of public loyalty.¹⁸ The idea of a president of the organization was abandoned by the Department of State, and the American "Tentative Proposals" prepared for the Dumbarton Oaks consultations among the great Powers speak only of a "director general" who was to act as the chief administrative officer, as "secretary general" for other organs and as coordinating officer with the specialized agencies.¹⁹

It was China and Great Britain who proposed at Dumbarton Oaks the privilege of the Secretary General to bring before the Security Council any matter he considered a threat to peace—"evidently as a result of the widespread criticism of the League system, which has allowed only a member state to bring an alleged threat before the Council and thus has hampered its speedy convening."²⁰ The United States and the Soviet Union had no objections to what was agreed to be "a very useful procedure when no member of the Organization wishes to take the initiative."²¹

The discussion at Dumbarton Oaks centered principally upon the procedure for the election of the Secretary General, and the resulting text, which followed essentially the American draft, included the substance of what became Articles 97, 98 and 99, except for the provision authorizing the Secretary General to perform "such other functions as are entrusted to him by" the other principal organs.²² This clause was added in Article

¹⁶ Draft Constitution of International Organization, Arts. 4 and 10, in Postwar Foreign Policy Preparation, 1939-1945, p. 472, at pp. 474, 478 (U. S. Dept. of State Pub. 3580, General Foreign Policy Series 15) (1949).

¹⁷ Russell and Muther, *A History of the United Nations Charter* 373-375 (1958).

¹⁸ *Ibid.* at 375-376.

¹⁹ [United States] Tentative Proposals for a General International Organization, Ch. X, in Postwar Foreign Policy Preparation, 1939-1945 (cited note 16 above); p. 595, at p. 605.

²⁰ Russell and Muther, *op. cit.* note 17 above, at 432.

²¹ Great Britain, *A Commentary on the Dumbarton Oaks Proposals for the Establishment of a General International Organization* 11, quoted in Russell and Muther, *ibid.*

²² [The Dumbarton Oaks] Proposals for the Establishment of a General International Organization, Ch. X, in Postwar Foreign Policy Preparation, 1939-1945 (note 16 above), p. 611, at pp. 618-619:

"1. There should be a Secretariat comprising a Secretary-General and such staff as may be required. The Secretary-General should be the chief administrative officer of the Organization. He should be elected by the General Assembly, on recommendation of the Security Council, for such term and under such conditions as are specified in the Charter.

"2. The Secretary-General should act in that capacity in all meetings of the General

98 at San Francisco apparently without any discussion²³ and generally the debate on that article was "minimal."²⁴

Surprisingly, there was hardly any debate on the important Article 99, but the Conference refused to accept three proposals which were designed to broaden the Secretary General's authority under that article.²⁵ The fact that one of these proposals was defeated by a narrow vote was viewed by one scholar as a "renewed demonstration of the desire widespread at San Francisco to invest the Secretary General with substantial political authority."²⁶

The four sponsoring Powers offered several modifications concerning the procedure of election, term of office and the election of Deputies Secretary General, which were, on the whole, restrictive of the Secretary General's status but had no direct bearing upon his political power. These proposals were also largely rejected by a "Small Power revolt."²⁷

Assembly, of the Security Council, and of the Economic and Social Council and should make an annual report to the General Assembly on the work of the Organization.

"3. The Secretary-General should have the right to bring to the attention of the Security Council any matter which in his opinion may threaten international peace and security."

²³ Professor Schwebel notes that at the time of the Iranian case in 1946, a restrictive interpretation of this clause "has been bruited about informally" along the following lines: "If the Secretary-General is to perform such other functions as are entrusted to him, it could be held that he is *not* to assume any functions relating to the activities of these organs *not* so entrusted to him." Schwebel, *The Secretary-General etc.*, *op. cit.* note 14 above, at 29. A somewhat similar interpretation was mentioned in newspaper reports from Paris at the time of the French-Tunisian conflict in July, 1961. *New York Times*, July 28, 1961, p. 4, col. 6.

²⁴ Committee I/2 recommended that the language of Art. 98 should be kept sufficiently broad to cover all the functions of the Secretariat. 7 U.N.C.I.O. Docs. 391 (1945). A subcommittee report spoke of "political as well as administrative" functions. See Kelsen, *op. cit.* note 14 above, at 302, note 8.

²⁵ Schwebel, *The Secretary-General etc.*, *op. cit.* note 14 above, at 19-21. The three proposals mentioned in the text were: (1) that the Secretary General should have the *duty*, not only the right to bring threats to peace before the Security Council; the motion to this effect was not accepted, 7 U.N.C.I.O. Docs. 392, 556 (1945); (2) that the Secretary General should have a right to bring matters which threaten international peace not only before the Security Council but also before the General Assembly, as was originally contemplated by the United States, Russell and Muther, *op. cit.* note 17 above, at 432. The amendment to this effect was rejected. The opponents of the amendment argued that it would impose upon the Secretary General the burden of a difficult choice between the two organs and perhaps impinge upon the Security Council's primary responsibility, 7 U.N.C.I.O. Docs. 162-163, 168-169, 392-393 (1945); Goodrich and Hambro, *Charter of the United Nations* 502 (1949). For a criticism of the rejection of this amendment, see Kelsen, *op. cit.* note 14 above, at 303; (3) that the Secretary General be entitled to bring before the Security Council matters which would not necessarily threaten the peace but would constitute violations of the Charter principles, including, according to some proponents, domestic infringements, 7 U.N.C.I.O. Docs. 162-163, 168-169, 392-393 (1945). This proposal, which the opponents argued would vest the Secretary General with wider authority than had been given to Members, was defeated in Committee I/2 by a vote of 16 to 13. *Ibid.* at 168-169.

²⁶ Schwebel, *The Secretary-General etc.*, *op. cit.* note 14 above, at 21.

²⁷ Russell and Muther, *op. cit.* note 17 above, at 854-860; Schwebel, *The Secretary-General etc.*, *op. cit.* note 14 above, at 19. Mr. Hammarskjöld argued in his address

The Preparatory Commission of the United Nations which was established by the San Francisco Conference foresaw late in 1945 that the Secretary General might have an important rôle to play "as a mediator and as an informal advisor of many governments." However, the Commission concluded that it was impossible to foresee how the "quite special right [under Article 99] which goes beyond any power previously accorded to the head of an international organization" would be applied; "but the responsibility it confers upon the Secretary-General will require the exercise of the highest qualities of political judgment, tact and integrity."²⁸ The type and importance of the mandates which were to be entrusted to the Secretary General by the political organs under Article 98 were equally unforeseen and unforeseeable. But Mr. Hammarskjöld's liberal interpretation of his powers is compelling, particularly when viewed against the background of the factual developments in the United Nations, which he described in the second portion of his statement.

MR. HAMMARSKJÖLD ON THE FACTS

The Charter articles, Mr. Hammarskjöld reported, have undergone a continual process of interpretation in the face of strong pressures brought to bear upon the Secretary General as a result of international tensions, changes in governments and concern with national security. On one hand the Secretary General, as a practical matter, has had to utilize the services of governments in staff recruitment to obtain applications for positions and information about the applicants. On the other hand, he has had to maintain the principle of independent selection of the staff, which compelled him to refuse to dismiss staff members on the basis of mere suspicion of a government or a conclusion based on undisclosed evidence.²⁹ But pressures have been exerted in a more subtle way when governments have insisted on seconding their national officials for brief fixed-term appointments in the

that, precisely because the Secretary General was charged with political functions, the San Francisco Conference rejected the proposals to eliminate the participation of the Security Council (acting under the unanimity rule) from the procedure for his election, 11 U.N.C.I.O. Docs. 568-571 (1945), as well as a proposal for a three-year term, considered too short to assure his independent position, 7 *ibid.* 279-281 (1945); again, the Conference rejected proposals, mirroring in some measure the idea of a Cabinet system, for Deputy Secretaries General, to be appointed in the same manner as the Secretary General, who would not be responsible to the Secretary General but to the bodies which elected them, *ibid.* 280-281 (1945).

²⁸ Report, note 11 above, at 87. For an analytical summary of practice in the application of Arts. 98-99, including the relevant rules of procedure of U.N. organs, see 5 *Repertory of United Nations Practice*, particularly pp. 156-162, 176-177 (1955) and *Supp. No. 1, Vol. II, particularly pp. 372-381 (1958).*

²⁹ Mr. Hammarskjöld recalled that this problem assumed critical proportions in 1952 and 1953 when the U. S. Government "conducted a series of highly publicized investigations of the loyalty of its nationals in the Secretariat. . . . [A]s a result of the stand taken by the Organization," the principle of Art. 100, par. 1, "was recognized by the United States Government in the procedures it established for hearings and submission of information to the Secretary-General regarding U. S. citizens." U.N. Press Release, note 7 above, at 12.

Secretariat, rather than allowing them to accept permanent career appointments. Mr. Hammarskjöld considered it desirable to have a reasonable number of "seconded" officials available to perform particular tasks calling for diplomatic or technical skills, but he warned that a large portion of such officials—perhaps in excess of one-third—would turn the present international Secretariat, based on career service, into an "intergovernmental" Secretariat contrary to Articles 100 and 101.

On this score also, Mr. Hammarskjöld's position deserves full support. Only recently, in the Committee of Experts mentioned earlier, the Soviet member rejected the concept of "permanent civil service" in respect to the bulk of the higher Secretariat positions.⁸⁰ The Committee noted that "[t]he ideological and cultural heterogeneity of the Organization places heavy strains on the conception of international civil service" and that "[t]here are those who feel that in the conditions now facing the Organization, there is a larger place for the fixed-term official" seconded from his national administration.⁸¹ But, quite properly, the Committee referred pointedly to the Charter articles and Staff Rules and Regulations establishing a *permanent* Secretariat,⁸² and there is little doubt that the United Nations membership as a whole will oppose any impairment of the concept of a permanent international civil service.

The Secretariat has had to resist national pressures, Mr. Hammarskjöld related, not only in matters of personnel but also in the independent implementation of controversial political decisions under mandates which frequently were of a highly general character expressing the bare minimum of agreement attainable in the political organs. It may be helpful to set forth Mr. Hammarskjöld's own series of examples:⁸³

He began with the Palestine armistice problem in 1956, when the Security Council requested the Secretary General "to arrange with the parties for the adoption of any measures" which he considered "would reduce existing tensions along the Armistice Demarcation Lines." A few months later, after the outbreak of hostilities in Egypt, the General Assembly requested the Secretary General immediately to "obtain compliance of the withdrawal" of foreign forces. At the same session he was requested to submit a plan for a United Nations Force to "secure and supervise the cessation of hostilities," and subsequently he was authorized "to take all . . . necessary administrative and executive action" to organize this Force and dispatch it to Egypt.

In 1958 the Secretary General was authorized "to dispatch urgently an observation group . . . to Lebanon so as to ensure that there is no illegal infiltration of personnel or supply of arms or other materiel across the Lebanese borders." Two months later he was requested to make forthwith "such practical arrangements as would adequately help in upholding the purposes and principles of the Charter in relation to Lebanon and Jordan."

⁸⁰ Report of the Committee of Experts, note 1 above, at 20.

⁸¹ *Ibid.* at 12.

⁸² *Ibid.* at 19.

⁸³ U.N. Press Release, note 7 above, at 15-16.

Most recently, in July, 1960, the Secretary General was requested to provide military assistance to the Central Government of the Republic of the Congo. The basic mandate is contained in a single paragraph of a Security Council resolution which reads as follows:

The Security Council

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2. *Decides* to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance, as may be necessary, until, through the efforts of the Congolese Government with the technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks; . . .

The only additional guidance was provided by the Security Council's approval of principles concerning the use of United Nations Forces drawn from the operation of the United Nations Emergency Force in Egypt (UNEF).⁸⁴

Mr. Hammarskjöld's list of examples is, of course, by no means exhaustive, and one may add the tasks imposed upon the Secretary General in connection with the freeing of American fliers in China, the Hungarian question, the various problems concerning the Union of South Africa, the Laotian mission, which he undertook upon the urging of Members but without a specific decision of a United Nations organ, and others.

The examples suffice to demonstrate, Mr. Hammarskjöld pointed out, the extent to which the Member states have entrusted the Secretary General with tasks which have required him to take action which unavoidably may have run counter to the views of at least some of the Member states. The agreement reached on the general terms of a resolution may no longer exist when more specific issues are presented. Even where the original resolution is fairly precise, subsequent unforeseen developments may render controversial the action called for under the resolution. Thus, the unanimous resolution authorizing assistance to the Central Government of the Congo offered little guidance to the Secretary General when that government split into competing centers of authority, each claiming to be the Central Government and each supported by different groups of Member states.

THE SECRETARY GENERAL'S DILEMMA

What then, Mr. Hammarskjöld asked, is the Secretary General to do? It would be a simple solution, he replied, to refer the problem back to the political organ—a course analogous to that of a national executive under a national parliamentary regime. But so often—because of the clash of in-

⁸⁴ For a more detailed account, see Jackson, "The Developing Role of the Secretary-General," 11 *International Organization* 431 (1957); for an illuminating account of the U. N. action in the Congo during the period from July 14 to Sept. 20, 1960, see Miller, "Legal Aspects of the United Nations Action in the Congo," 55 *A.J.I.L.* 1 (1961).

terests and positions—the required majority in the Security Council and General Assembly cannot be obtained for any particular solution. Since this is frequently evident in advance of a meeting, Member states conclude that it would be futile for the organs to attempt to reach a decision. Thus the Secretary General is left to solve the problem at “his own risk with as faithful an interpretation of the instructions, rights and obligations of the Organization as possible in view of international law and the decisions already taken.”

The dilemma as posed by Mr. Hammarskjöld is this: Should the Secretary General, to avoid offending one or another group of Members, take the easy way out and refuse to implement a valid decision on the ground that a specific implementation would be opposed to positions some Members might wish to take, as indicated perhaps by an earlier minority vote? Should he, for example, have abandoned the operation in the Congo, because almost any decision he made as to the composition or rôle of the Force would have been contrary to the attitudes of some Members as reflected in debates or in votes, although not in a formal decision?

Mr. Hammarskjöld's answer “in law” was clearly that he could not abandon the Congo operation. However, he saw the crucial issue in whether or not the Secretary General can resolve controversial questions on a truly international basis without obtaining the formal decision of the organs. On the basis of experience he believed that the Secretary General can do just this: the Secretary General can carry out his tasks in controversial political situations with full regard to his exclusively international obligations under the Charter and without subservience to a particular national or ideological attitude. He is not “a kind of Delphic oracle who alone speaks for the international community,” but he has available for his tasks varied means and resources. Mr. Hammarskjöld listed as of primary importance:

(1) the principles and purposes of the Charter—the fundamental law accepted by all—“necessarily general and comprehensive” yet “specific enough to have practical significance in concrete cases”;

(2) the body of legal doctrine and precepts (supplementing the Charter principles) that has been accepted by states generally and particularly as manifested in the resolutions of United Nations organs.

Since problems of political judgment will still remain after resort to these sources, the Secretary General must reduce the element of purely personal judgment by seeking to obtain what is regarded as representative opinion of the Organization through such constitutional means as

(1) consultations with permanent missions to the United Nations safeguarded by diplomatic privacy;

(2) advisory committees, such as those on UNEF and the Congo, composed of representatives of the governments most directly concerned and representing diverse political positions. To Mr. Hammarskjöld, these committees provided an essential link between the judgment of the executive and the consensus of the political bodies.

According to Mr. Hammarskjöld's summary, the Secretary General will carefully seek guidance in the decisions of the main organs, in statements relevant for the interpretation of those decisions, in the Charter and in generally recognized principles of law, remembering that by his actions he may set important precedents. Further, he will report to the main organs as completely as circumstances will permit, seeking their guidance whenever it seems possible to obtain such guidance.

It is interesting to note in perusing the Secretary General's Reports on the Congo that, at a time when the Security Council and the General Assembly show substantially less interest in legal precepts than in earlier years, the Secretary General has displayed an acute awareness of the law and great skill in legal reasoning as a method for reducing the area of his discretion. But Mr. Hammarskjöld recognized that even if all of the steps summarized above are taken, the reduced area of discretion will be large enough to expose the international Secretariat to heated political controversy and to accusations of a lack of neutrality:

[T]he international civil servant cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and cannot be avoided. But there remains a serious intellectual and moral problem as we move within an area inside which personal judgment must come into play. Finally, we have to deal here with a question of integrity or . . . a question of conscience.

The international civil servant must keep himself under the strictest observation. He is not requested to be a neuter in the sense that he has to have no sympathies or antipathies, that there are to be no interests which are close to him in his personal capacity or that he is to have no ideas or ideals that matter for him. However, he is requested to be fully aware of those human reactions and meticulously check himself so that they are not permitted to influence his actions. This is nothing unique. Is not every judge professionally under the same obligation?

If the international civil servant knows himself to be free from such personal influences in his actions and guided solely by the common aims and rules laid down for, and by the Organisation he serves and by recognised legal principles, then he has done his duty, and then he can face the criticism which, even so, will be unavoidable. As I said, at the final last, this is a question of integrity, and if integrity in the sense of respect for law and respect for truth were to drive him into positions of conflict with this or that interest, then that conflict is a sign of his neutrality and not of his failure to observe neutrality—then it is in line, not in conflict with his duties as an international civil servant.³⁵

It is difficult to read these words without emotion and sympathy for a man who served the international community with devotion and ability. Not only was Mr. Hammarskjöld compelled to defend his personal integrity and that of his staff against an attack exceeding entirely the bounds of

³⁵ U.N. Press Release, note 7 above, at 19-20.

criticism which a person engaged in political affairs must expect; but he was constrained to defend also the position of the Secretariat as one of "the principal organs" in the scheme of the Charter as it has evolved in the constitutional life of the Organization.

WHY THE SHIFT TO THE SECRETARY GENERAL?

It is essential to view the Secretary General's position in the context of the constitutional development of the United Nations. When the Security Council became deadlocked in the late '40's and early '50's, the principal responsibility for political problems shifted from the Security Council to the General Assembly. The United States argued that, if the Security Council is frustrated by a veto, the Assembly must step into the gap, because under "the doctrine of compensation," the atrophy of one organ requires compensatory development of another organ of the Organization.³⁶ This move toward the General Assembly culminated in the adoption in 1950 of the "Uniting for Peace" resolution, in which the Assembly asserted its power to deal on an emergency basis with any matter affecting international peace on which the Security Council failed to act because of the lack of unanimity among the permanent members, and, if necessary, to recommend military sanctions against an aggressor.³⁷ This development, while not foreseen in San Francisco, was sustainable constitutionally because in the Charter the General Assembly was given concurrent jurisdiction with the Security Council in matters affecting international peace.

Politically, the move was popular with most of the smaller states because it tended to increase their influence in matters which would otherwise be dealt with principally by the great Powers in the Security Council. The Soviet Union fought the shift to the Assembly because it foreshadowed a reduction in the effectiveness of the veto power. Yet the Soviet Union subsequently did not hesitate to support the use of the "Uniting for Peace" procedure in the Suez crisis of 1956³⁸ and again in connection with the situation in Jordan and Lebanon in 1958.³⁹ One can therefore conclude that the constitutional development based on the "Uniting for Peace" resolution has become part of the generally accepted United Nations doctrine.

The radical adjustment in the balance of power between the two political organs of the United Nations occurred while Trygve Lie held the office

³⁶ *E.g.*, Mr. John Foster Dulles, in U.N. General Assembly, 2d Sess., Official Records, 1st Comm., pp. 78, 172-173 (Oct. 18, 1947); B. V. Cohen, *The United Nations—Constitutional Developments, Growth, and Possibilities* at 15-19 (1961).

³⁷ Res. 377A (V) of Nov. 3, 1950, U.N. General Assembly, 5th Sess., Official Records, Supp. No. 20, pp. 10-12 (Doc. A/1775) (1950).

³⁸ U.N. Security Council, 11th Year, Official Records, 751st Meeting, pp. 2-4, 22 (Oct. 31, 1956); *Repertoire of the Practice of the Security Council*, Supp. 1956-1958, p. 76 (1959).

³⁹ U.N. Security Council, 18th Year, Official Records, 838th Meeting, pp. 8-9 (Aug. 7, 1958); *Repertoire of the Practice of the Security Council*, Supp. 1956-1958, pp. 76-77 (1959).

of Secretary General.⁴⁰ Mr. Lie came to the United Nations from an active political life in his native Norway and it was taken for granted that as Secretary General he would play a political rôle of some significance. In fact he did not hesitate to take political initiative and to seek to influence governments and other United Nations organs. He was outspoken in his annual reports to the General Assembly. He was given relatively few and rather limited tasks by the political organs, but he pressed his views upon them during the consideration of the Iranian and Palestine questions. In the first Greek case, he forcefully stated his views as to his independent power of investigation.⁴¹ Again, he prepared on his own initiative a ten-point program for the achievement of peace through the United Nations, toured the principal capitals to obtain its acceptance, and brought it before the General Assembly. He submitted to members of the Security Council a far-reaching memorandum bearing upon the representation of China in the United Nations. Although the Korean conflict was first brought to the attention of the Security Council by the United States, Mr. Lie subsequently took the position that he invoked his right under Article 99 for the first time in that matter.⁴² Professor Goodrich believes that Mr. Lie, while staying entirely within the Charter law, "sought to provide leadership too openly and independently" and without "sufficient care to have the support of those whose approval was necessary."⁴³ Another and perhaps more important reason why Mr. Lie encountered difficulties in seeking to develop the potential of his office was the fact that at that early stage of the Organization, the governments, jealous of their prerogatives as members of the political organs, felt little need for an active political rôle by the Secretary General. Strong Soviet opposition to Mr. Lie, caused principally by his stand on Korea, prevented the Security Council from recommending his reappointment for another term. In view of the deadlock in the Council the Assembly decided to continue Mr. Lie in office for a period of three years, but the Soviet group refused to deal with him.

⁴⁰ Mr. Lie served from 1946 to 1953.

⁴¹ When the Security Council was discussing the first Greek question submitted by the Ukrainian S.S.R. in 1946, the Secretary General made the following statement: "Just a few words to make clear my own position as Secretary-General and the rights of this office under the Charter. Should the proposal of the United States representative not be carried, I hope that the Council will understand that the Secretary-General must reserve his right to make such enquiries or investigations as he may think necessary, in order to determine whether or not he should consider bringing any aspect of this matter to the attention of the Council under the provisions of the Charter."

It is interesting that the representative of the U.S.S.R. replied as follows: "As the representative of the Union of Soviet Socialist Republics I would like to say the following in connexion with the statement made by the Secretary-General. I think that Mr. Lie was right in raising the question of his rights. It seems to me that in this case, as in all other cases, the Secretary-General must act. I have no doubt that he will do so in accordance with the rights and powers of the Secretary-General as defined in the Charter of the United Nations." U.N. Security Council, 1st Year, Official Records, 70th Meeting, p. 404 (Sept. 20, 1946).

⁴² U.N. General Assembly, 5th Sess., Official Records, 289th Meeting, p. 176 (1950).

⁴³ Goodrich, *The United Nations* 140 (1960).

After Mr. Lie's resignation in 1953, Mr. Hammarskjöld was appointed in his place. It is perhaps significant that a choice of Mr. Lie's successor fell not on another political figure but on a career civil servant and expert economist.

Not long thereafter, in the mid-fifties, a further shift took place gradually, this time from the General Assembly to the Secretary General, as illustrated by Mr. Hammarskjöld's examples. There were several reasons for this development:

✓ (1) With the increase in United Nations membership after 1955 from 61 to almost 80 and subsequently to the present total of 104, the Assembly has become even more unwieldy as an action body than it was before. The growing number of smaller states and the variety of interests has made it more difficult for the Assembly to reach agreement on specific steps.

(2) The United Nations undertook new tasks which involved operational responsibility, such as the organization and administration of the United Nations Emergency Force for Egypt.

(3) The loosening of the Western alliance in and outside the United Nations during the Suez crisis and thereafter has reduced its influence and has made the United States initiatives more difficult. The increase in the number and influence of smaller Members from Africa and Asia has also contributed to this development.

The new operational activities required an increase in the responsibility of the Secretary General, since certain decisions had to be made by an individual. However, due to the other two reasons suggested above, a tendency has rapidly gained momentum to drop all difficult problems into the Secretary General's lap without adequate guidance from the political organs. The fact that Mr. Hammarskjöld performed so well added to the momentum, but he made a genuine effort to keep this movement within bounds. Both by his background and inclination, he tended toward more traditional methods of diplomacy than those employed by Mr. Lie and showed greater sensitivity to the views of governments and the rôle of the political organs. At the outset, at least, Mr. Hammarskjöld sought to leave the initiative to the political organs and to avoid involvement in "cold war" issues. On occasion he took the initiative without an express request from the political organs or asked for a mandate suggesting his own instructions. However, in 1956 he was placed in the position of having to negotiate the complex series of arrangements with Egypt and the other states concerned in the Suez crisis on the basis of a few broad principles laid down by the Assembly. At that time, the United States submitted proposals which would have established two committees composed of Member governments to deal with the Arab-Israeli controversy and with the reopening of the Suez Canal.⁴⁴ However, these proposals were abandoned, and the entire burden was placed upon the Secretary General. Because

⁴⁴ U.N. General Assembly, 1st Emergency Spec. Sess., Official Records, Annexes, Agenda Item No. 5, at p. 6 (A/3272) (1956), *ibid.* at pp. 6-7 (A/3273) (1956); for a statement of the U. S. position by Mr. Lodge, see U.N. General Assembly, 1st Emergency Spec. Sess., Official Records, 563rd Meeting, pp. 46-48 (Nov. 3, 1956).

of the continued concurrence of interests of the two principal Powers, the Secretary General succeeded in retaining the essential support throughout the tortuous negotiations.⁴⁵ In the Congo crisis, however, the very brittle initial agreement, reflected in the first three Security Council resolutions, collapsed when Mr. Mobutu, after the removal of Premier Lumumba, expelled Communist diplomats from the Congo—at a moment when Chairman Khrushchev was on his way to the General Assembly.

TOWARD IMPROVED DECISION-MAKING IN POLITICAL ORGANS

Professor Korovin of the Soviet Academy of Sciences charges that, during the Suez crisis and particularly during the events in the Congo, the Secretary General “arbitrarily arrogated to himself” the “supreme command” of the United Nations Force, although such powers are “wholly reserved for the Security Council and its Military Staff Committee” by Articles 45 to 49 of the Charter. The Secretary General’s recent “demand” that qualified military specialists be assigned to the Secretariat is taken by Professor Korovin as further evidence of the “militarization” of the Secretariat functions:

Neither the U.S.S.R. nor any other state which holds dear its freedom and security would agree that after implementing general and complete disarmament, police (militia) contingents, contributed by member states to the Security Council if there arose a threat to the peace, should be entrusted to the sole command of the Secretary-General who could utilize them for suppressing the freedom of the peoples or throttling their movement for national liberation.⁴⁶

✓ To the extent that this argument postulates exclusive Security Council authority with respect to the use of armed force within the United Nations framework, it was refuted by the “Uniting for Peace” resolution, in which the General Assembly affirmed its power to recommend use of force. The Secretary General was keenly aware of the legal limits imposed upon the United Nations organs with respect to the employment of force.⁴⁷ Whatever rôle he assumed with respect to the United Nations military forces, it was in response to a mandate, however general and broad the mandate may have been, issued to him by the Security Council or the Assembly in accordance with Article 98 of the Charter. The proposals and steps which he initiated did not exceed the scope of his general power under Article 99. Furthermore, there is no evidence to support the charge by the Soviet

⁴⁵ Cf., for instance, the following statement by Mr. Sobolev, the representative of the U.S.S.R., during the Suez problem discussion: “May I begin by saying that the Soviet delegation has confidence in the Secretary-General of the United Nations and lends him its support.” U.N. Security Council, 11th Year, Official Records, 751st Meeting, p. 2 (Oct. 31, 1956).

⁴⁶ Korovin, “Ways of Reorganizing the U.N. Executive Organs,” 6 International Affairs 7, at 9 (December, 1960).

⁴⁷ See, e.g., the Secretary General’s statement in U.N. Security Council, 15th Year, 920th Meeting, S/P.V. 920 (Dec. 13, 1960) (Provisional).

scholar that the Secretary General or his associates violated the obligation of impartiality under Article 100 in the Congo case.

But speaking on the Congo problem in the Security Council on December 13, 1960, the Secretary General said:

... there are daily decisions, involving interpretations in detail of the extent of our power, which I and my collaborators now have had to take alone for five months. Representatives of the Council or the Assembly might well shoulder on behalf of the General Assembly or the Council the fair share of the responsibility of those organs for current interpretations of the mandate...⁴⁸

Clearly Mr. Hammarskjöld felt that the area of discretion within which he had been compelled to make decisions with far-reaching political implications had been much too wide.⁴⁹

In our divided world the consensus on which the United Nations is built is narrow and brittle. If one begins to reason in terms of basic philosophies, the differences in values between the Communist and non-Communist world become so sharp as to defy communication, let alone conciliation. In Communist theory, a non-Communist by definition cannot be "neutral"; there is only a "socialist" integrity and morality, as there is only a "socialist" legality, and law is an instrument of the ruling group. "Both moral and legal rules are but a means for carrying out Communist plans."⁵⁰

The non-Communist part of the world has its own—and very different—ideas of "neutrality," integrity and law. We believe that if the United Nations advances the cause of international security and peaceful change in accordance with the purposes and principles of the Charter, it will thereby advance the cause of individual freedom, as we see it, and our values in general.

Yet the life of the United Nations as the most advanced instrument of international co-operation on the universal level depends on whether it

⁴⁸ *Ibid.*

⁴⁹ Envisaging the possibility that his mandate might be broadened, Mr. Hammarskjöld said:

"I would further invite the Council to consider such arrangements as would mean that Member nations would assume formally their part of the responsibility for the policy pursued from day to day in the Congo. This does not mean that the operations of the Secretary-General or his special representative should be put under some kind of stultifying control of a parliamentary body; conditions do not permit such a policy. Nor does it mean, from my side, any reservations as regards the extremely useful activities of the Advisory Committee, the members of which, however, do not carry any formal responsibility for the policy pursued..." *Ibid.*

⁵⁰ Guins, *Soviet Law and Soviet Society* 32 (The Hague, 1954); Karewa, *Recht und Moral in der Sozialistischen Gesellschaft*, Chs. II and III (Berlin, 1954); Lapenna, *Conceptions Soviétiques de Droit International Public* 56-58 (Paris, 1954). For a survey of the evolution of Soviet legal thought, see Grzybowski, *Doctrines of Soviet Legal Institutions*, Ch. I (Parallels and Analogies) and Ch. IV (Re-education) (scheduled for publication by the Michigan University Law School in 1962). For the attitude of the U.N. Secretary General on "the gulf between East and West," see Bloomfield, *The United Nations and U. S. Foreign Policy* 125 (1960).

can function despite the ideological cleavage, and this in turn depends on viewing the United Nations in the first place as a practical instrument to be employed by governments for concrete arrangements reflecting a measure of common interest and helpful in the maintenance of peace. The success of these arrangements helps in broadening the consensus in the Organization which in turn should lead to stronger and more independent institutions.

In the emerging European Communities in which wide consensus has been achieved among related states on a regional level, there function today collegiate executive bodies with significant powers independent of the member governments. These powers, however, are confined to the economic sphere; they are spelled out in extensive treaty provisions representing agreed rules and carefully negotiated adjustments of interests; and they are exercised generally within the bounds of directives issued by the political organs, which are more or less controlled by the governments and function under a realistic weighted voting formula. Moreover, the executives are politically responsible to a quasi-parliamentary body which, at least in theory, may force their dismissal by a motion of censure. Again, those acts of the executives which have legal effect upon governments and individuals are subject to extensive judicial review by a judicial tribunal. In practice, finally, the executives have shown considerable reluctance to use their independent powers in the face of strong opposition of member governments.

Today there is obviously little basis for an analogy between the status of the Community executives and the Secretary General acting in the exercise of his power under Article 99, however broadly defined, or in the performance of a mandate entrusted to him under Article 98. Nevertheless, the European executives, resting on a broader consensus and thus requiring less accountability, tend to hold back in exploiting their power, while the Secretary General, operating in a less favorable political context with less consensus upon which to base himself and with less explicit authority, is compelled to draw upon the full amplitude of his powers.

The Secretary General must continue to play an important rôle in the United Nations scheme. Until the basic consensus widens, however, and the United Nations evolves further, important policy decisions with political implications must be made by the governments through the political organs and should not be delegated to the Secretary General. If this conclusion is warranted, what steps can be taken to establish a balanced relationship between the Secretary General and the political organs? There are no dramatic solutions, and the answer certainly does not lie in the Soviet proposals, which would destroy the international civil service and reduce drastically the capacity of the United Nations to take action in political controversies.⁶¹

⁶¹ The following argument by Professor Korovin, seeking to refute the paralyzing effect of the "triumvirate" proposal, is not very convincing:

"In reality, however, the assertion that the work of a collective U.N. Secretariat would inevitably be paralyzed by a 'veto' of one of its three members is completely

1. In the first place, every effort should be made to improve the policy-making rôle of the political organs, particularly the General Assembly, but also of the Security Council. In the early years of the Organization, whenever an important matter came before the Security Council or the General Assembly, these bodies, almost as a matter of standard procedure, appointed committees from among their members which would investigate the problem, proceed if necessary to the scene of the controversy, and report with proper recommendations to the parent body. This practice might well be resumed. A subcommittee of the Security Council or a commission of the Assembly would have been much more useful to the Secretary General in the Congo case than an advisory committee which he had to appoint himself and which had no independent responsibility. An Assembly commission in Leopoldville could have given the Secretary General at least some of the guidance for which he pleaded, even though the commission's decisions might not have been unanimous. Of course the Secretary General's operational tasks must not be hampered by such a responsibility-sharing device. It should be possible to increase the rôle of the political organs and their subsidiary bodies in the "interplay between parliamentary operations in the United Nations, political action, diplomatic negotiation, military operations and administrative measures,"⁵² without impairing the basic effectiveness of the pattern of action evolved in the Congo enterprise.

In dealing with controversies generally—depending on the nature of the case and whether fact-finding, mediation or other tasks are called for—the political organs may resort to individual mediators, experts, and of course to the Secretary General, but for the purpose of more specific tasks and within fairly specific directives. It is important to keep in mind that the Secretary General's sources of information are limited and that, in this respect also, he is dependent substantially upon governments unless his own means of obtaining information are improved. The panel of mediators which was established by the Assembly some time ago might be revived and brought up to date so that the organs would have at their disposal the services of distinguished individuals on whom they could call when necessary. A report of the Interim Committee prepared some years ago contains some useful ideas in this respect.⁵³ When such a mediator in a controversial case outlives his utility, he can be replaced without an institutional crisis.

unfounded. The Soviet proposal for a collegiate Secretariat contains no special 'veto' right. The equal position of members of any collegiate body makes it incumbent upon them to seek agreed and mutually acceptable decisions. If agreed decisions on questions of principle are not achieved in the General Secretariat, then it should be remembered that the Secretariat itself is only the executive organ of the Security Council and General Assembly (Article 97 of the Charter). Hence, in the absence of agreement within the General Secretariat, the final word remains with these two leading bodies of the U.N." Korovin, *loc. cit.* note 46 above.

⁵² Introduction to the Annual Report of the Secretary General on the Work of the Organization, June 16, 1959–June 15, 1960, U.N. General Assembly, 15th Sess., Official Records, Supp. No. 1 A at p. 3 (Doc. A/4890/Add. 1) (1960).

⁵³ See Report of the Interim Committee, U.N. General Assembly, 3rd Sess., Official Records, Supp. No. 10, at pp. 22–36 (Doc. A/605) (Aug. 13, 1948); Res. 268 (III),

2. While the new Assembly of 104 Members is not a very nimble instrument for reaching decisions, the difficulties have been over-publicized and exaggerated. Evaluating the performance of the Resumed Fifteenth Session of the Assembly from the national viewpoint of the United States, a high official of the Department of State enumerated a number of important controversial decisions on which the necessary two-thirds majority was obtained.⁵⁴ What is needed to improve decision-making in the Assembly is a new generation of "parliamentary diplomats" who combine consummate political skills with keen awareness of the importance of parliamentary procedure, unlimited capacity for human contact and realistic knowledge of the changing world. They must master the art of bloc politics, perceive the *foci* of real influence and discount the delusion stemming from the "one Member—one vote" voting formula. Blocs and bloc voting will remain a permanent feature of a political body such as the Assembly. Effective bloc action requires clear, predictable, but flexible long-range policy by the major Powers and systematic continuing consultation on all levels. The smaller nations, including the greatly strengthened Afro-Asian group, must be aware that the Assembly will evolve into a policy-making body only if the views of the great Powers are given adequate weight.

3. The absurdly cumbersome structure of the Assembly must be streamlined. The Assembly cannot continue doing its work in the seven main committees, each of which is composed of 104 representatives. Either the concept of committees-of-the-whole must be scrapped, or steps must be taken to ensure that the substantive work is done in subcommittees of a workable size. Some of these subcommittees might become standing groups and continue to function after the Assembly adjourns. A number of minor adjustments have been recommended which might make the Assembly's work somewhat more effective and could be put into force without much difficulty.⁵⁵ Even a more rigorous enforcement of the Assembly's present rules of procedure envisaging limits on speeches would be helpful, as would a more forceful steering action by the General Committee.

ibid., Resolutions, Pt. II, pp. 10-16 (Doc. A/900) (1949); *ibid.*, 4th Sess., Supp. No. 11 (Doc. A/966) (1949); *ibid.*, 5th Sess., Supp. No. 14 (Doc. A/1388) (1950). See also Hyde, "The Development of Procedures for the Peaceful Adjustment of Disputes," and Schwebel, "Secretary-General and Secretariat," in Commission to Study the Organization of Peace, Ninth Report and Papers Presented to the Commission, at pp. 153 and 198 respectively (1955). Cf. Twelfth Report of the same Commission, Peaceful Co-existence—a New Challenge to the United Nations, at pp. 33-34 (1960).

⁵⁴ Address by the Honorable Harlan Cleveland, Assistant Secretary of State for International Organization Affairs, 1961 Proceedings, American Society of International Law 206; Dept. of State Press Release No. 273 (Rev.), pp. 2-3 (April 29, 1961); 44 Dept. of State Bulletin 808 (1961).

⁵⁵ For the most recent study and survey of previous Assembly efforts in this field, see Bailey, The General Assembly of the United Nations, a Study of Procedure and Practice (1960). See also Stein, Some Implications of Expanding United Nations Membership (Memorandum for the Carnegie Endowment for International Peace, 1956).

The representative of Ghana recently suggested a reconsideration of the existence of the "Little Assembly" with a view to establishing a more effective organ.⁵⁶ This standing "Interim Committee" of the General Assembly, composed of all Members, was established in 1947 to do preparatory and follow-up work between the annual sessions, but it has never been used on important political problems and has fallen into disuse because of constitutional objections to its existence pressed by the Soviet group. Subcommittees of such an intersessional committee, organized as the need arises, might improve the decision-making process. The radical increase in the membership from Africa and the particular rôle which the United Nations seems destined to play on that Continent raise the possibility of new regional instrumentalities within the framework of the Organization.⁵⁷ In any event, a review of these matters should be undertaken, perhaps under the aegis of the Assembly itself, but from a broader perspective than the studies carried out by Assembly committees from time to time in the past.

4. As far as the Secretariat is concerned, "every effort should be made to avoid one-sidedness or the appearance of one-sidedness." "[W]ide geographical representation, especially on the upper echelon," affords "some assurance that different points of view and perspectives will be represented."⁵⁸ Widening of the representation is necessary, particularly during this period of radical increase in the membership. Mr. Hammarskjöld suggested recently that five Assistant Secretaries General be selected by him "on a broad regional basis" who would be responsible for assisting him on political problems. "All the members of the group would be available for special assignments entrusted to them by the Secretary-General on his own responsibility and at his discretion."⁵⁹ What is perhaps even more important, the Secretariat officials must maintain self-restraint and discipline. They must obey the directives of the United Nations organs, must insist on guidance from them and seek such guidance through formal procedures and informal means. The recent French-Tunisian controversy presented a problem whether the Secretary General should seek compliance with a Security Council resolution⁶⁰ without a directive from the Council, in response to a request from only one of the two parties in conflict. While the Secretary General clearly is concerned with any matter before the Security Council, there may be a delicate question of ways and means, private or public, for any initiative he wishes to take under such circumstances in order to achieve settlement without unnecessary criticism.

5. In view of the dramatic increase in United Nations membership, the number of representatives on the Security Council, the Economic and Social Council, and other bodies must be increased correspondingly so as to reflect the new interests represented in the United Nations. While in

⁵⁶ U.N. Doc. A/AC.18/SR.33 at p. 2 (June 26, 1961).

⁵⁷ Johnson, "Helping to Build New States," in Wilcox and Haviland (eds.), *United States and the United Nations* 3, at 12 (1961).

⁵⁸ Schachter, 1961 Proceedings, American Society of International Law at 86.

⁵⁹ U.N. Doc. A/4794 at p. 6 (June 30, 1961).

⁶⁰ U.N. Doc. S/4882 (July 22, 1961).

one sense such an increase might render the decision-making more difficult, it would strengthen the authority of the bodies concerned and contribute to redressing the balance among the United Nations organs, thus alleviating in some measure the problems of the Secretary General.

CONCLUSIONS

Mr. Hammarskjöld rendered an admirable account of the rôle of his office in law and in fact. More than any single person, he contributed to the growth of the "principal organ" which he headed. As the United Nations assumes new action responsibilities in the field of maintaining peace and order, the executive and operational duties of the Secretariat must grow correspondingly. In a measure, the increase in the Secretary General's rôle reflects on the international level the increased rôle of the national executive in a modern state. However, despite the growing prestige and symbolic weight of his office, the Secretary General has no independent national power to fall back on, and his resources are still limited. He is thus intensely vulnerable when forced to exercise discretion on controversial matters, particularly if great-Power interests are involved.

In the present world situation, it would therefore be unwise for the Member governments and for the United Nations political organs to continue to place the burden of their responsibility indiscriminately upon the shoulders of the Secretary General and to charge him with political tasks without proper political guidance. It follows as a logical conclusion that the political organs, which alone can make important political decisions and provide adequate political guidance, must improve their decision-making process. This is particularly true with respect to the General Assembly, whose cumbersome procedure has become even less manageable with the rapid increase in membership. The future division of responsibility between the Security Council and the General Assembly is by no means clear. Although there has been some resurgence of activity in the Security Council, the Assembly seems to be evolving into a body which in due course may assume the predominant policy-making authority, provided that it will be able to harmonize the interests of great and smaller Powers. If the Assembly aspires to a position of political control, it must adjust its structure accordingly.

If there is no improvement in political decision-making in the United Nations, the working of "the doctrine of compensation" will compel the Secretary General to continue to exercise broad discretion at a considerable personal sacrifice and at a risk of stress within the Organization. Mr. Hammarskjöld made it clear upon his reappointment in 1957 that he was determined to do so, if necessary. After having stressed that the Secretary General should not be asked to act without guidance, Mr. Hammarskjöld said:

[It] is in keeping with the philosophy of the Charter that the Secretary-General should be expected to act also without such guidance, should this appear to him necessary in order to help in filling any

vacuum that may appear in the systems which the Charter and traditional diplomacy provide for the safeguarding of peace and security.⁵¹

A glance into the crystal ball may even suggest a possible power struggle between a more powerful Secretary General and the Security Council on one hand, and the Assembly on the other, creating a new sense of solidarity among the Assembly delegations akin to that existing among members of parliamentary and quasi-parliamentary bodies. If, however, the next Secretary General is less forceful and less influential than Mr. Hammarskjold was, the need for more effective and sustained policy-making by the political organs will be even more acute than it is today. In any event, as a matter of categorical axiom, the United Nations cannot abdicate its responsibilities because one or the other of its organs is incapable of decision.

⁵¹ U.N. General Assembly, 12th Sess., Official Records, 690th Meeting, p. 175 (1957). On the same occasion Mr. Kuznetsov, the representative of the U.S.S.R., had the following to say:

"Allow me, Mr. Hammarskjold, to extend to you the congratulations of the Soviet delegation on your election to the post of Secretary-General of the United Nations.

"It is hardly necessary to mention the important role that can and should be played by the Secretary-General of an organization which now has a membership of eighty-two States and which is called upon to direct the efforts of all its Members towards fulfilling its basic task—the maintenance and strengthening of world peace.

"We fully appreciate Mr. Hammarskjold's efforts in a number of matters related to the activities of our Organization. We must nevertheless note, in this connexion—and here I think that the Secretary-General will agree with me—that many problems of vital importance to the preservation and strengthening of peace remain to be settled. I should like to express the hope that, during Mr. Hammarskjold's second five-year term as Secretary-General, the United Nations will achieve far greater success in solving the problems with which it is confronted." *Ibid.*

SOME OBSERVATIONS ON THE INTERNATIONAL COURT OF JUSTICE

BY LEO GROSS

Of the Board of Editors

I

The International Court of Justice, the principal judicial organ of the United Nations, unquestionably has made important contributions to the development of international law, though perhaps not on a scale that was optimistically assumed or, at any rate, hoped for at the time of its founding. Nor has the rôle which it has played in the actual functioning of the organization come up to these expectations. It may be well to recall at the outset what they were. In the words of the Report of the Rapporteur of Committee IV/1 at San Francisco:

On the basis of the texts proposed for the Charter and for the Statute, the First Committee ventures to foresee a significant role for the new Court in the international relations of the future. The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means. An adequate tribunal will exist for the exercise of the judicial function, and it will rank as a principal organ of the Organization. It is confidently anticipated that the jurisdiction of this tribunal will be extended as time goes on, and past experience warrants the expectation that its exercise of this jurisdiction will command a general support.

A long road has been travelled in the effort to enthrone law as the guide for the conduct of states in their relations one with another. A new milepost is now erected along that road. In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.¹

In espousing the view that international adjudication of disputes might become a substitute for war and force, the report merely adopted what has virtually become the *leitmotif* of the peace movement, of the advocates of arbitration, since the turn of the century. As will be shown presently, this view no longer predominates, though it has by no means been abandoned. With respect to the hope or expectation that law would be enthroned as a guide for the conduct of states or that the Court would play a significant rôle in the United Nations, there is hardly a difference of opinion; neither has the Court played such a rôle nor has international law significantly expanded its moderating and regulatory influence in the relations of states.

¹ Report of the Rapporteur of Committee IV/1 to Commission IV, Doc. 913 (June 12), 13 U.N.C.I.O. Docs. 381, at 393.

II

Arbitration or adjudication as an alternative to war for the settlement of disputes is a theme which runs from the Hague Convention for the Pacific Settlement of International Disputes of 1899 through the Covenant of the League of Nations to the Charter of the United Nations. The inspiration for this link was probably provided by the *Alabama Arbitration* of 1872 which, it was widely believed, averted a war between the parties, the United States and the United Kingdom.² It is made explicit, along with the still current notion of the limitation of armaments as a means of ensuring peace, in the Russian Circular Note proposing the program of the First Conference of December 30, 1898,³ and in several articles of the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907.⁴

Characteristically, the governments, while affirming on the one hand the desirability of seeking solutions of differences by methods other than force, are careful, on the other hand, to hedge this commitment in such a way as to leave the door open for war.⁵ However, the peaceful settlement of the 1904 Dogger Bank incident involving Russia and Great Britain with the assistance of a commission of inquiry confirmed the belief in the power of public opinion and the efficacy of new devices of diplomacy for the settlement of issues involving national honor, if not vital interests.⁶ The so-called Bryan Treaties of 1913-1914 reinforced the idea that wars can and would be avoided by skillful manipulation of international devices combined with a cooling-off period.⁷ This, together with the 1907 proposal

² Sir Arnold D. McNair, *The Development of International Justice*, p. 3: "But without question the most important, from the point of view of both the danger it averted and the influence it exerted upon the future, is the *Alabama Claims* arbitration between the United States and Great Britain, which took place in Geneva in 1872. . . . The feature of this arbitration which captured the public imagination and was significant for the future was that two states were prepared to submit to a tribunal . . . disputes which were regarded as affecting their honor and vital interests and as being of such a character that, I think I can say, had never been submitted to arbitration before and had often led to war." See also Percy E. Corbett, *Law in Diplomacy* 152-156 (1959).

³ The Hague Conventions and Declarations of 1899 and 1907 (ed. by James Brown Scott, 1915), p. xvii: "Acceptance, in principle, of the use of good offices, mediation, and voluntary arbitration, in cases where they are available with the purpose of preventing armed conflicts between nations."

⁴ *Ibid.* 41 ff. Art. 1 of the 1899 Convention reads: "With a view to obviating, as far as possible, recourse to force in the relations between States, the signatory Powers agree to use their best efforts to insure the pacific settlement of international differences." See also Arts. 2, 8, and 15.

⁵ See Art. 9: "In differences of an international nature involving neither honor nor vital interests . . ."; and Art. 16: "In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle." *Ibid.* 45, 55.

⁶ For arbitration in the period between the First Hague Peace Conference and World War I, see Corbett, *op. cit.* 186-186.

⁷ See 2 Oppenheim, *International Law* 14 (7th ed. by H. Lauterpacht, 1952); and 2 Hyde, *International Law* 1570 (2nd ed., 1945).

for the creation of a permanent judicial Arbitration Court,⁸ completes the elements on the basis of which the Covenant of the League of Nations erected a coherent pattern of peaceful settlement. Without eliminating resort to war altogether, Article 12 provided, and the Members agreed, that disputes "likely to lead to a rupture" should be submitted to arbitration or judicial settlement or to inquiry by the Council. Here, without drawing a distinction between legal and political disputes which is shown in Article 13, and confirming the belief of the Hague Peace Conference that wars can be avoided by new devices of diplomacy, a choice is offered between political—inquiry by the Council—and judicial procedures—arbitration and adjudication. The drive for such alternatives to war led, between 1918 and 1928, to the conclusion of well over one hundred and fifty bilateral treaties creating permanent institutions for the settlement of disputes.⁹

The Geneva Protocol for the Pacific Settlement of International Disputes, adopted by the Assembly of the League in 1924, though it never entered into force, is a further stage in the invention of new, and the combination of existing, devices to maintain peace and security and to eliminate war.¹⁰ A similar effort at consolidation and systematization is represented by the General Act for the Pacific Settlement of International Disputes, adopted by the League Assembly in 1928 and adapted to changed conditions by the General Assembly of the United Nations in Resolution 268A(III) of April 28, 1949.¹¹ The link between some form of peaceful settlement and the elimination of war is particularly striking in the Locarno Agreements of 1925¹² and the Treaty for the Renunciation of War of August 27, 1928, commonly known as the Pact of Paris or the Kellogg-Briand Pact. In the latter the parties "condemn recourse to war for the solution of international controversies," and consequently agree that the solution of all disputes or conflicts of whatever origin or nature "shall never be sought except by pacific means."¹³

In addition to offering a combination of procedures for settling disputes, the Covenant provided for, and the League of Nations established, the Permanent Court of International Justice and the enforcement of its judgments as well as of awards rendered by arbitral tribunals.¹⁴ The Court gave, during the period of its existence (1922–1946) thirty-two judgments and twenty-seven advisory opinions.¹⁵ Of the latter, twenty opinions

⁸ Scott, *op. cit.* 81.

⁹ Max Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* xix (1981). For the period 1929–1941 a similar number of treaties is listed in *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948*, pp. 1180 ff. (U.N. Pub. Sales No. 1949.V. 3).

¹⁰ For text, see Habicht, *op. cit.* 929.

¹¹ General Assembly, 3rd Sess., Official Records, Pt. 2, Resolutions, pp. 10–11 (Doc. A/900).

¹² 54 League of Nations Treaty Series 291. ¹³ 94 *ibid.* 59.

¹⁴ Art. 13, par. 4, and Art. 14 of the Covenant.

¹⁵ Manley O. Hudson, *The Permanent Court of International Justice, 1920–1942*, p. 779 (1943). For a brief analysis of the Court's jurisprudence, see C. Wilfred Jenks,

were requested by the Council of the League in connection with disputes or situations of international concern which were pending before it.¹⁶

In spite of this impressive record of fence-building to contain war, minor and major hostilities were fought, and finally the second World War broke out. Did the governments then conclude that the various devices incorporated and developed thoughtfully and systematically in an unprecedentedly large number of bilateral and multilateral instruments were based on a fundamental misconception? By no means. The Charter of the United Nations, which was fashioned before the war was over, resumes the *leitmotif* and declares in new ways the old theme that peaceful procedures should supersede resort to force.¹⁷ It is expressed in Article 1, paragraph 1, in Article 2, paragraphs 3 and 4, and it pervades all of Chapter VI with the solitary exception of Article 38. Contrary to the reaction which had developed in doctrine against the belief in the effectiveness of procedures for peaceful settlement of state differences which are rooted in political tensions or clashes of national interests, the Charter with remarkable consistency pursues one large object: the elimination of war, with the exception of limited self-defense and collective enforcement action, exceptions which are not relevant in this context. Even Article 36, paragraph 3, which directs the Security Council "to take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice," is concerned exclusively with disputes "the continuance of which is likely to endanger the maintenance of international peace and security" or with situations of like nature. These are precisely the sort of disputes or situations which the dominant doctrine today tends to single out as peculiarly unsuitable for decision by the Court. It is worthy of note that in the one and only case in which the Council, acting under Article 36, paragraph 3, recommended that the parties refer their dispute to the Court—in the *Corfu Channel* Case—the United Kingdom brought the dispute to the Council under Article 35, which, like Article 36, deals with what might be called political disputes.¹⁸ The Court had no difficulty in decid-

"The Compulsory Jurisdiction of International Courts and Tribunals," Preliminary Report, 24th Commission, 47 *Annuaire, Institut de Droit International* 119-182 (1957, I) (referred to hereinafter as Jenks, Preliminary Report).

¹⁶ Jenks, Preliminary Report 121.

¹⁷ It may be noted in passing that this theme was received in the systems of major treatises on international law. Suffice it to refer to Oppenheim, *op. cit.* note 7 above. Part I is entitled "Settlement of State Differences," Chapter I, "Amicable Settlement of State Differences," Chapter II, "Compulsive Settlement of State Differences." In Hyde, *op. cit.*, Part VI is entitled "Differences between States. Modes of Redress other than War," and Vol. 3, Part VII, "Differences between States. War."

¹⁸ Report of the Security Council to the General Assembly covering the period from July 16, 1946, to July 15, 1947. General Assembly, 2nd Sess., Official Records, Supp. No. 2, pp. 51, 61 (Doc. A/866). In the debate the Soviet Union contended that the dispute did not constitute a threat to peace and security and that presumably for this reason it fell outside the competence of the Council. The United Kingdom submitted that it might be hard to define what constituted such a threat. The Council, by placing the item on its agenda and issuing the recommendation, presumably considered itself competent and the dispute as one constituting an actual or potential threat to the peace.

ing the legal issues involved in the dispute, and awarded damages to the United Kingdom which, regrettably, have not yet been paid by Albania.¹⁹ This case, isolated as it is, does not necessarily invalidate the doctrine; nor does it bear out the thesis that adjudication offers an alternative to war. Its contribution, modest though it is, by no means should be belittled, for it does lend support to the often advanced proposition that even so-called political issues can be broken down into legal and political components, and that the former are amenable to adjudication. This separability of the legal and political issues has been recognized by the governments parties to the Brussels Pact of March 17, 1948. They agree to refer to the Court all disputes falling within the scope of Article 36, paragraph 2, of its Statute and to submit to conciliation all disputes outside the scope of this clause. But they also agree

In the case of a mixed dispute involving both questions for which conciliation is appropriate and other questions for which judicial settlement is appropriate, any Party to the dispute shall have the right to insist that the judicial settlement of the legal questions shall precede conciliation.²⁰

The Charter prohibition of the use of force as an instrument for the settlement of disputes leaves to the Members of the United Nations the choice between stalemate and submission to a procedure designed to produce a solution accepted as binding. Whatever one may think about arbitration

See also statements by Sir Hartley Shawcross before the Court on Feb. 28 and March 1, 1948. 3 Corfu Channel Case, Pleadings 51-59, at 53 (1948).

¹⁹ [1949] I.C.J. Rep. 4 and 244.

²⁰ Systematic Survey of Treaties . . . pp. 1160 ff. The full title of this instrument is: Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defense between the United Kingdom of Great Britain and Northern Ireland, Belgium, France, Luxembourg, and The Netherlands (Brussels Pact). The accession of the Federal Republic of Germany and the Italian Republic to this Pact was accomplished through Protocol No. I, Modifying and Completing the Brussels Treaty, Paris, October 24, 1954. Disarmament and Security, A Collection of Documents 1919-1955. Subcommittee on Disarmament, 84th Cong., 2d Sess. (Committee Print, 1956), p. 504. The divisibility of disputes into their legal and political components has been suggested on several occasions by the U.N. Secretary General. Thus, in his Annual Report on the Work of the Organization 1954-1955, he said: "It is apparent that there are a number of controversies between Governments which continue to be sources of tension but which are suitable, in whole or in part, for judicial settlement through the Court." General Assembly, 10th Sess., Official Records, Supp. No. 1, p. xiii (Doc. A/2911); in his Report for 1956-1957 he stated: "Even in the present state of international society there are many disputes which would be closer to settlement if the legal issues involved had been the subject of judicial determination." *Ibid.*, 12th Sess., Supp. No. 1 A, p. 5 (Doc. A/3594/Add.1); and in his Report for 1958-1959 he declared: "It should also be recognized that there are many international disputes which involve legal questions along with the political elements and that submission of such questions to the Court for judicial determination would clear the ground for processes of peaceful negotiation in the political organs of the United Nations. Neglect of the legal elements in international conflicts, and of the means by which they may be clarified, thus stands in the way of progress in the political field and, in the long run, may tend to weaken the weight of law in international affairs." *Ibid.*, 14th Sess., Supp. No. 1 A, p. 3 (Doc. A/4132/Add.1).

as an alternative to war, on the juridical plane there are few choices left to governments today. That this is so has been recently recognized in one of the resolutions adopted by the Institute of International Law on September 11, 1959. The Institute,

Convinced that the maintenance of justice by submission to law through acceptance of recourse to international courts and arbitral tribunals is an essential complement to the renunciation of recourse to force in international relations;

resolved:

In an international community the members of which have renounced recourse to force and undertaken by the Charter of the United Nations to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, recourse to the International Court of Justice or to another international court or arbitral tribunal constitutes a normal method of settlement of legal disputes as defined in Article 36, paragraph 2, of the Statute of the International Court of Justice.

In a following paragraph the Institute felt it necessary and expedient to add:

Consequently, recourse to the International Court of Justice or to another international court or arbitral tribunal can never be regarded as an unfriendly act towards the respondent State.²¹

Nothing could express better the prevailing conditions of international adjudication than this paragraph. That so distinguished and well-informed a body of scholars and practitioners found it necessary to plead forbearance for a state which referred a dispute to the Court indicates so clearly how little real progress has been achieved in the sixty years since the First Hague Peace Conference, which deemed it necessary to stipulate that the exercise of the right of third states to offer their good offices or mediation to states at variance "can never be regarded by one or the other of the parties in conflict as an unfriendly act." Similarly, in connection with arbitration, that Conference provided

The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind the latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interest of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.²²

One may be tempted to suggest that sixty years ago governments, acting perhaps under the influence of the widespread peace movement and of

²¹ 48 *Annuaire, Institut de Droit International* 381 (1959, II). Reproduced in 54 *A.J.I.L.* 136 (1960).

²² Arts. 3 and 27 of the 1899 Convention for the Pacific Settlement of International Disputes. Scott, *op. cit.* 43, 61. Cf. also Charles De Visscher, *Théories et Réalités en Droit International Public* 460 (3rd ed., 1960) (hereinafter cited as *De Visscher, Théories*).

public opinion generally, gave official sanction to a fallacy which has two faces: first, that wars arise from disputes suitable for solution by resort to arbitration or other devices, and secondly, that for this reason arbitration or some other devices are desirable and indeed practical alternatives and substitutes for war. In spite of the official sanction of this *leitmotif* and in spite of the proven worth of arbitration and mediation and commissions of inquiry for relieving tensions and actually solving disputes, governments made explicit their determination not to entrust to any of these procedures disputes likely to be sources of war, such as those involving vital interests, independence and honor. The more arbitration becomes generalized and institutionalized, the more sweeping, if less explicit, become the reservations, of which trend the Connally Reservation has rightly come to be regarded as a symbol. As a consequence of these conflicting tendencies—towards and away from arbitration and adjudication as a substitute for war—the institutionalized tribunals, the Permanent Court of Arbitration, the Permanent Court of International Justice and the International Court of Justice, have not been used by governments in a manner commensurate with the expectations aroused by the governments themselves.

The institutions were created for the avowed object of facilitating recourse to third-party judgment, but governments have made, and continue to make, very sparing use of the facility which they maintain at their own expense. The compulsory jurisdiction of the Permanent Court of International Justice was prudently limited to a stated list of four “classes of legal disputes” in the classic sense. A still higher degree of prudence was manifest at the San Francisco Conference in redrafting the Statute of the Court. While the list was left in its original form, the new version of the optional clause contains the further limitation “in all legal disputes.”²³ This may well mean that, even if a dispute concerns any of the four stated types, it is open to the respondent state to object to the jurisdiction of the Court on the ground that, even though the dispute relates to the interpretation of a treaty, it is nonetheless not a “legal dispute.”²⁴ Yet in spite of

²³ Cf. Art. 36, par. 2, of the Statute of the I.C.J., with the text of Art. 36 of the Statute of the P.C.I.J.

²⁴ The distinction between justiciable disputes (in the phraseology of the Locarno Treaties, disputes in which the parties are in conflict as to their respective rights) which are in fact regarded as justiciable, and disputes which, although regarded as justiciable in law, are not regarded as justiciable in fact, was made by the British Government in Reservation V of its Declaration of April 18, 1957, accepting the jurisdiction of the Court as compulsory pursuant to Art. 36, par. 2, of the Statute of the Court. 1957–1958 I.C.J. Yearbook 211. This Declaration was somewhat modified by the Declaration of Nov. 26, 1958. 1959–1960 *ibid.* 254. The motivations for such a distinction may be found in the British Observations on the Programme of Work of the Committee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference:

“4. . . . Arbitration treaties impliedly, if not explicitly, impose upon the parties the obligation loyally to accept the decision of the tribunal. An arbitration treaty which goes beyond what the public opinion of a country can be counted on to support when the interests of that country are in question and when a decision unfavourable to those interests is pronounced is a treaty which is useless. It is merely calculated to deceive the

this apogee of prudence, the new Court's business has not grown appreciably over that of its predecessor. It has been contended that the function of the Court should be regarded "as part of the general diplomatic machinery at the disposal of States."²⁵ This may be so in more senses than one. It is certainly correct to maintain that governments at variance have the choice between more than one device for seeking a solution. In this sense the Court may well be conceived as part of the diplomatic arsenal. But of the devices among which they choose some are more "diplomatic" than others. One criterion by which various procedures for the peaceful settlement of disputes may be classified divides them into two categories: the decisional and the non-decisional. The former includes arbitration and adjudication;²⁶ the latter comprises negotiations, good offices, mediation and conciliation. Commissions of inquiry or other devices designed to elucidate the facts relating to a dispute are by their nature and object auxiliary procedures²⁷ that may and have been used to advantage in connection with any of the others. The essential difference between these two categories is obvious: procedures in the former are bound to lead to a decision on the points with respect to which the governments are at variance, and the decision is accepted in advance as binding.²⁸ Procedures in the latter, by contrast, may or may not lead to a resolution of the con-

public. In a moment of grave importance it may fail to achieve a solution of a dispute even if the dispute is arbitrated in accordance with its terms. . . . 5. It is because it is so generally felt that there are some questions—justiciable in their nature—which no country could safely submit to arbitration that it has been usual to make reservations limiting the extent of the obligation to arbitrate. These limitations may vary in form, but their existence indicates the consciousness on the part of Governments that there is a point beyond which they cannot count on their peoples giving effect to the obligations of the treaty. . . . 12. . . . Disputes legal in their nature may arise between two States with regard to matters falling exclusively within the domestic jurisdiction of one of them. No State can agree to the submission to an international tribunal of matters falling exclusively within the range of its national sovereignty. Similarly, there are some political questions even of a justiciable nature as to which a country feels that for the reasons indicated in paragraph 4 the stage has not yet been reached when it can agree unreservedly in advance to submit them to an arbitration tribunal." League of Nations Official Journal, May, 1928, pp. 695-697.

The logic of this reasoning appears to establish public opinion of the moment as the criterion of the justiciability of a dispute and to lead to the sort of self-judging reservation made by the United States in the so-called Connally Amendment and by the United Kingdom in the Declaration referred to above, excluding from the compulsory jurisdiction disputes "relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or of any of its dependent territories." This exclusion was maintained in the Declaration of Nov. 26, 1958.

²⁵ Shabtai Rosenne, *The International Court of Justice* 118 (1957).

²⁶ Instruments like the General Convention on the Privileges and Immunities of the United Nations of Feb. 3, 1946 (Doc. A/43), according to which an Advisory Opinion given by the Court "shall be accepted as decisive by the parties" (Art. VIII, Sec. 30), are left out of account here.

²⁷ See Art. 9 of the 1899 Hague Convention for the Pacific Settlement of International Disputes in Scott, *op. cit.* 45.

²⁸ The question of a *non liquet* is not material in the present context.

flict. The decision on this point is reserved by governments. This is perfectly clear in the case of diplomatic negotiations, and it is equally clear in the case of good offices and mediation.²⁹ Basically this observation holds good in the case of conciliation commissions, which enjoyed in the interwar period a phenomenal popularity on paper, though not in practice. They were to be particularly suitable for handling political disputes. Be that as it may, the conciliation commissions are not empowered to decide a dispute or conflict of interests. Their task is to seek an amicable settlement acceptable to the parties.³⁰ The governments reserve the decision.

Generalizing, it seems possible to suggest the rôle which law and power or politics play in these two categories. In the case of the non-decisional procedures there is the greatest opportunity for power and politics. International law need not be excluded and may indeed offer a useful starting or bargaining position, but law is not the dominant factor in the process. The object is a settlement acceptable to the parties. It should be noted that the rôle of politics may be strongest and that of law weakest in negotiation, and this may well be the reason why great Powers show a penchant for this procedure. Among the great Powers this preference is most marked in the Soviet Union, which has been known as a champion of state sovereignty, though not of law. In the other procedures of this category the rôles of politics and law are progressively reversed until they reach something of an equilibrium in the conciliation commission. Here the face-to-face collaboration of three or five distinguished individuals may cushion the impact of politics and enhance the part of fair play and justice, *i.e.*, the elements which make up law, if not *the* law applicable to the case. In this sense it is correct to say that the conciliation commission represents a "partial depoliticization" in the settlement-seeking procedures.³¹ And it is probably this depoliticization, partial though it be, which may be the reason why governments have so rarely activated the commissions which, pursuant to treaties, they so frequently have established.³²

In the case of the decisional procedures the depoliticization is complete, for here the parties agree to a decision based on law and not on politics.³³ It may be possible to distinguish even in this category degrees of depoliticization between arbitration and adjudication by the International Court of Justice. The distinctions, rather subtle in nature, would relate to the influence the parties exercise on the composition of a tribunal of arbitration, on the law and procedure to be applied, and finally to the perennial problem, on which doctrine is not of one mind, whether arbitral tribunals act as "*amiables compositeurs*" or as *ad hoc* tribunals of law.³⁴

²⁹ Good offices and mediation, says Art. 6 of the 1899 Hague Convention, "have exclusively the character of advice and never have binding force." Scott, *op. cit.* 44.

³⁰ De Visscher, *Théories* 433.

³¹ *Ibid.* 431.

³² For example, *of*. United Nations Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948, pp. 180 ff.

³³ See De Visscher, *Théories* 442, and Rosenne, *op. cit.* 118.

³⁴ This distinction goes back to Arts. 15 and 37 of the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, which define arbitration as follows: "International Arbitration has for its object the settlement of disputes

Some of these political elements cannot be eliminated even from the Court: the judges have to be elected by political bodies, special agreements have to be drawn up by states at variance, etc. But once the Court is seized, politics are minimized in the work of the Court as completely and as fully as they can be in any human institution, whereas the rôle of law is maximized. Here the surrender of sovereign states to third-party decision is consummated and this is one among several factors which account for the still prevalent reluctance of states to take their disputes to the Court. The completely depoliticized procedure, however, has compensating virtues which the partially depoliticized procedure lacks. One cannot be sure in the absence of reliable statistics, but it seems fairly safe to contend that governments prefer the completely depoliticized to the partially depoliticized procedures, yet they prefer—and for this statement no precise statistics are needed—the diplomatic and fully politicized procedures to the judicial procedure.

III

Between 1946 and 1960 the International Court of Justice was seized in 34 contentious cases and received 11 requests for Advisory Opinions.³⁵ Nine Advisory Opinions were given at the request of the United Nations General Assembly, and one each at the request of UNESCO and IMCO, respectively. Of the contentious proceedings three were instituted by special agreement.³⁶ In one case, the *Corfu Channel* Case, proceedings were instituted by the United Kingdom by means of a unilateral application

between States by judges of their own choice and on the basis of respect for law." Scott, *op. cit.* 55. See also Corbett, *Law in Diplomacy* 136 ff. On the fate of the draft on arbitral procedure prepared by the International Law Commission, see 1958 I.L.C. Yearbook (II) 1-15, Doc. A/CN.4/Ser. A/1958/Add. 1, and De Visscher, *Théories* 438 f. This draft, as originally conceived by Georges Scelle, Special Rapporteur, aimed at virtually eliminating completely the discretionary element from the arbitral procedure which De Visscher argues is inherent in it and which the majority of Members of the United Nations were determined to preserve. Reversing gears, the Rapporteur submitted a draft from which, as he put it, "*every trace of obligation has been eliminated.*" (Italics in the original.) 1958 I.L.C. Yearbook (II) 3, par. 6.

³⁵ This information is culled from the Yearbooks of the Court. In the case instituted on Nov. 4, 1960, separately by Liberia and Ethiopia against the Union of South Africa on the basis of Art. 7 of the Mandate for South West Africa of Dec. 17, 1920, and Art. 37 of the Statute, the Court, by order of May 20, 1961, after finding that the submissions of the Applications and Memorials by the applicant governments were *mutatis mutandis* identical and that, accordingly, the Governments of Ethiopia and Liberia were in the same interest, joined the proceedings instituted against the Union of South Africa, [1961] I.C.J. Rep. 13. On May 30, 1961, the Republic of Cameroun filed an Application instituting proceedings against the United Kingdom, General List No. 48; 1960-1961 Yearbook 91. This case is included in the total of 34.

³⁶ The Asylum Case (Colombia-Peru), the Minquiers and Ecrehos Case (France-United Kingdom) and the Case concerning Sovereignty over Certain Frontier Land (Belgium-Netherlands), 1960-1961 Yearbook 32. In one case, the Case concerning the Arbitral Award Made by the King of Spain on Dec. 23, 1906 (*Honduras v. Nicaragua*), the parties had made an Agreement governing the procedure for submitting the dispute to the Court. 1957-1958 Yearbook 228.

which in the Court's judgment was accepted by Albania. The Court, rejecting Albania's plea to its jurisdiction, found that these two acts constituted a sufficient basis for affirming its jurisdiction. However, by order of March 26, 1948, the Court placed on record the Special Agreement concluded between the parties on March 25, 1948, and declared that this "now formed the basis of further proceedings before the Court."³⁷ In eight cases the applicant states—the United States in six and the United Kingdom in two—did not invoke any juridical basis for instituting proceedings such as the Optional Clause or a jurisdictional clause in a treaty. The applications were in the nature of offers or invitations addressed to the adverse party to accept the jurisdiction of the Court. In all cases the adverse party declined such offer or invitation. The American applications related to aerial incidents,³⁸ and the British cases to Antarctica.³⁹ In two cases, *Aerial Incident of 27 June 1955, United States v. Bulgaria* and *United Kingdom v. Bulgaria*, the applications relied on the acceptance in 1921 by Bulgaria of the jurisdiction of the Court under the Optional Clause. In the principal litigation arising out of this aerial incident between Israel and Bulgaria the Court found that Article 36, paragraph 5, of its Statute was not applicable to the Bulgarian Declaration of 1921, and that consequently the Court lacked a basis for its jurisdiction to deal with the case.⁴⁰ Following this judgment the proceedings against Bulgaria were discontinued at the request of the United Kingdom and the United States.⁴¹ However, the reasons which motivated the action of the United States were totally unrelated to that judgment.⁴²

In one instance, the Case concerning the *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient (France v. Lebanon)*, the proceedings were discontinued at the request of the Agent for the applicant state, who informed the Registrar that, "as the result of conversations between the Government of the Republic of Lebanon and the French Embassy in Beirut, satisfactory arrangements had been concluded, and that the Government of the French Republic considered that the conclusion and execution of new undertakings by the Government of the Re-

³⁷ [1947–1948] I.C.J. Rep. 15 at 27 ff. and [1949] *ibid.* 6 ff. See also Rosenne (The International Court of Justice 292), who refers to this case as an instance of jurisdiction "conferred upon the Court by an informal agreement between the parties, reached by successive acts."

³⁸ See Nos. 22, 23, 25, 28, 40, 44 of the Court's General List, 1960–1961 Yearbook 62 ff. Replying to the Soviet statement that, in filing an application without Soviet consent, the United States "acted in disaccord with the Statute of the International Court of Justice," the Agent for the United States, in a note of Nov. 25, 1958, addressed to the Registrar of the Court, declared: "It is now well settled that any government qualified to appear before this Court may file its application without prior special agreement." 1958–1959 Yearbook 91. The United States appears thus to have relied implicitly upon the *forum prorogatum* doctrine. See Rosenne, *op. cit.*, 284–302.

³⁹ See Nos. 26 and 27 of the Court's General List, 1960–1961 Yearbook 64.

⁴⁰ *Aerial Incident of July 27, 1955 (Preliminary Objections) (Israel v. Bulgaria)*, [1959] I.C.J. Rep. 127. For a discussion of this case see Lucius C. Cafilisch, in 54 A.J.I.L. 855–868 (1960).

⁴¹ 1959–1960 Yearbook 85, 93.

⁴² *Cf.* [1960] I.C.J. Rep. 146.

public of Lebanon put an end to the disputes."⁴³ It is not possible to say to what extent the pendency of the dispute before the Court facilitated the amicable settlement arrived at by the parties. In three other instances the proceedings were discontinued at the request of the applicant state.⁴⁴ In fourteen cases objections to the jurisdiction were raised. Three cases were withdrawn before the Court could make a ruling.⁴⁵ In one case the preliminary objection was withdrawn.⁴⁶ Preliminary objections were overruled in five cases⁴⁷ and sustained in five cases.⁴⁸ However, a distinction may be made between objections to the Court's jurisdiction pure and simple, and objections contesting the admissibility of the case. If this is done, then it must be said that preliminary objections were sustained in three cases and pleas to the admissibility were sustained in two cases: in the *Nottebohm* Case on the ground of the non-opposability of Nottebohm's nationality, and in the *Interhandel* Case on the ground of the non-exhaustion of local remedies.⁴⁹ In one case, that of the *Monetary Gold*, the jurisdiction of the Court was challenged by the applicant state, which the Court found to be unusual but, having regard to special circumstances of the case, compatible with Article 62 of the Rules of Procedure of the Court.⁵⁰

The Court gave judgments on the merits in eleven cases.⁵¹ In addition, the Court gave one judgment in response to a request for an interpretation

⁴³ Order of the Court of Aug. 31, 1960, [1960] I.C.J. Rep. 186 at 187. It may be noted that the Lebanese Government transmitted to the Registrar the documents establishing these arrangements. *Ibid.*

⁴⁴ Case concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Order of April 10, 1961, [1961] I.C.J. Rep. 9; Case concerning the Protection of French Nationals and Protected Persons in Egypt (France v. Egypt), 1959-1960 Yearbook 52; and "Électricité de Beyrouth". Company Case (France v. Lebanon), *ibid.* 65.

⁴⁵ Aerial Incident of July 27, 1955 (United States v. Bulgaria), Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), and Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient (France v. Lebanon).

⁴⁶ In the Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States), the United States filed a preliminary objection on June 21, 1951, and withdrew it on Oct. 22, 1951. 1960-1961 Yearbook 53.

⁴⁷ The Corfu Channel Case (United Kingdom v. Albania), 1960-1961 Yearbook 44; Ambatielos Case (Greece v. United Kingdom), *ibid.* 55; Nottebohm Case (Liechtenstein v. Guatemala), *ibid.* 58; Case Concerning Right of Passage over Indian Territory (Portugal v. India), *ibid.* 68; Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment of May 26, 1961, *ibid.* 79, 88.

⁴⁸ Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), *ibid.* 56; Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States), *ibid.* 60; Case of Certain Norwegian Loans (France v. Norway), *ibid.* 65; Interhandel Case (Switzerland v. United States), *ibid.* 70; and Aerial Incident of July 27, 1955 (Israel v. Bulgaria), *ibid.* 71.

⁴⁹ [1955] I.C.J. Rep. 4, at 26, and [1959] *ibid.* 6, at 30.

⁵⁰ [1954] I.C.J. Rep. 19, at 28-29.

⁵¹ Corfu Channel Case (Merits) (United Kingdom v. Albania), [1949] I.C.J. Rep. 4; Fisheries Case (United Kingdom v. Norway), [1951] *ibid.* 116; Asylum Case (Colombia/Peru), [1950] *ibid.* 266; Case Concerning Rights of Nationals of the United States in Morocco (France v. United States), [1952] *ibid.* 176; Haya de la Torre Case (Colombia v. Peru), [1951] *ibid.* 71; Ambatielos Case (Greece v. United Kingdom), [1953] *ibid.* 10; Minquiers and Ecrehos Case (France/United Kingdom), [1953] *ibid.* 47; Case Con-

of an earlier judgment,⁵² and one judgment assessing exclusively the amount of damages.⁵³

In two cases the Court was requested to issue interim measures of protection. The request was granted in one⁵⁴ and denied in the other.⁵⁵

To dispose of the contentious cases and requests for advisory opinions the Court held 334 public meetings between April 18, 1946, its official opening, and November 21, 1960. Not counting the formal meeting in 1946, the Court held, on average, approximately 25 public meetings per year between January 1, 1948, and November 21, 1960. The number of public meetings devoted to cases and advisory opinions runs from a minimum of one in the question of the *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made Against UNESCO*,⁵⁶ to 52 in the case of the *Right of Passage over Indian Territory*. The number of public meetings held per year varied from three in 1956 to 57 in 1959.

CASE	NUMBER OF PUBLIC MEETINGS
Conditions of Admission of a State to Membership in the United Nations	4
The Corfu Channel Case	46
Reparation for Injuries Suffered in the Service of the United Nations .	4
Competence of the General Assembly for the Admission of a State to the United Nations	2
Interpretation of Peace Treaties with Bulgaria, Hungary and Romania	7
International Status of South-West Africa	7
Asylum Case	11
Haya de la Torre Case	4
Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide	6
Fisheries Case	25
Case concerning Rights of Nationals of the United States of America in Morocco	9
Anglo-Iranian Oil Co. Case	14
Ambatielos Case	12
The Minquiers and Ecrehos Case	17

cerning Right of Passage over Indian Territory (Portugal v. India), [1960] *ibid.* 6; Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), [1958] *ibid.* 55; Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands), [1959] *ibid.* 209; Case Concerning the Arbitral Award Made by the King of Spain on Dec. 23, 1906 (Honduras v. Nicaragua), [1960] *ibid.* 192.

⁵² Request for Interpretation of the Judgment of Nov. 20, 1950, in the Asylum Case (Colombia/Peru), [1950] I.C.J. Rep. 395.

⁵³ The Corfu Channel Case (Assessment of the Amount of Compensation) (United Kingdom v. Albania), [1949] *ibid.* 244.

⁵⁴ Anglo-Iranian Oil Company Case (United Kingdom v. Iran), Order of July 5, 1951, [1951] *ibid.* 89.

⁵⁵ Interhandel Case (Switzerland v. United States), Order of Oct. 24, 1957, [1957] *ibid.* 105.

⁵⁶ In this case the Court dispensed with oral hearings altogether and the one public meeting was devoted to the reading of the opinion. See Leo Gross, "Participation of Individuals in Advisory Proceedings before the I.C.J.: Question of Equality of Parties," 52 A.J.I.L. 16 ff. (1958).

CASE	NUMBER OF PUBLIC MEETINGS
Effect of Awards of Compensation made by the United Nations Administrative Tribunal	5
Case of the Monetary Gold Removed from Rome in 1943	6
Nottebohm Case	20
Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa	1
Admissibility of Hearings of Petitioners by the Committee on South-West Africa	2
Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the United Nations Educational Scientific and Cultural Organization	1
Case of Certain Norwegian Loans	12
Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants	8
Interhandel Case	11
Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization	8
Aerial Incident of 27 July 1955 (Israel v. Bulgaria)	12
Frontier Land Case	8
Right of Passage Case	52
Honduras-Nicaragua Case	19
<i>Total:</i>	<u>333</u>

YEAR	NUMBER OF PUBLIC MEETINGS
1946	1
1948	41
1949	13
1950	27
1951	35
1952	27
1953	27
1954	11
1955	19
1956	3
1957	29
1958	16
1959	57
1960	28
<i>Total:</i>	<u>334</u>

These figures do not of course give an accurate idea of the time devoted by the Court to official business, as no information is available on the number of private meetings. No information is available on the amount of time devoted by members of the Court to the drafting of opinions, orders, and judgments handed down by the Court or on the amount of time spent by members of the Court on their individual or dissenting opinions. While the length of these opinions is not necessarily an index of the time or energy required, some of the detailed and wide-ranging opinions must have required a prodigious amount of energy and a rare devotion to the duties of an international judge. Still, with all these reservations in mind, the figures given below may provide at least a partial indication of the time

devoted to the active consideration of a case or a request for an advisory opinion as distinguished from the necessarily substantial time required for the study of the frequently very voluminous written pleadings. This consideration, beginning with the oral hearings, if any, and ending with the delivery of the judgment or advisory opinion, runs from seven days in the case of the *Request for Interpretation of the Judgment in the Asylum Case* to two hundred and five days in the *Case Concerning the Right of Passage over Indian Territory*.

JUDGMENTS

	<u>Public Sitzings</u>	<u>Judgment</u>	<u>Time Elapsed*</u>
Corfu Channel Case (Preliminary Objection): 1947-1948 I.C.J. Rep. 15	Feb. 26-28, March 1, 2, 5, 1948	March 25, 1948	29 days
Corfu Channel Case (Merits): 1949 I.C.J. Rep. 4	Nov. 9-12, 15-19, 22-26, 28, 29, Dec. 1-4, 6-11, 13, 14, 17, 1948 Jan. 17-22, 1949	April 9, 1949	153 days**
Corfu Channel Case (Assessment of the Amount of Compensation): 1949 I.C.J. Rep. 244	Nov. 17, 1949	Dec. 15, 1949	28 days
Asylum Case (Colombia/Peru): 1950 I.C.J. Rep. 266	Sept. 26-29, Oct. 2, 3, 6, 9, 1950	Nov. 20, 1950	25 days
Request for Interpretation of the Judgment of Nov. 20, 1950, in the Asylum Case: 1950 I.C.J. Rep. 395	None	Nov. 27, 1950	7 days***
Haya de la Torre Case: 1951 I.C.J. Rep. 71	May 15, 16, 17, 1951	June 13, 1951	30 days
Fisheries Case: 1951 I.C.J. Rep. 116	Sept. 25-29, Oct. 1, 5, 6, 8-13, 15, 17-20, 24-27, 29, 1951	Dec. 18, 1951	85 days
Ambatielos Case (Preliminary Objection): 1952 I.C.J. Rep. 28	May 15, 16, 17, 1952	July 1, 1952	48 days
Anglo-Iranian Oil Co. Case (Preliminary Objection): 1952 I.C.J. Rep. 93	June 9-11, 13, 14, 16-19, 21, 23, 1952	July 22, 1952	44 days
Case concerning Rights of Nationals of the U.S.A. in Morocco: 1952 I.C.J. Rep. 176	July 15-17, 21-24, 26, 1952	Aug. 27, 1952	44 days

* Including the first day of hearings and the day on which judgment was given.

** This total does not take into consideration possible judicial holidays.

*** The time elapsed has been calculated from Nov. 20, date on which the Court received the request for interpretation. Final written observations were made on Nov. 24.

	<u>Public Sitzings</u>	<u>Judgment</u>	<u>Time Elapsed *</u>
Ambatielos Case (Merits: Obligation to Arbitrate): 1953 I.C.J. Rep. 10	March 23-28, 30, 1953	May 10, 1953	58 days
The Minquiers and Ecrehos Case: 1953 I.C.J. Rep. 47	Sept. 17, Oct. 8, 1953	Nov. 17, 1953	62 days
Nottebohm Case (Preliminary Objection): 1953 I.C.J. Rep. 111	Nov. 10, 1953	Nov. 18, 1953	8 days
Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question): 1954 I.C.J. Rep. 19	May 10-14, 1954	June 15, 1954	37 days
Nottebohm Case (Second Phase): 1955 I.C.J. Rep. 4	Feb. 10, 11, 14-19, 21-24, March 2-4, 7, 8, 1955	April 6, 1955	56 days
Case of Certain Norwegian Loans: 1957 I.C.J. Rep. 9	May 13-15, 17, 20-25, 28, 1957	July 6, 1957	55 days
Interhandel Case (Switzerland v. United States of America), Request for the Indication of Interim Measures of Protection: 1957 I.C.J. Rep. 105	Oct. 12, 14, 1957	Oct. 24, 1957	13 days
Case concerning Right of Passage over Indian Territory (Preliminary Objections): 1957 I.C.J. Rep. 125	Sept. 23-27, 30, Oct. 1-3, 5, 7, 8, 10, 11, 1957	Nov. 26, 1957	65 days
Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden): 1958 I.C.J. Rep. 55	Sept. 25, 26, 29, 30, Oct. 1, 3, 4, 1958	Nov. 28, 1958	65 days
Interhandel Case (Preliminary Objection): 1959 I.C.J. Rep. 6	Nov. 5, 6, 8, 10, 11, 12, 14, 17, 1958	March 21, 1959	137 days**
Aerial Incident of July 27, 1955 (Israel v. Bulgaria), (Preliminary Objection): 1959 I.C.J. Rep. 127	March 16-19, 23-26, April 1-3, 1959	May 26, 1959	72 days
Case concerning Sovereignty over Certain Frontier Land: 1959 I.C.J. Rep. 209	April 27-29, May 1, 2, 4, 5, 1959	June 20, 1959	55 days
Case concerning Right of Passage over Indian Territory (Merits): 1960 I.C.J. Rep. 6	Sept. 21-26, 28-30, Oct. 1-3, 5, 6, 9, 10, 12-17, 19-21, 24, 26-31, Nov. 3-6, 1959	April 12, 1960	205 days***

* Including first day of hearings and day of judgment.

** This total does not take into consideration judicial holidays.

*** This total does not take into consideration possible judicial holidays.

	<u>Public Sitzings</u>	<u>Opinion</u>	<u>Time Elapsed*</u>
Case concerning the Arbitral Award made by the King of Spain on 23 December 1906: 1960 I.C.J. Rep. 192	Sept. 15-17, 19-24, 27-30, Oct. 1, 3, 4, 6, 7, 10, 11, 1960	Nov. 18, 1960	65 days
Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Preliminary Objections): 1961 I.C.J. Rep. 17	April 10, 11, 12, 14, 15, 1961	May 26, 1961	47 days
ADVISORY OPINIONS			
Conditions of Admission of a State to Membership in the United Nations (Art. 4 of the Charter): 1947-1948 I.O.J. Rep. 57	April 22, 23, 24, 1948	May 28, 1948	37 days
Reparation for Injuries Suffered in the Service of the United Nations: 1949 I.C.J. Rep. 174	March 7, 8, 9, 1949	April 11, 1949	36 days
Competence of the General Assembly for the Admission of a State to the United Nations: 1950 I.C.J. Rep. 4	February 16, 1950	March 3, 1950	26 days
Interpretation of Peace Treaties: 1950 I.C.J. Rep. 65	Feb. 28, March 1, 2, 1950	March 30, 1950	31 days
International Status of South-West Africa: 1950 I.C.J. Rep. 128	May 16-23, 1950	July 11, 1950	57 days
Interpretation of Peace Treaties (Second Phase): 1950 I.C.J. Rep. 221	June 27, 28, 1950	July 18, 1950	22 days
Reservations to the Convention on Genocide: 1951 I.C.J. Rep. 15	April 10-14, 1951	May 28, 1951	49 days
Effect of Awards of Compensation made by the United Nations Administrative Tribunal: 1954 I.C.J. Rep. 47	June 10, 11, 12, 14, 1954	July 13, 1954	34 days
South-West Africa—Voting Procedure: 1955 I.C.J. Rep. 67	None Time had been set for oral proceedings: May 10, 1955	June 7, 1955	29 days**
Admissibility of Hearings of Petitioners by the Committee on South-West Africa: 1956 I.C.J. Rep. 23	March 22, 1956	June 1, 1956	72 days

* Including day of first hearing and day of advisory opinion.

** Time elapsed has been calculated from May 10, 1955, time set for oral proceedings.

	<u>Public Sitzings</u>	<u>Opinion</u>	<u>Time Elapsed</u>
Judgments of the Administrative Tribunal of the I.L.O. upon Complaints made against the U.N.E.S.C.O.: 1956 I.C.J. Rep. 77	None Time limit for written statements: July 1, 1956	Oct. 23, 1956	115 days***
Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization: 1960 I.C.J. Rep. 150	April 26, 27, 28, 29, May 2, 3, 4, 1960	June 8, 1960	44 days

*** Time elapsed has been calculated from July 1, 1956, time set for written statements.

IV

It is not possible within the scope of a short and necessarily summary survey of the Court to attempt an estimate of the contribution of the Court to the lessening of international tension or to the development of international law.⁵⁷ While the Court's jurisprudence has encouraged a lively and constructive controversy, there is no doubt that it has forced a greater awareness of the limits and function of law in the situations which were submitted to the Court's judgment, whether in the form of contentious or advisory proceedings. The Court's judgments and opinions have illumined the fundamental problem of order and liberty in international relations. In some instances the Court's pronouncements may have cleared the way for the codification of the law of the sea. Thus the International Law Commission based some of its draft articles on the law of the sea on the Court's judgments in the *Corfu Channel*, *Fisheries* and *Nottebohm* Cases,⁵⁸ which commended themselves to the subsequent Geneva Conference of 1958 in spite of the doctrinal controversy stirred up particularly by the *Fisheries* and *Nottebohm* Cases. One of the keys, if not the key, to the Court's jurisprudence is the exacting standard of customary international law which it applies. In the *Asylum* Case the Court required the complaining state, Colombia, to "prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question," on the one hand, and, on the other, to "prove that this custom is established in such a manner that it has become binding on the other Party."⁵⁹ This dual standard must be combined with the holding of the Permanent Court of International Justice in the *Lotus* Case that mere abstention by states is no evidence of the rule; that, on the contrary, "only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom."⁶⁰ This psychological element

⁵⁷ It may be sufficient to refer to Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958); De Visscher, *Théories et Réalités en Droit International Public* (3rd ed., 1960); Rosenne, *The International Court of Justice* (1957); Schwarzenberger, *International Law*, Vol. 1 (3rd ed., 1957).

⁵⁸ Report of the International Law Commission covering the Work of its Eighth Session, April 23-July 4, 1956. General Assembly, 11th Sess., Official Records, Supp. No. 9, pp. 13 ff., 19 f., and 24 f. (Doc. A/3159).

⁵⁹ [1950] I.C.J. Rep. 276.

⁶⁰ P.C.I.J., Series A, No. 10 (1927), p. 28.

in custom which raises delicate questions of proof was applied by the present Court in the *Asylum* Case.⁶¹ In adhering to its high standard of law and rejecting unilateral pretensions of legal rights and obligations, the Court accomplishes two objects: It manifests its conception of the judicial function as consisting in applying valid law rather than creating it, and it clears the way for appropriate law-creating activity by the states, which necessarily balances and compensates diverse interests of states.⁶²

In the context of the *Asylum* Case the Court had the opportunity to develop the distinction between auto-interpretation and auto-decision of a state's rights and obligations under international law and treaties, a distinction which is as vital for an understanding of international law and its institutional deficiencies as it is overlooked, perhaps not altogether inadvertently, in state practice. In its first submission Colombia requested the Court to declare that it, Colombia, "as the country granting asylum, is competent to qualify the said offence for the purpose of the said asylum" on the basis of certain treaties and "of American international law in general." The Court rejected this submission "in so far as it involves a right for Colombia, as the country granting asylum, to qualify the nature of the offence by a unilateral and definitive decision, binding on Peru."⁶³ In its reasoning the Court sharply distinguished between the right of a state to interpret international law and treaties "for the sole purpose of determining its own conduct," which might be called auto-interpretation, and the pretended right, that is, the competence claimed by Colombia, "to qualify the nature of the offence by a unilateral and definitive decision binding on Peru."⁶⁴ It should be clear that, barring exceptional situations and special arrangements, no state has the right to lay down the law for another state. This is so because all states are equal to and independent of one another. An authoritative, that is, a binding interpretation, can only result from agreement among the states at variance or from the decision of a tribunal established by common agreement. This is one of the central features of international law today. It may not be a satisfactory one, but it is for the states to create the necessary institutional devices and to empower them to interpret their rights and obligations authoritatively and with binding effect. Such an instrument *par excellence* is the Court, and its greatest contribution has been to separate international law from pseudo-international law and to confine auto-interpretation to its necessary but limited function.

An instructive illustration of the Court's conception of its own function is afforded by the Advisory Opinion of June 27, 1950, in the case of the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*. Referring to the principle of effectiveness or the maxim

⁶¹ [1950] I.C.J. Rep. 277.

⁶² Cf. De Visscher, *Théories* 480; Lauterpacht, *op. cit.* 197.

⁶³ [1950] I.C.J. Rep. 266, at 288.

⁶⁴ *Ibid.* at 274. The distinction between auto-interpretation, which is not authoritative, and auto-decision, which is claimed to be authoritative though wholly unilateral, is indicated in the present writer's essay, "States as Organs of International Law and the Problem of Autointerpretation," in *Law and Politics in the World Community* 59-89 (ed. by G. A. Lipsky, 1953).

ut res magis valeat quam pereat, the Court said: "It is the duty of the Court to interpret the Treaties, not to revise them."⁶⁵

The principle of effectiveness must be subordinated to fidelity to the text of the treaty which at once incorporates the declared intent of, and offers security to, the parties that they will not be bound to do more than they agreed to do.⁶⁶ The Court did not hesitate to give an appropriate scope to the principle of effectiveness when it was concerned with the interpretation of an institution like the Mandates System as distinguished from interpretation of the Charter. In the Advisory Opinion on the *International Status of South-West Africa* the Court held unanimously that this territory continued to be under the Mandate assumed by the Union of South Africa on December 17, 1920, and, by twelve votes to two, that the Union "continues to have the international obligations stated in Article 22 of the Covenant" and in the Mandate, the supervisory functions to be exercised by the United Nations.⁶⁷ The Court also declared in particular that the General Assembly of the United Nations was

legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory, and that the Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it.⁶⁸

However, the Court did not go so far as to hold that the Union of South Africa was legally bound by Chapter XII of the Charter of the United Nations to place the territory under the Trusteeship System of the United Nations. Here the Court, faced with the text of Article 80, paragraph 2, of the Charter, adopted a strict interpretation and rejected the contention that an obligation to negotiate and conclude a trusteeship agreement was created, and said

Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms.⁶⁹

In another opinion, which has been characterized as "a conspicuous example of judicial legislation,"⁷⁰ namely, that on the *Reparations for Injuries Suffered in the Service of the United Nations*, the Court was pri-

⁶⁵ [1950] I.C.J. Rep. 229. See Schwarzenberger, *op. cit.* 488 ff.

⁶⁶ De Visscher, *Théories* 318, 475 ff., and the opinions there quoted, notably the Advisory Opinion of the Court of March 8, 1950, in the case of the Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. Rep. 4, at 8. See also Lauterpacht, *op. cit.* 290: "... The Advisory Opinion of the Court on the Interpretation of the Peace Treaties (Second Phase) affords an instructive example of a much needed warning of the limitations of the principle of effectiveness." But see also p. 290, note 13.

⁶⁷ [1950] I.C.J. Rep. 128, at 143.

⁶⁸ *Ibid.* 137.

⁶⁹ *Ibid.* at 140 and 144. See also Lauterpacht, *op. cit.* 280.

⁷⁰ Lauterpacht, *op. cit.* 179. See also De Visscher (*Théories* 478), who refers to this case as illustration of the Court's courage in breaking new ground when faced with a novel situation.

marily concerned with the nature and character of an institution, the United Nations, and not with the interpretation of a particular treaty text. In this opinion the Court affirmed, not merely that the United Nations had international personality and was even possessed of "objective international personality," but that it also enjoyed the right to claim compensation for injuries which it, as well as the agent or those entitled to claim through him, suffered. The basis for the Court's findings may be seen in the following:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁷¹

To be sure, the Court referred in its opinion to the purposes and principles of the Charter and the functions which it confers upon the Organization, but it is difficult to accept the view that the Court's opinion "is merely a question of treaty interpretation."⁷² The Charter is silent on the points involved in this case, as De Visscher points out.⁷³ Had this been just another case of treaty interpretation, it would have been unnecessary for the Court to say that it was "here faced with a new situation."⁷⁴ The Charter offered a convenient and even necessary frame of reference, but hardly more than that. The Court, rather than interpreting, it is submitted, interpolated or completed the Charter in a manner in which the framers of the Charter would have done it, had they anticipated situations such as had arisen in fact.⁷⁵

The judgment of the Court in the *Nottebohm* Case aroused probably more controversy than any other.⁷⁶ In this case the question was not whether Nottebohm was a naturalized citizen of Liechtenstein but whether he was such a citizen for the purpose of diplomatic protection vis-à-vis Guatemala. The real issue, in the words of the Court, was "the admissibility of the claim of Liechtenstein in respect of Nottebohm."⁷⁷ The Court affirmed, without referring to it, the ruling of the Permanent Court in the case of the *Tunis-Morocco Nationality Decrees*⁷⁸ "that nationality is within the

⁷¹ [1949] I.C.J. Rep. 182.

⁷² Schwarzenberger, *op. cit.* 595.

⁷³ Théories 478. But he goes on to say that in this case the Court applied the two principles of interpretation: the object and function of the treaty and the full effectiveness of its provisions, the convergence of which nearly always suffices to sway the interpreter.

⁷⁴ [1949] I.C.J. Rep. 182.

⁷⁵ That this is so is corroborated by the following statement in the Report of the Rapporteur of Committee IV/2 as approved by the Committee: "As regards the question of international juridical personality, the Committee has considered it superfluous to make this the subject of a text. In effect, it will be determined *implicitly from the provisions of the Charter taken as a whole*." Doc. 933, June 12, 1945; 13 U.N.C.I.O. Docs. 708, at 710 (emphasis supplied).

⁷⁶ Cf. Kunz, "The Nottebohm Judgment (Second Phase)," 54 A.J.I.L. 536-571 (1960), and the literature there cited.

⁷⁷ [1955] I.C.J. Rep. 4, at 16.

⁷⁸ P.C.I.J., Publications, Series B, No. 4 (1923).

domestic jurisdiction of the State,"⁷⁹ and nothing was said by the Court to cast doubt on this fundamental principle. But where, as in the *Nottebohm* Case, nationality or naturalization projects itself on the international plane, other considerations are bound to enter into account. Again, as in the *Tunis-Morocco* Case, the recognition by, or "opposability" of nationality vis-à-vis, third states depends, and always depended, on international law.⁸⁰ In order "to be respected by a State in the position of Guatemala,"⁸¹ the naturalization of Nottebohm had to conform to applicable standards of international law. This it failed to do, because at the time when it was conferred on Nottebohm by Liechtenstein there was no "genuine connection" between Nottebohm and Liechtenstein. "It was granted," said the Court, "without regard to the concept of nationality adopted in international relations."⁸² It may be noted that the Court used here the wider term, international relations ("*rapports internationaux*"), rather than the more technical term, international law.

In this case, as in others, the Court acted as the guardian of the sovereignty of both the applicant and respondent states: the autonomy of Liechtenstein in matters of nationality and the autonomy of Guatemala in refusing to admit the right of Liechtenstein to protect Nottebohm on the basis of an "extremely tenuous" link.⁸³ To hold otherwise would have placed one state (Guatemala), in a matter which affects its interests protected by international law, under the sway of another state, and thus would have denied to the former the protection to which it was entitled under existing principles of international law.⁸⁴ To criticize the holding of the Court in the *Nottebohm* Case for introducing an element of uncer-

⁷⁹ [1955] I.O.J. Rep. at 20.

⁸⁰ On these points the Court said: "It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. . . .

"But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.

"The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration." *Ibid.* at 20 ff.

⁸¹ *Ibid.* 26.

⁸² The preceding passage is as follows: "That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the way of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala." *Ibid.*, and at 23.

⁸³ *Ibid.* 25.

⁸⁴ Schwarzenberger, *op. cit.* 370: "The element of a genuine connection between a sovereign State and a naturalized individual is the common denominator of all those cases." See also *ibid.* 132.

tainty by relying on subjective criteria is to criticize international law and particularly that part of it relating to nationality, which exhibits all the elements of uncertainty corresponding to the prevailing degree of international integration.⁸⁵

In considering and protecting the autonomy of both litigants in the *Nottebohm* Case, the Court merely applied a principle which it had used as a starting point in the *Fisheries* Case, where it said:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.⁸⁶

The same principle applies to naturalization: it is an act which can be performed only by the state concerned, but the validity (opposability) of this naturalization with regard to other states depends upon international law. It is difficult to see how otherwise the principles of order and liberty can be harmonized on the international plane. The Court has no choice but to take international law and relations as it finds them at any given time, to show their essentially mutual aspect, to strengthen international institutions when it is called upon to do so and, without revising them, to introduce progressive improvements here and there.

The Court was able to make a notable contribution of far-reaching significance along these lines in the *Corfu Channel* Case. On the one hand, the Court declared that Albania had failed to observe "certain general and well-recognized principles" which include "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."⁸⁷ On the other hand, the Court, upholding Albania's territorial sovereignty, rejected the defenses of intervention and self-protection or self-help on which the United Kingdom relied in justification of "Operation Retail." It may be worth while to quote in full the pronouncements of the Court in view of their relevance to contemporary international relations. Referring to intervention, the Court said:

The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of justice itself.⁸⁸

Referring to the defense of self-protection or self-help, the Court declared:

⁸⁵ De Visscher, *Théories* 399.

⁸⁷ [1949] I.C.J. Rep. 4 at 22.

⁸⁶ [1951] I.C.J. Rep. 132.

⁸⁸ *Ibid.* at 35.

The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.⁸⁹

These pronouncements afford a glimpse into the sort of international relations which could be ours if only the governments would live up to their glib professions in favor of the rule of law, if only they would call upon the Court more frequently, even regularly, to adjudicate their disputes on the basis of the mutual respect for their sovereignty that they all claim and the reciprocal rights of which sovereignty is the accepted and traditional symbol.

The Court has made significant, if modest, contributions to the strengthening of international organizations and the clarification of the competence of their organs. To be sure, the opportunities offered the Court were far removed from the "defects in international organization" to which the Court referred above. The advisory opinions of the Court in the *Reparations* and *South-West African* cases have already been mentioned. In the second *Admissions* case the Court clarified authoritatively the respective rôles of the General Assembly and Security Council in the procedure of admission to the United Nations, and rejected the attempt "to deprive the Security Council of an important power which has been entrusted to it by the Charter." The Court, speaking generally, declared that "the Charter does not place the Security Council in a subordinate position," and stated as a general proposition "that nowhere has the General Assembly received the power to change, to the point of revising, the meaning of a vote of the Security Council."⁹⁰ The Court thus decisively spoke in order to preserve the autonomy of the Assembly and Council in the exercise of the powers and responsibilities conferred upon them by the Charter.

In two advisory opinions the Court had occasion to pronounce upon the status of members of the international civil service and in so doing to strengthen their independence and secure them from arbitrary dismissal. In the opinion of July 13, 1954, the Court rejected the contention that the General Assembly could not, in establishing an administrative tribunal, impose legal limitations upon powers with which it was charged by the Charter, i.e., the budgetary power, a contention amounting to a claim of legal irresponsibility of the General Assembly.⁹¹ As the Court construed the request, it was asked to say "whether the General Assembly is legally entitled to refuse to give effect to an award of compensation made by the

⁸⁹ *Ibid.*

⁹⁰ Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of March 3, 1950, [1950] I.O.J. Rep. 4, at 8-10.

⁹¹ Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of July 13, 1954, [1954] I.C.J. Rep. 47, at 59.

Administrative Tribunal, properly constituted and acting within the limits of its statutory competence.”⁹² The Court, by nine votes to three, held

that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.⁹³

The Court thus put a stop to a determined effort on the part of some Members of the United Nations to vindicate for the United Nations a sort of illimitability of absolute monarchs, who invoked on its behalf the old and now discredited “Divine Right of Kings” idea. To do otherwise would not merely have cast doubt on the good faith which should govern the relations between the organization and its international staff. “It would,” as the Court said

hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant pre-occupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.⁹⁴

The Court showed complete understanding, in fact a much greater understanding than was manifested by certain Members of the Organization, of the prerequisite of a sound international civil service when it found that

the power to establish a tribunal, to do justice as between the Organization and staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.⁹⁵

The Court has shown here not merely its concern to ensure the welfare of the individual members of the Secretariat but also its characteristic penchant towards a broad and flexible “interpretation” of constitutional foundations on which the organization rests. The opinion of the Court exercised a salutary impact on the subsequent decisions of the General Assembly in this matter.⁹⁶

The Court, when called upon to interpret a specific clause in a constitutional instrument, does not deviate from the principle of fidelity to the text. This it demonstrated again in its opinion of June 8, 1960, on the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*. The Court, after a careful examination of the

⁹² *Ibid.* 51.

⁹³ *Ibid.* at 62.

⁹⁴ *Ibid.* at 57.

⁹⁵ *Ibid.*

⁹⁶ See Gross, “Participation of Individuals in Advisory Proceedings before the International Court of Justice: Question of Equality between the Parties,” 52 A.J.I.L. 16-40, at 26 ff. (1958).

preparatory work relating to Article 28(a) of the Convention establishing this organization, refuted the attempts at a broad and functional interpretation of this provision and concluded that the term "ship-owning nations" refers "solely to registered tonnage. The largest ship-owning nations are the nations having the largest registered ship tonnage."⁹⁷ The Court refused to subscribe to a subjective test when an objective test was not merely intended but also available,⁹⁸ and in so doing expressed its preference for order as against arbitrariness.

The exacting test which the Court laid down with respect to proof of customary international law led the Court to a pronouncement on reservations to multilateral treaties which, much to the surprise of a large segment of the profession, appears to espouse arbitrariness against order. In its opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court referred to the argument

that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted

and, noting that this theory cannot prevail over the intent of the parties to derogate from that rule, said:

It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law.⁹⁹

The Court then laid down the principal test:

that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, a State cannot be regarded as being a party to the Convention.¹⁰⁰

Admittedly the test of "compatibility" is a flexible one and open to divergent interpretations.¹⁰¹ But the Court does not have the function of creating rules where none exist. This is a prerogative of the states.¹⁰²

⁹⁷ [1960] I.C.J. Rep. 150, at 170.

⁹⁸ *Ibid.* at 166, 171.

⁹⁹ [1951] I.C.J. Rep. 15 at 24. See Lauterpacht (*op. cit.* 186), who regards this Opinion and the Judgment in the Fisheries Case as "the two principal instances of judicial legislation in face of an admitted absence of agreed law."

¹⁰⁰ *Ibid.* at 29. The Court also laid down several other rules.

¹⁰¹ See *ibid.* at 31, the Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Bead, Hsu Mo.

¹⁰² That governments responded to this challenge can be seen from the discussion in the General Assembly's Sixth Committee on Reservations to Multilateral Conventions and India's ratification with a condition of the Convention on the Inter-Governmental Maritime Consultative Organization. General Assembly, 14th Sess., Official Records, 6th Committee, pp. 69-159. The Court's opinion had also a remarkable impact in the International Law Commission. In his Report on the Law of Treaties, the Rapporteur, Pro-

The Court can do no more useful service than to point out that no rule in fact exists where one was assumed to exist, even if in the meantime a degree of uncertainty should prevail.¹⁰³ But uncertainty is a mark of international law in the present state of integration in the society of nations.

This is an admittedly and necessarily sketchy review of some of the points on which the Court is believed to have made a significant contribution to international law and relations and thereby to a better understanding of the problem of order and liberty in the relations of states. Perhaps in the future the Court may make an even greater and more constructive contribution as an instance or organ of review of the constitutionality of acts of the United Nations and its specialized agencies. Its status as the principal judicial organ of the United Nations qualifies it pre-eminently for this rôle. That this view was shared by Members of the organization can best be shown by recalling General Assembly Resolution 171 (II) A, adopted on November 14, 1947, recommending

that organs of the United Nations and the specialized agencies should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled, including points of law relating to the interpretation of the Charter of the United Nations or the constitutions of the specialized agencies, and, if duly authorized according to Article 96, paragraph 2, of the Charter, should refer them to the International Court of Justice for an Advisory Opinion.¹⁰⁴

V

The organs of the United Nations, including the General Assembly, have paid scant attention to this call for greater use of the Court as a sort of

fessor H. Lauterpacht, after noting that, even prior to the Court's Advisory Opinion in the matter of Reservations to the Genocide Convention, no general agreement on the so-called "unanimity view" existed, and that some governments, including the United Kingdom, "who in the past have conspicuously advocated that principle, may be ready to admit that it is too rigid," stated: "In view of the fact that the principle of unanimous consent has ceased to be regarded as supplying a satisfactory solution of the problems which have arisen and are likely to arise in this connexion, the Commission no longer feels justified in limiting itself to the formulation, by way of codification, of a legal rule on the subject based on that principle. Nor does it consider itself justified in making the principle of unanimous consent the basis of the future law on the subject." Doc. A/CN.4/68, pp. 107 ff. See also Second Report on the Law of Treaties by H. Lauterpacht, Doc. A/CN.4/87, pp. 28 ff.

¹⁰³ Among the constant preoccupations of international tribunals De Visscher notes the considerations of order and stability which determine the judge not to sanction, without compelling reasons, interpretations which would bring about confusion and uncertainty. *Théories* 474 and 480.

¹⁰⁴ General Assembly, 2nd Sess., Official Records, Resolutions, Sept. 16-Nov. 29, 1947, p. 103 (Doc. A/519). The vote on this resolution was 46 in favor, 6 against, and 2 abstentions. At that time the membership of the United Nations stood at 59. It would be interesting to know what would be the vote if the resolution or a similar one were put to the vote in the present General Assembly comprising 104 Members.

constitutional court. Yet, with the United Nations gaining visibly in stature and becoming increasingly a focal point of worldwide international relations, can there be any doubt that the Court is fully capable of being of service to the United Nations and its Members for resolving their differences? At least one of the principal organs of the United Nations, the Secretary General, has strongly urged the Members to make greater use of the Court. In one of his statements Mr. Dag Hammarskjöld said:

One may recognize that the reluctance of Governments to submit their controversies to judicial settlement stems in part from the fragmentary and uncertain character of much of international law as it now exists. Where wide margins of uncertainty remain in the law, the tendency to seek a political settlement even in cases where questions of law lie at the heart of the dispute is understandable. Yet in the longer view, it is surely in the interest of all Member States to restrict as much as possible the sphere where sheer strength is an argument and to extend as widely as possible the area ruled by considerations of law and justice. In an interdependent world, a greater degree of authority and effectiveness in international law will be a safeguard, not a threat, to the freedom and independence of national States.¹⁰⁵

He also recognized the contribution of the Court to development of the law of the United Nations in stating:

The beginnings of a "common law" of the United Nations, based on the Charter, are now apparent; its steady growth will contribute to stability and orderliness. Advisory opinions of the International Court of Justice have added substantially to the law of the United Nations; their more frequent use should be encouraged. In appropriate cases, arbitral proceedings may usefully be employed in connexion with controversies on legal points; the use of such proceedings would tend both to facilitate immediate solutions and to further the long-range goal of strengthening the authority of law. The systematic examination within the United Nations of the practice of States can bring to light areas of agreement and divergence in the law and stimulate efforts to seek a reconciliation of opposing views.¹⁰⁶

It is not possible to deny the strength of the argument that the growth of tensions, in particular of hegemonial tensions, adversely affected the flow of business of the Permanent Court and that it inhibits the flow of business of the present Court.¹⁰⁷ The dominant tension plays now between East and West and this tension would have to cool down very substantially be-

¹⁰⁵ Annual Report of the Secretary General on the Work of the Organization July 1, 1954-June 15, 1955. General Assembly, 10th Sess., Official Records, Supp. No. 1, p. xiii (Doc. A/2911).

¹⁰⁶ *Ibid.* See also the Annual Reports of the Secretary General for 1952-1953, General Assembly, 8th Sess., Official Records, Supp. No. 1, pp. xi-xii (Doc. A/2404); for 1956-1957, *ibid.*, 12th Sess., Supp. 1 A, pp. 4-5 (Doc. A/3594/Add. 1); and for 1958-1959, *ibid.*, 14th Sess., Supp. 1 A, pp. 3-4 (Doc. A/4132/Add. 1). And see Basdevant ("La Place et le Rôle de la Justice Internationale . . .," 5 *Les Affaires Etrangères* 331-351 at 346 ff. (1959)), who stresses the restraining influence of Advisory Opinions.

¹⁰⁷ De Visscher, *Théories* 445 ff.

fore any disputes between East and West would be submitted to the Court.¹⁰⁸ The future flow of cases depends, in realistic terms, upon disputes between members of the Free World being steered in the direction of the Court. The fact that not many such disputes go to the Court cannot, it is submitted, be explained by the prevailing East-West tension.

In the past it has been fashionable to emphasize the "legislative" aspects of the Court's jurisprudence. This was natural in the context of the debate on the function of adjudication as a key factor in establishing peace on a durable basis. Today more modest expectations are attributed to the judicial function: to settle disputes on the basis of law.¹⁰⁹ It has been shown that the diplomatic procedures for the settlement of disputes maximize power and minimize law. The procedures now available to a large number of states in and through the United Nations to a degree neutralize the power element, but they do not enhance the rôle of law. They could do that in some measure, that is, to the extent that the advisory function of the Court is drawn upon, as suggested by the General Assembly and the Secretary General. The possibilities which lie in that direction have hardly been explored, let alone exploited. As the jurisprudence of the Court has shown, the depoliticization of the dispute, whether involving states or individuals, is achieved once the dispute is submitted to it. The Court has been scrupulous in its respect for the autonomy of states in the absence of strict proof of legal obligation.

States are autonomous and sovereign only in virtue of international law. Every increment of strength of the law is bound to make more secure the independence of states. Adjudication is no longer regarded as a cure for all the ills which currently afflict international relations. Nor is adjudication of itself and by itself the sure road to peace under the rule of law in the relations between states. On the other hand, to avoid, except in the rarest of circumstances, resort to the judicial authority, to confine states almost exclusively to diplomatic and political procedures, amounts to depriving the world of a possibility or avenue for strengthening international peace. For, as the former President of the Court, Judge Basdevant, suggested, the mere fact of appearing and arguing a case before the Court constitutes an important factor in the slow process of building an international community. And to the extent that governments submit or refuse to submit disputes to the Court, they fulfill or decline to fulfill the object stated in the Preamble of the Charter of the United Nations, "to establish conditions under which justice and respect for the obligations arising from treaties

¹⁰⁸ But see the various efforts of the United States referred to above, p. 43, to bring such disputes before the Court.

¹⁰⁹ In a sense the surrender of the larger, if illusory, object for a more modest, if realistic, one, makes matters more difficult rather than easier. For, as Jenks pointed out, "the movement for a larger measure of compulsory jurisdiction can no longer draw strength from the emotional and political forces which supported it when it could be presented as an alternative to war and a guarantee of peace." Preliminary Report 179.

and other sources of international law can be maintained.”¹¹⁰ Granted that in the past there may have been a tendency to overestimate the rôle of the judicial function in international relations, there is no reason for allowing the pendulum to swing in the opposite direction and to underestimate the contribution which the Court is fully capable of making towards introducing a measure of stability and predictability in the relations of the largest single group of states. At the very least the boundaries between what is law and what is advanced under the guise of law will be progressively delineated.

¹¹⁰ Jules Basdevant, “La Place et le Rôle de la Justice Internationale dans les Relations entre Etats et à l’égard des Organisations Internationales,” 5 *Les Affaires Etrangères* 331-351, at 338, 351 (Presses Universitaires de France, 1959). His statement on p. 349 may bear quotation in full:

“Non seulement les Etats se présentent et sont traités comme des égaux devant la justice internationale mais ceux qui comparaissent devant celle-ci pour représenter un Etat ou une organisation internationale parlent tous le même langage, le langage du droit, pour convaincre les juges dont ils savent que ceux-ci statueront selon le droit et par une décision obligatoire. C’est tout autre chose que parler dans un débat à l’Assemblée générale des Nations Unies ou au Conseil de sécurité où, bien souvent, les représentants des Etats parlent beaucoup moins pour convaincre ceux à qui ils s’adressent directement que pour satisfaire leurs mandants, leur presse, leur opinion publique, ou encore pour le retentissement qu’ils espèrent obtenir dans l’opinion publique de tel ou tel pays. A l’opposé de cela, tous ceux qui parlent devant la Cour, s’efforçant de parler le langage du droit, tout en soutenant des thèses opposées, retrouvent ou découvrent devant le juge quelque chose qui leur est commun. Ainsi le fait d’aller devant le juge international fait apparaître ou mieux sentir ce qu’il y a de commun entre les peuples. Cela contribue à créer ou à entretenir un esprit de compréhension, de mutuelle considération, de mutuel respect, esprit qui, lui-même, sera générateur de l’esprit de mutuelle concession.

“Par cela, le recours à la justice internationale, au delà et par-dessus la solution de tel différend qui lui est déféré, apporte sa contribution à la formation d’une psychologie commune susceptible de fournir le meilleur appui au maintien de la paix et de la sécurité internationales.”

THE PROPER LAW OF LOANS CONCLUDED BY INTERNATIONAL PERSONS: A RESTATE- MENT AND A FORECAST

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“ . . . It would be strange if now, in face of the formidable development of international debts, there were nothing for the lawyer to say.” Sir John Fischer Williams, *Chapters on Current International Law and the League of Nations*, p. 257 (1929).

In *Etat Ottoman v. Comptoir d'Escompte*, a lower French court said that a state contracting with foreign individuals is free to contract under its own law or the foreign law, or to create “*par la convention une loi particulière destinée spécialement à régir le contrat. . .*”¹

This was in 1875. Today, the idea that state contracts can be subject to a legal system other than municipal law, and in particular the law of the contracting state, has made considerable progress. Contemporary attempts to insulate, by appropriate stipulations, state contracts, and more generally contracts between international persons and private individuals or entities, from the consequences of municipal law show that a reconsideration of the respective spheres of application of the two systems of law into which the rules of international intercourse are traditionally divided is now in order.² This is not the same, of course, as saying that the distinction

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¹ Trib. Civ. Seine, March 3, 1875, Sirey 1877.2.25 (dictum only). As security for a loan, the borrowing government had pledged certain securities with French bankers and had agreed that the bankers could forfeit the security in the event of a default. Under French law, the forfeiture clause was invalid; it was apparently valid under Turkish law which was held to be the applicable law.

² See, e.g., Mann, “The Law Governing State Contracts” (hereinafter cited as “State Contracts”), 21 Brit. Yr. Bk. of Int. Law 11 (1944); “The Proper Law of Contracts Concluded by International Persons” (hereinafter cited as “The Proper Law”), 35 *ibid.* 34 (1959); McNair, “The General Principles of Law Recognized by Civilized Nations” (hereinafter cited as “The General Principles”), 33 *ibid.* 1 (1957); Schwarzenberger, “The Protection of British Property Abroad,” 5 Current Legal Problems 294 (1952); Verdross, “Protection of Private Property under Quasi-International Agreements,” 6 Nederlands Tijdschrift voor Int. Recht 355 (1959); Bourquin, “Arbitration and Economic Development Agreements,” 15 The Business Lawyer 860 (1960); Jessup,

between private and public international law, blurred as it may be by the necessities of modern international economic relations, is now obsolete and that intermediate legal systems are likely to emerge or be desirable.³ What is proposed presently by prominent scholars is to permit contracting parties, one of whom at least is an international person, to select international law as the proper law of their contract.

Put in those terms, the proposition is immediately reminiscent of the familiar distinction between choice of law and autonomy of the will which pervades the ordinary rules of the conflict of laws. To permit the parties to choose municipal law or public international law as the system of law governing their rights and obligations, presupposes that there is no cogent rule of law which limits their autonomy. That no such rule prevents international persons from selecting municipal law as the law applicable, wholly or in part, to transactions, such as a loan between an international organization and a member government, which would otherwise be governed by international law, is hardly a matter of doubt. The real question, therefore, is whether there is any imperative impediment to permitting the process to be reversed and to authorizing an international person, dealing with a private person, to contract under its own system of law rather than under the system of law of the private contracting party.

Until recently, at least, the answer to this question was clearly in the negative. Courts, including the French-Chilean Arbitral Tribunal set up to settle disputes relating to the "*Guano Loans*" of Peru⁴ and the P.C.I.J. in the *Serbian and Brazilian Loan Cases*,⁵ were in agreement that:

Transnational Law (1956); Friedmann, "Some Impacts of Social Organization on International Law," 50 A.J.I.L. 475 (1956).

³ Such is particularly the case of Professor Verdross' theory according to which there would exist "quasi-international agreements" between international and private persons, constituting "a new legal order, created by the concurring wills of the parties, i.e., the agreed *lex contractus*" which would regulate "the relation between the parties exhaustively" (*loc. cit.* note 2 above, p. 358). The idea that a contract can be the "law" of the parties is not new; it is characteristic of the well-known hypertrophy of the doctrine of autonomy proper to the French notion of "international payments," sometimes referred to (not always correctly, see, e.g., Ray, "Law Governing Contracts between States and Foreign Nationals," Proceedings of the 1960 Institute on Private Investments Abroad 5, at 30 (1960)) by Professor Verdross' followers. Under the circumstances, it is not surprising that Professor Verdross' proposal has encountered the same criticism as that which has been directed, both in France and abroad, against the French doctrine. See Mann, "The Proper Law," p. 49.

⁴ Arbitral Award dated July 5, 1901, Descamps and Renault, *Recueil International des Traités du XXème Siècle* 188 (year 1901). As security for external loans, Peru had given to lenders a "Guano Guarantee" authorizing them to exploit guano deposits and to retain the profits derived from the exploitation to maintain loan service. Under Peruvian law, the "guarantee" amounted at best to a personal obligation of Peru and did not create any valid and effective security. To overcome the consequences of this conclusion, one plaintiff argued that the guarantee was not subject to the law of Peru but rather to international law, and constituted "un droit réel identique à l'hypothèque et consacré par le droit des gens." *Ibid.* 370; see also pp. 252-253. It was held that, since only transactions between states can be subject to international law, the guano guarantee was governed by Peruvian law and the claim was consequently denied. *Ibid.* 370.

⁵ Series A, Nos. 20 and 21, pp. 42 and 121.

any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country.

Since those decisions were rendered, however, new developments have taken place and the process of "depoliticization" of the commercial and financial activities of states has been accelerated considerably. The last decades have witnessed also a proliferation of international organizations specialized in financial, monetary, trade or other activities conducted exclusively from a technical, as opposed to a political, viewpoint. The increasingly frequent association of states and private persons and specialized international organizations in interrelated economic transactions of a highly technical character has thrown a new light on the problem.⁹

In practical terms, the problem resolves itself into ascertaining whether the legal arsenal available to meet new situations should remain cast in the old mold or whether, in an agreement to which an international person is a party: (1) the parties, or (failing any statement of intention by them) (2) the courts, should be free to borrow from either system of law the rules most suitable to regulate the particular contractual relationship involved and enable them to meet successfully the complexities of present and future international economic relations.

Loans concluded by international persons, both as lenders and borrowers, account for a considerable share of current international transactions, and constitute also one of the most remarkable examples of successful co-ordination of public and private endeavors to promote economic development. For this reason they have been selected as the subject of the following observations which will: (1) review the practice of lenders regarding stipulations of applicable law in contemporary loans in an attempt to ascertain whether there is any evidence in those transactions of a change in the traditional scope of international law, and (2) assess, as far as can be done with precision, the rules likely to obtain in the absence of manifestation of intention by the parties.

⁹ See, e.g., Broches, "International Legal Aspects of the Operations of the World Bank" (hereinafter cited as Broches), 98 Hague Academy Recueil des Cours 301 (1959); Sereni, "International Economic Institutions and the Municipal Law of States" (hereinafter cited as Sereni), 96 Hague Academy Recueil des Cours 133 (1959); Salmon, *Le Rôle des Organisations Internationales en Matière de Prêts et d'Emprunts* (hereinafter cited as Salmon) (1958); Delaume, "International Machinery for Financing Economic Development," 28 Geo. Washington Law Rev. 533 (1960); Cutler, "The Inter-American Development Bank," 16 The Business Lawyer 22 (1960); Metzger, "The New International Development Association," 49 Georgetown Law J. 23 (1960); Fromentin, "La Banque Européenne d'Investissement," Ministère des Finances, Bulletin d'Information No. 2, p. 95 (Brussels, 1960); Townsend, "The Export-Import Bank of Washington: Organization and Operation," U. of Illinois Law Forum, Legal Problems of International Trade 237 (1959 Spring Number); Sauer, "The Export-Import Bank and Private Investment," 19 Fed. Bar J. 327 (1959); Golby, "The Development Loan Fund and Private Investment," *ibid.* 316; Nurick, "The World Bank, The International Finance Corporation and Foreign Investment," *ibid.* 308; Olmstead, "Economic Development Agreements, Part I, Public Economic Development Loan Agreements; Choice of Law and Remedy," 48 Calif. Law Rev. 424 (1960).

I. EXPRESS STIPULATIONS OF APPLICABLE LAW

A. *Direct Loans*

Loan contracts between bankers or other institutional investors and international persons rarely fail to contain stipulations of applicable law. Most frequently such stipulations, conforming in this respect to those consistently stipulated in loan contracts with foreign private borrowers,⁷ provide that the law of the lenders shall govern the loan relationship. Typical examples are found in a loan made to the Republic of France by a group of American bankers:

This Agreement and the notes issued pursuant thereto and all rights under this Agreement and said notes shall be construed and determined and may be enforced in accordance with the laws of the State of New York,⁸

or in loan contracts between European bankers and the High Authority of the European Coal and Steel Community (ECSC), such as the following:

Except in regard to the Act of Pledge which is governed by the law applicable thereto, the parties agree that the law applicable to this Convention is the law of Belgium.

Similar provisions are found in loans made by public lending agencies both national and international, the number of which is steadily increasing. Thus, agreements between the Development Loan Fund (DLF) and foreign governments, acting as borrowers or as guarantors of loans made to private borrowers, currently stipulate that the law of the District of Columbia shall be the applicable law.⁹ Although provisions of applicable law appear to be somewhat less frequent in loans made by the Export-Import Bank of Washington (Eximbank), the loan made by that institution to the United Kingdom in 1957 contemplates the applicability of the law of New York.¹⁰

⁷ See Sommers, Broches and Delaume, "Conflict Avoidance in International Loans and Monetary Agreements," 21 *Law and Contemporary Problems* 463, at 466-469 (Summer, 1956); Nurick, "Choice of Law Clauses and International Contracts," 1960 *Proceedings, American Society of Int. Law* 56.

⁸ Loan Agreement dated Oct. 31, 1949, between the Republic of France, The Chase National Bank of the City of New York and other bankers, Sec. 10, par. 10.3. Similar stipulations are also found in various loan contracts, the provisions of which the present writer is not authorized to quote, negotiated in other, including European, financial centers. For an earlier American example, see Loan Contract between the Republic of Nicaragua and Brown Brothers & Co., etc., dated Oct. 8, 1913, Art. XV, reprinted in Dunn, *American Foreign Investments* 378 (1926, hereinafter cited as Dunn).

⁹ The provision currently used reads as follows:

"*Applicable Law.* This Loan Agreement shall be deemed to be a contract made under the laws of the District of Columbia, United States of America, and shall be governed by and construed in accordance with the laws of the District of Columbia, United States of America."

¹⁰ Agreement dated Feb. 25, 1957 (Cmd. 104), Art. XVI:

"All questions with respect to the execution and interpretation of this Agreement and the notes or with respect to performance or non-performance hereunder or thereunder shall be interpreted according to New York law." See also Townsend, *loc. cit.* note 6 above, at 241-245.

Public lenders, however, and in particular international lending organizations, although they are usually as attentive as private lenders to remove all doubts as to the law governing the loan relationship, do not necessarily insist that the desired clarification be made in favor of the law in force at their headquarters. A typical example is that of the investment agreements of the International Finance Corporation (IFC), whose headquarters are located in Washington, D. C. Originally, the IFC, whose investment patterns are sometimes complex, stipulated that the law of New York should govern its investments in private foreign enterprises.¹¹ However, IFC subsequently took the view that a reference to the law of New York would, in many cases, be unhelpful unless it were accompanied by a specific submission by the parties to the courts of New York because, in many countries, local courts would either fail to apply New York law or apply New York law only to the extent that it was consistent with local law. IFC considered that it would not be reasonable always to insist upon a submission to the New York courts and, further, that any such submission might not, in many cases, be of much use since, as a practical matter, any award would ultimately have to be enforced in the foreign jurisdiction (unless the investment enterprise had assets in New York which would not usually be the case), which might again present problems.

In result, IFC considered that, since its ultimate remedies would normally lie in the courts in the country in which the investment enterprise is located, it should be prepared to rely upon taking care that its investment documents are valid under the law of that country. For these reasons, most IFC investment agreements do not specify the applicability of any particular law, although each case is judged on the merits.

In certain cases, submission to the law of the borrower's country may be motivated by other considerations. For example, the organization involved, such as the ECSC, may merely wish to avoid the only likely alternative, namely, having all the loan contracts made by it governed by the law of the particular member country in which that organization has its seat.¹² In other cases, as in the case of the European Investment Bank (EIB), whose loan agreements generally provide for submission to both the law and the courts of the borrower's country, it may be also an understandable desire to facilitate the recovery and enforcement of a judgment against the borrower.¹³

¹¹ See Nurick, *loc. cit.* note 7 above, at 61. The majority of IFC investments provide for the issuance of notes denominated in U. S. dollars and payable in New York. IFC takes care that these notes are in any case valid under the laws of New York. This is especially important where "proper law" rules are relevant, and would render New York law applicable to such notes even in the absence of a specific provision stipulating the applicability of New York law.

¹² Blondeel and Vander Eycken, "Les Emprunts de la Communauté Européenne du Charbon et de l'Acier," 19 *Revue de la Banque* 249, at 274 (1955).

¹³ Stein and Hay, "Legal Remedies of Enterprises in the European Economic Community," 9 *A. J. Comp. Law* 375, at 407 (1960). If the loan is guaranteed or secured and the guarantor belongs to a country other than that of the borrower, or the security is located outside that country, the law of the guarantor or that of the situs may be stipulated as applicable.

A different situation is presented by the International Bank for Reconstruction and Development (IBRD) loan agreements.¹⁴ The IBRD, which has international personality and is a subject of international law, makes loans either directly to member governments or with the guarantee of a member country. Leaving aside for the moment the nature of the relations between the IBRD and a borrower other than a member, it would seem *prima facie* that, in the absence of express provision to the contrary, the relations between the IBRD and one of its members, *qua* borrower or guarantor, should be governed by international law, the law common to both parties. The IBRD loan documents are consistent with this conclusion.

Loan Regulations No. 3, which are applicable to direct loans to member governments and are incorporated by express reference into the Loan Agreement, contain the following provision (Section 7.01):

The rights and obligations of the Bank and the Borrower under the Loan Agreement and the Bonds shall be valid and enforceable in accordance with their terms notwithstanding the law of any state, or political subdivision thereof to the contrary . . .

This provision makes clear the intention of the parties that the terms and conditions of the loan agreement shall not be frustrated by conflicting domestic law. Since it is quite obvious, however, that no agreement can exist in a legal vacuum, the conclusion is inescapable that the effect of this provision, although it is formulated in a negative fashion, is not only to remove the loan relationship from domestic law but to subject it to international law.¹⁵

¹⁴ The following discussion is based largely on the views developed in Broches 316-353.

¹⁵ This conclusion is not impaired by the second sentence of Sec. 7.01, which reads as follows:

". . . Neither the Bank nor the Borrower shall be entitled in any proceeding under this Article to assert any claim that any provision of these Regulations or of the Loan Agreement or the Bonds is invalid or unenforceable because of any provision of the Articles of Agreement of the Bank or for any other reason."

This provision is justified by the following considerations. On the one hand, the Loan Regulations (Sec. 7.04) provide for the settlement of loan disputes by an arbitral tribunal. On the other hand, the Articles of Agreement of the IBRD (Art. IX) stipulate that any question of interpretation of the Articles shall be submitted to the Executive Directors of the IBRD for their decision. In order to account for the Directors' statutory prerogatives and to avoid having the arbitral tribunal pass judgment upon arbitrable issues conceivably involving the consistency of a loan transaction with the Articles of Agreement, it was necessary to remove all such issues from the jurisdiction of the arbitral tribunal. This is the rationale of the provision under review. Far from making the Loan Agreement a self-supporting instrument or from subjecting the loan relationship to the "internal law" of the IBRD (as suggested by Salmon 230; but see Adam, "Les Accords de Prêt de la Banque Internationale pour la Reconstruction et le Développement," 55 *Revue Générale de Droit International Public* 41, 55-56 (1951); Sereni 160), this provision, therefore, is the natural complement of the first sentence of Sec. 7.01. It is intended only to avoid having specific issues within the jurisdiction of the Executive Directors adjudicated by the arbitral tribunal, which is otherwise competent to settle, on the basis of international law, disputes arising between the IBRD and a borrowing member country. See Broches 362-373.

Section 7.01 of Loan Regulations No. 4, applicable to guaranteed loans, is substantially similar to the corresponding provision of Loan Regulations No. 3.¹⁶ In that case, however, one of the parties to the transaction, namely, the borrower (which in the overwhelming majority of cases is a public or private entity created or operating within the guarantor's territories) is not a subject of international law.¹⁷ Since a loan agreement between the IBRD and a borrower other than a member country, unlike a loan or guarantee agreement with a member, cannot be regarded as an international agreement,¹⁸ the question does arise whether the loan, as distinguished from the guarantee, relationship can be insulated from the effect of conflicting domestic law. It is submitted that the answer to this question is in the affirmative for the following reasons.

The tripartite relations arising under any guaranteed loan made by the IBRD are so intimately related that to consider them separately would ignore both the factual and the juridical considerations pertaining to the IBRD's lending operations. In many instances, the fact that the loan is made to an entity other than a member government is purely coincidental and the lending process could be achieved with equal success were the loan made directly to the member concerned, subject to its making available the proceeds of the loan to the entity in charge of the project financed by the IBRD.¹⁹ Also, from a juridical viewpoint, it should be recalled that the loan and guarantee agreements are not only interdependent in many respects, but that the guarantor, by accepting the terms of the guarantee agreement, agrees to be bound "as a primary obligor," an undertaking which goes far beyond the ordinary concept of suretyship and in effect makes the guarantor a joint co-debtor of the borrower.²⁰ Under the circumstances, it is apparent that the IBRD guarantee agreements give rise to a very unusual situation in which the guarantor's obligations are not merely accessory to those of the borrower, as in the case of ordinary guarantees, including those obtained by such other international organizations as the EIB or the ECSC.²¹ In the words of the General Counsel of the IBRD:

. . . . the loan agreement is only one element—although obviously an important one—in the dealings on the international level between the Bank and its member, and partakes of the international character of these dealings. This is not the same as saying that the loan agreement itself thereby becomes an international agreement, and that it is governed by international law. But it does justify the internationalization of the loan agreement to the extent of insulating it from the

¹⁶ "The rights and obligations of the Bank, the Borrower and the Guarantor under the Loan Agreement, the Guarantee Agreement and the Bonds shall be valid and enforceable in accordance with their terms notwithstanding the law of any state, or political subdivision thereof, to the contrary . . ."

¹⁷ Difficult questions may arise when the borrower is a dependent territory in a transitional stage towards full independence. See Broches 351.

¹⁸ *Ibid.*

¹⁹ For examples, see *ibid.* 352-353.

²⁰ See, e.g., Guarantee Agreement dated Feb. 17, 1959, between Japan and the IBRD (Sec. 2.01) relating to a loan made by the IBRD to the Japan Development Bank, 337 U.N. Treaty Series 205.

²¹ Broches 351-353, 355-356; Adam, *loc. cit.* note 15 above, pp. 57-58.

effect of municipal law. It seems perfectly proper for the guaranteeing member and the Bank, both subjects of international law, to agree that this shall be so, and they do so agree by accepting Section 7.01 of Loan Regulations No. 4 as governing the transaction. To put it somewhat differently, while the borrower could not contract itself out of the application of municipal law, the Bank and the guaranteeing member may do so in respect not only of their own relationship but also (with the borrower's consent evidenced by the borrower's acceptance of Section 7.01) of that between the Bank and the Borrower.²²

In addition to the provisions of Section 7.01, the early agreements of the IBRD stipulated that:

The provisions of this Agreement and of the Bonds and of the Guarantee Agreement shall be interpreted in accordance with the law of the State of New York, as in effect at the date of this Agreement.²³

It has been contended that, despite the language of Section 7.01 which always preceded this provision, it had the effect of subjecting loan agreements to the law of New York not only in regard to matters of interpretation but in respect to matters of substance also.²⁴ This contention is unacceptable.

True, courts have held on many occasions that, when the parties stipulate in a contract that it shall be "construed" or "interpreted" in accordance with the law of a particular country, "... it could scarcely be doubted that the parties contemplate that their rights will be governed by [that] law."²⁵ This reasoning, in the particular circumstances to which it applies, is undoubtedly correct, since, in the great majority of cases, there is little doubt that the use of the word "construed" rather than that of the word "governed" in an international contract is "merely verbal."²⁶ There are, however, instances in which references to a specific law are limited to incorporating certain provisions of that law (*e.g.*, the definition of the currency involved) and do not purport to make the law referred to

²² Broches 352.

²³ Loan Agreement between the IBRD and Crédit National pour faciliter la réparation des dommages causés par la guerre (guaranteed by the Republic of France), May 9, 1947, Art. IX, Sec. 2, 152 U.N. Treaty Series 111.

A slightly different formulation is found in other loan agreements of the same period such as the Agreement of Aug. 18, 1949, between India and the IBRD, Art. IX, Sec. 2, 154 U.N. Treaty Series 4:

"The provisions of this Agreement and of the Bonds shall be interpreted in accordance with the law of the State of New York, as at the time in effect."

²⁴ Sereni 206; Mann, "The Proper Law," p. 38. See, however, note 28 below.

²⁵ *Re Helbert Wagg & Co., Ltd.*, [1956] 1 All E.R. 129, at 135.

²⁶ See, *e.g.*, in the case of loans, *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.*, (1938) Vict. L. R. 94, 48 C.L.R. 391. *Cf.* *Irving Trust Co. v. Deutsch Atlantische Tel.*, 22 N.Y.S. 2d 581 (1940), dictum only.

Most cases concern shipping or other commercial contracts. See, *e.g.*, *Vita Food Products v. Unus Shipping Co., Ltd.*, [1939] A.C. 277; *Overseas Trading Company, S.A. v. U. S.*, 159 F. Supp. 382 (Ct. Cl., 1958). But see the *Torni* [1932], P. 78; *Cass.*, March 3, 1924, *The Produce Brokers Co. v. Société Maritime et Commerciale de France*, *Sirey* 1924.1.252, *Clunet* 1926, p. 349.

the proper law of the contract.²⁷ That the distinction between the two situations is far from easy is sufficiently illustrated by the many controversies respecting gold or multiple currency clauses or maritime contracts. It seems clear, nevertheless that, in the case of the IBRD loan agreements, the distinction was particularly well spelled out, since it was expressly stated that the New York law to be taken into consideration was exclusively the law *in force at the time of contracting*, a formula which by all relevant canons of interpretation cannot be construed as a choice-of-law provision.²⁸ Under the circumstances, the reference to the law of New York, which was soon dropped from the IBRD loan agreements,²⁹ constituted merely one example of the kind of stipulations sometimes found in commercial or financial agreements concluded by international persons, which for the sake of precision incorporate into such agreements technical definitions borrowed from municipal law.³⁰

It is too early to forecast with accuracy the future practice of the International Development Association (IDA) and the Inter-American Development Bank (IADB) which recently started their first lending operations. Until now, the IDA credits have been extended only to member governments and the credit agreements in existence contain a provision similar to that of Section 7.01 of Loan Regulations No. 3 of the IBRD.³¹ However, it should be noted that the IDA may also extend credits to public or private entities in the territories of members and that, unlike in the case of the IBRD, such credits need not be guaranteed by a member government and may be secured by any form of security. It is, therefore, conceivable that in this last case conflict-of-laws issues might arise.

The IADB is authorized to embark upon financing operations similar to those of the IBRD, the EIB, the IFC and the IDA, respectively. In view of the variety of these operations, it is not unlikely that the IADB may

²⁷ See, e.g., Batiffol, *Les Conflits de Lois en Matière de Contrats* 151-155 (1938); Dicey, *Conflict of Laws* 728-729 (7th ed., 1958); Mann, *The Legal Aspects of Money* 138-139 (2d ed., 1953).

²⁸ See Adam, *loc. cit.* note 15 above, p. 58; Salmon 228-229; Broches 357. See also Van Hecke, *Problèmes Juridiques des Emprunts Internationaux* 29, note 78 (1955).

Dr. Mann ("The Proper Law," p. 38, note 2), who bases his critical reasoning on the second type of provision quoted in note 23 above, which was avowedly less clear than that quoted in the text above, agrees that the fixation in point of time of the reference to the law of New York "would, indeed, involve a mere case of incorporation, not a choice of New York law." However, even the second type of provision, whatever its meaning in the absence of any other indication of the parties' intention as to the applicable law, cannot reasonably be construed as a choice-of-law provision in the face of the unambiguous statement of Sec. 7.01 of the IBRD Loan Regulations.

²⁹ It is believed that the last time this provision was used was on the occasion of the July 7, 1950, loan to Turkey (156 U.N. Treaty Series 75), which was the 28th loan made by the IBRD since the beginning of its operations.

³⁰ See Mann, "Reflections on a Commercial Law of Nations," 33 *Brit. Yr. Bk. of Int. Law* 20 (1957).

³¹ See Development Credit Agreement dated May 12, 1961, between Republic of Honduras and IDA, Art. VII, Sec. 7.01; Development Credit Agreement dated June 21, 1961, between India and IDA, incorporating by reference the provisions of Development Credit Regulations No. 1 of the IDA.

find it convenient to resort alternatively to public and private international law. It is not inconceivable also that in the process of selection between the two systems of law, the part of public international law will be increased. It is indeed significant that, in the case of the first ten loans of the IADB, which were made to private as well as governmental entities, in some cases with guarantees of the borrowers' governments, each of the loan contracts contains a provision substantially similar to that of Section 7.01 of Loan Regulations No. 4 of the IBRD.³²

B. Bonds

The respective practices of lenders in leading financial markets regarding conflict-of-laws provisions in bonds issued by international persons exhibit considerable variations. Continental lenders, consistent with their practice regarding direct loans, usually stipulate, both in the case of government bonds,³³ and of bonds issued by international organizations,³⁴ that the rights and obligations of the parties shall be governed by the law of the market of issue. Lenders in the United States, the United Kingdom or Canada do not always insist on stipulating the applicable law in bonds issued in these countries by international entities.³⁵ Whatever the motiva-

³² The relevant provision employed by the IADB appeared in various slightly differing forms in the initial loan contracts of that institution. The provision currently being used is:

"Los derechos y obligaciones establecidos en este Contrato son válidos y exigibles de conformidad con los términos en él convenidos, sin respecto a legislación determinada, y, en consecuencia, ni el Banco ni el Deudor podrán alegar la invalidez de ninguna de sus disposiciones."

³³ See, *e.g.*, in Switzerland, the prospectus of the Commonwealth of Australia 4½% Loan of 1960, reading as follows:

"Any dispute between the bondholders, on the one side, and on the other side the Australian Government arising in connection with the bonds or the coupons of this loan shall be governed by Swiss law and shall be decided by the ordinary courts of the District [canton] of Bâle-Ville, subject to appeal to the Federal Tribunal at Lausanne." (As translated.)

Similar provisions are found in other Swiss issues, such as those regarding the Belgian Congo Guaranteed 4% Loan of 1953; the Union of South Africa 4% Loan of 1952; or the Kingdom of Denmark 4½% Loan of 1959. *Of.* in Germany the prospectus respecting the Oesterreichische Donaukraftwerke A.G. 6% DM Bonds of 1959, guaranteed by the Republic of Austria and two power companies.

³⁴ See, *e.g.*, the following provision regarding the IBRD 5% Deutsche Mark Bonds of 1959:

"All rights and duties arising out of or in connection with this issue are exclusively determined in accordance with the law of the Federal Republic of Germany. The place of performance and jurisdiction will be in Frankfurt am Main for all parties concerned." (As translated.)

Similar provisions are found in other IBRD bond issues in Switzerland (see, *e.g.*, the prospectus of the 4½% Swiss Franc Loan of 1960) and in The Netherlands (see, *e.g.*, the prospectus of the 3½% Netherlands Guilder Bonds of 1955). See also the prospectuses of the High Authority of the ECSC Swiss franc 4¼% Loan of 1956 (quoted in note 69 below) and Netherlands Guilder 4¼% Loan of 1961.

³⁵ For example, no conflict-of-laws provision is found in bonds issued in New York by the Kingdom of The Netherlands, the Italian Republic, and the Kingdom of Norway in 1947, the State of Israel in 1950, the Kingdom of Belgium in 1954, and the Union of

tions of the lenders, it seems clear, nevertheless, that they consider that the loan relationship is governed by domestic law.³⁶

As far as it is known, no direct attempt has ever been made by private lenders contracting with an international person to remove the loan relationship from the field of domestic law to that of international law. Dr. Mann has argued that such a removal was implicit in certain loans made by private lenders to foreign governments, which provided for the settlement of loan disputes by the Permanent Court of International Justice³⁷ or the International Court of Justice.³⁸ This contention is open to the objection, acknowledged by Dr. Mann himself,³⁹ that, since the jurisdiction of the International Court is limited to disputes between states, the Court would have had to refuse to entertain jurisdiction over disputes brought by the lenders against the debtor government.⁴⁰ Furthermore, since, in certain of these clauses, provision is made not only for the jurisdiction of the International Court of Justice but also for that of domestic courts,⁴¹ it is doubtful that the clauses in question were intended to solve problems other than those respecting jurisdiction. Yet, the habit of lenders to couple jurisdictional clauses and provisions of applicable law whenever possible⁴² certainly lends support to Dr. Mann's contention. Had the parties substituted for an impossible forum an effective means of international adjudication, *e.g.*, by way of arbitration, it would seem that Dr. Mann's view would be entitled to great weight.⁴³ Whether provisions of the kind

South Africa in 1955; or in bonds issued in Canada by the Commonwealth of Australia in 1955; or in bonds issued in England by the Commonwealth of Australia in 1948-1949. But see the prospectus (p. 4) of the Belgian Congo \$15 million, Fifteen-Year 5¼% External Loan Bonds of 1958, due April 1, 1973, which provides that: "The Bonds will provide that the rights and obligations of the Government and the holders of the Bonds shall be governed by and construed in accordance with the laws of the State of New York."

No provision of applicable law was made in bonds issued in the United Kingdom by the Japanese Government (6% Sterling Loan of 1924) or by the Kingdom of Iraq (Secured Sterling Loan of 1937). But see the Kingdom of Belgium Sterling Conversion Bonds of 1936 providing that English law would be applicable.

Bonds issued by the IBRD in the United States, Canada and the United Kingdom contain no stipulation of applicable law. Bonds issued by the High Authority of the ECSC in New York are governed by the law of that State (5¼% Secured Bonds (Eighth Series) of 1957).

³⁶ See Sommers, Broches and Delaume, *loc. cit.* note 7 above, pp. 472-473.

³⁷ See the 5% 1932 and 1937 Bonds of the Czechoslovak Republic guaranteed by the Republic of France; the external loan of the French Republic of 1939 issued both in Switzerland and The Netherlands. Both provisions are quoted by Mann, "State Contracts," pp. 20-21, and Delaume, "Jurisdiction of Courts and International Loans," 6 A. J. Comp. Law 189, at 205 and 206, note 46 (1957).

³⁸ See the provision in bonds issued in Switzerland by the Régie des Télégraphes et Téléphones, guaranteed by the Belgian Government (External Loan 4% of 1947), quoted by Delaume, *ibid.* 206.

³⁹ "The Proper Law," p. 51.

⁴⁰ See Delaume, *loc. cit.* note 37 above, pp. 205-207; Sereni 223-224.

⁴¹ Delaume, *ibid.*

⁴² Delaume, *ibid.*

⁴³ In the same sense, McNair, "General Principles," p. 6. Bonds issued in the United States by the High Authority of the ECSC constitute a remarkable exception to the maxim "qui elegit judicem elegit jus." The Bonds indeed provide simultaneously for

anticipated by Dr. Mann, which are viewed with increasing favor in concessions and economic development agreements, are likely to be found also in international loan documents, at least in the near future, is of course another matter. Recently, for example, on the occasion of lending operations undertaken jointly by private lenders and international organizations, private lenders have had several opportunities to follow Dr. Mann's suggestion. Invariably, however, they have failed to do so.

C. Joint Operations

In an ever-increasing number of instances, institutional lenders, both domestic and international, combine efforts to supply borrowers with the financial resources needed for their operations or the development of their economy. Sometimes this co-operation is, both from the economic and the legal viewpoints, rather a loose one, each lender supplying funds for a purpose other than that financed by the other lender.⁴⁴ On other occasions, the proceeds of all financings are applied to a single economic objective, such as the completion of a specific project contributing to the economic development of the borrower's country.⁴⁵ In that case, the various loan agreements normally contain provisions making the transactions mutually interdependent, *e.g.*, in regard to such matters as entry into force, disbursements, consultation, default, etc. Even in this last instance, and *a fortiori* in the first type of operations, the lenders' practice regarding stipulations of applicable law is not prognosticative of revolutionary departures from currently obtaining solutions.

A concrete example is that of the 1957 loans made by several American commercial banks and by the IBRD to finance the purchase of jet passenger planes by Air-India International, India's international airline. The relations between the bankers, the IBRD and the borrower (and India as guarantor) are defined in two sets of agreements. The IBRD Loan and Guarantee Agreements, which incorporate by reference several provisions of the Bankers' Agreement,⁴⁶ follow the ordinary pattern of IBRD agree-

the jurisdiction of the Court of Justice of the Community and for submission of the loan relationship to the law of New York. See Delaume, *loc. cit.* note 37 above, at p. 208.

⁴⁴ Thus, in 1959 the Kingdom of Denmark borrowed \$20 million in the New York market and contracted concurrently a loan from the IBRD for the equivalent of \$20 million. The proceeds of the bond issue were not allocated to a specific purpose. The IBRD loan is intended to assist in the financing of specific power projects. See Loan Agreement dated Feb. 4, 1959, 328 U.N. Treaty Series 143, and the prospectus of the 5½% Fifteen-Year External Loan Bonds of 1959, p. 3. For other illustrations, see *The World Bank, Policies and Operations* 102-105 (IBRD pub., 1960).

⁴⁵ Thus, in 1959 Japan borrowed the equivalent of \$40 million in a combined operation consisting of public offerings of \$30 million of bonds in New York and of \$10 million in the form of a loan made by the IBRD to the Japanese Development Bank, a government agency. The purpose of the borrowings was to provide part of the funds needed for a hydroelectric power project. See Loan, Guarantee and Project Agreements dated Feb. 17, 1959, 337 U.N. Treaty Series 205, and the prospectus of the External Loan Bonds dated Jan. 15, 1959, p. 4.

⁴⁶ Only the IBRD Agreements dated March 5, 1957, have been published. See 272 U.N. Treaty Series 201. See, in particular, Sec. 5.02 of the Loan Agreement. The due execution of the Bankers' Agreement was a condition of effectiveness of the IBRD loan

ments. They incorporate Section 7.01 of Loan Regulations No. 4 and provide for the arbitral settlement of disputes arising thereunder.

In view of the interdependence of the IBRD's and the Bankers' loans, there was a perfect opportunity for the bankers to seek to "internationalize" their own agreements. No such attempt was made. Instead, the bankers chose to stipulate for the applicability of the law of New York and the jurisdiction of the New York courts. It is believed that this example is significant. It shows that private lenders, provided they can succeed in bringing the loan relationship within their own system of law and the jurisdiction of their own courts, feel adequately protected. Whether this feeling is justified is not the question; it explains, however, that private lenders have no compulsion to seek additional safeguards by placing their interests under the convenient umbrella of international law, which is much less precise, in their opinion, than the domestic law with which they are familiar.

Other examples are worth mentioning also. Thus, in 1959 the Southern Italy Development Fund (Cassa per il Mezzogiorno), an agency of the Government of Italy, borrowed \$70 million in a combined operation consisting of two loans of \$20 million from the IBRD and the EIB, respectively, and of \$30 million of bonds issued in the New York investment market. The *live* equivalent of the proceeds of the IBRD and the EIB loans were used to finance a power project in southern Italy and two industrial projects in Sicily, while funds borrowed from the market were applied to the general program of the Cassa.⁴⁷

In order to co-ordinate the IBRD and the EIB's financing, the loan agreements between each of these two organizations and the Cassa were interrelated, the terms and conditions of both loans being substantially the same in regard to disbursements and repayment at or in advance of maturity.⁴⁸ Nevertheless, while the IBRD loan is subject to the provisions of Section 7.01 of the Loan Regulations, the EIB loan is governed by the law of Italy. No stipulation of applicable law is found in the bonds issued in the New York market.

In 1960, simultaneously with the signing of the Indus Water Treaty between India and Pakistan, an international agreement was executed by the representatives of the governments of Australia, Canada, Germany, New Zealand, Pakistan, the United Kingdom and the United States, and of the IBRD. This agreement creates an Indus Basin Development Fund of

(Loan Agreement, Sec. 7.02(b)), while the bankers' obligation to make loans under their Agreement was conditional upon the execution of the IBRD Loan Agreement.

⁴⁷ See the preamble of the Loan Agreement dated April 21, 1959, between the IBRD and the Cassa per Opere Straordinarie di Pubblico Interesse nell'Italia Meridionale (Cassa per il Mezzogiorno), guaranteed by the Republic of Italy (359 U.N. Treaty Series 191). See also the prospectus of the Southern Italy Development Fund, Guaranteed External Loan Bonds of 1959, pp. 3-4.

⁴⁸ IBRD Loan Agreement, Art. II, Sec. 2.02 and Schedule 3(d) (h) (i) and (k). Both loans also provided that the subsidiary loan agreements and other arrangements between the Cassa and the three beneficiary enterprises concerning the financing, construction and operations of the projects should contain provisions adequate to protect the interests of the Cassa and of the two lending organizations and could not be amended without the latter's consent (IBRD Loan Agreement, Art. IV, Secs. 4.01 and 4.03).

almost \$900 million equivalent to finance the construction of irrigation and other works in Pakistan. The Fund's resources will be supplied by the participating governments, with a contribution payable by India under the Water Treaty, and by the IBRD (which is also acting as Administrator of the Fund) under a Loan Agreement of even date with the Water Treaty and the Fund Agreement.⁴⁹ On the same date that these instruments were executed, the DLF agreed to make a \$70 million loan to Pakistan, the proceeds of which are to be disbursed directly to the Fund and to be used for the purposes and in the manner specified in the Fund Agreement. While there is little question that the Water Treaty, the Fund Agreement and the IBRD Loan Agreement are subject to international law, the DLF Agreement, conforming to the usual practice of the DLF, provides expressly that it is governed by the law of the District of Columbia.

II. DETERMINATION OF THE PROPER LAW IN THE ABSENCE OF EXPRESS STIPULATION OF APPLICABLE LAW

A. *Initial Uncertainty*

It is generally agreed that loan agreements between international persons are normally governed by international law. This rule applies to intergovernmental loans or credit arrangements,⁵⁰ and to loans between governments and international organizations, such as the United States Government loan to the ECSC,⁵¹ or the Swiss Government loans to the IBRD,⁵²

⁴⁹ Loan Agreement dated Sept. 19, 1960. The text of the Water Treaty (in a French translation) is found in 65 *Revue Générale de Droit International Public* 452 (1961); English text reprinted in 55 *A.J.I.L.* 797 (1961).

⁵⁰ For examples of such arrangements, see, e.g., Mann, "Reflections on a Commercial Law of Nations," 83 *Brit. Yr. Bk. of Int. Law* 20, at 26-27 (1957); Delaume, "Gold and Currency Clauses in Contemporary International Loans," 9 *A. J. Comp. Law* 199 (1960). See also recently the agreements between the United States and (1) Ceylon (March 18, 1959, 342 *U.N. Treaty Series* 51) and (2) France (March 21, 1959, *ibid.* 71); the agreement dated Feb. 3, 1959, between the United Kingdom and Yugoslavia (343 *ibid.* 153), and the agreements between the United Kingdom and (1) Denmark (*ibid.* 258); (2) Austria (*ibid.* 263); (3) Belgium (*ibid.* 271); (4) France (*ibid.* 277); (5) Norway (*ibid.* 283).

⁵¹ Sept. 17, 1956, 340 *U.N. Treaty Series* 312. The view has been advanced that the loan would be subject to "American" law (see Blondeel and Vander Eycken, *loc. cit.* note 12 above, at pp. 273-274). It would seem that the better view is that the loan is governed by international law. See Mann, "The Proper Law," pp. 39-40; X . . . , "La Personnalité Juridique de la Communauté Européenne du Charbon et de l'Acier dans les Relations Internationales," 1959 *Annuaire Français de Droit International* 714, at 722-723; De Soto, "Les Relations Internationales de la Communauté Européenne du Charbon et de l'Acier," 90 *Hague Academy Recueil des Cours* 29, at 59 (1956).

Sereni is mistaken when he states that the loan is governed "by national law, although it was pre-arranged through an international agreement" (p. 162); this statement is based on the erroneous assumption that the Export-Import Bank acted on its own account rather than as agent for the U. S. Government, a fact which is clearly stated in Art. I of the Loan Agreement. See also the U. S. Government loan to the United Nations for the construction of the headquarters building, March 23, 1948, 19 *U.N. Treaty Series* 43. Cf. the French Government loan to UNESCO for the same purpose, analyzed by Salmon 114-120, 313-317.

⁵² A first loan was made on Sept. 17, 1956 (340 *U.N. Treaty Series* 312). See Broches 383-384. A second loan was made on Oct. 23, 1961.

as well as to transactions between international organizations and governments, such as those between the International Monetary Fund and its members,⁵³ or those between the United Nations Special Fund and recipient governments.⁵⁴

The rule also applies frequently to security arrangements incidental to loans between international persons. Examples are those of intergovernmental loans secured by a pledge of revenues,⁵⁵ or an assignment of monies, *e.g.*, reparations or war indemnities⁵⁶ due the assignor by another government. Another illustration is found in a loan made by the IBRD to Yugoslavia, which provided that payments due Yugoslavia by timber-importing countries, pursuant to "Timber Payments Agreements" between each importer and Yugoslavia, were to be made to, or on the order of, the IBRD.⁵⁷ This Agreement and the Timber Payment Agreements were all governed by international law. So are also several agreements between the IBRD and member governments providing for the setting aside of oil royalties or other revenues accruing to the borrowing government.⁵⁸

A different situation was presented by a loan (since repaid) from the IBRD to Iraq.⁵⁹ The loan was secured by an assignment of oil royalties due Iraq by three British oil companies. The assignment, which, as between the IBRD and Iraq was governed by international law, gave to the IBRD the right to receive direct payment from the oil companies, a right which, should the occasion had arisen, would have had to be enforced in accordance with the applicable domestic law.⁶⁰

⁵³ These transactions are equivalent to short-term loans. See Mann, "Money in Public International Law," 96 *Hague Academy Recueil des Cours* 7, at 23-25 (1959); see also Tew, "The International Monetary Fund: Its Present Role and Future Prospects," *Essays in International Finance* 16-17 (Princeton University, No. 36, March, 1961). From a strictly legal standpoint, however, they can be analyzed as a purchase and sale of currencies. See Fawcett, "The Place of Law in an International Organization," 36 *Brit. Yr. Bk. of Int. Law* 321 (1960).

⁵⁴ See, *e.g.*, Agreement dated Oct. 6, 1959, between the Fund and Iran, 342 U.N. Treaty Series 89; Agreement dated Oct. 15, 1959, between the Fund and the Polish People's Republic, 344 U.N. Treaty Series 29.

⁵⁵ See, *e.g.*, Agreement dated March 19, 1936, between Italy and Albania (Art. 3), 173 L.N. Treaty Series 83 (secured on the revenues of the Albanian tobacco monopoly).

⁵⁶ See, *e.g.*, Agreement Regarding the Relief of Debts Contracted by the Kingdom of the Serbs, Croats and Slovenes, towards Australia, Denmark, France, Great Britain, The Netherlands, Norway, Sweden and Switzerland, dated Aug. 8-12, 1927 (Art. 6), 101 L.N. Treaty Series 483; the form of Bond annexed to the Agreement Concerning Polish Reconstruction Debts, dated March 14, 1935, reproduced in 7 Hudson, *International Legislation* 39, 43 (1941).

⁵⁷ Oct. 17, 1949, 155 U.N. Treaty Series 3.

⁵⁸ Loan Agreement dated Jan. 22, 1957, between Iran and the IBRD, 317 U.N. Treaty Series 129 (oil revenues); Loan Agreement dated Sept. 9, 1960, between Israel and the IBRD (port revenues).

⁵⁹ Loan Agreement dated June 15, 1950, 155 U.N. Treaty Series 267, and Annexed Indenture of Assignment (Arts. II and V).

⁶⁰ Broches 358. Yet another situation is presented by the IBRD loans to private borrowers. Even though under Sec. 7.01 of the Loan Regulations, the loan relationship itself (including the borrower's obligation to create and maintain the security) is insulated against the operation of domestic law, reference is normally made in the loan agreement to domestic law in regard to such matters as those concerning the characterization, validity and enforcement of the security. See, *e.g.*, the following loans made by

Domestic law, of course, is the law normally applicable to loans between private and international persons. This principle, which is abundantly illustrated by the many cases involving loan disputes between private lenders and foreign governments,⁶¹ applies also to borrowings made in the private capital market by international organizations.⁶²

Although the existence of the principle is not in dispute, the question has been raised whether the presumption in favor of domestic law can be overcome and the loan relationship, wholly or in part, made subject to international, rather than municipal, law. If, as the current trend of legal thinking seems to demonstrate, it should be conceded that an international person must have the authority to contract under its own system of law, should it be admitted also that the judge, in the absence of express statement of intention, be free to apply international, rather than municipal, law to the transaction? Rephrased in other words, the question is whether the choice between two systems of law is a process so substantially different from that which characterizes the daily administration of the conflict of laws, that the judge or the arbitrator should be denied in the first instance a prerogative which he traditionally enjoys in the second instance. It is submitted that the difference, if any, is one of degree rather than substance and that to preclude judges from exercising a reasonable discretion in the selection of the proper law, domestic or international, in an era in which the traditional distinction between the two systems of law is subject to considerable erosion, no longer appears an imperative proposition. If circumstances are such as to make it "impossible to assume that the parties intended to be governed by a national system of law,"⁶³ courts should be authorized to draw the proper conclusion and adjudicate the issue on the basis of international law.

That this situation is unlikely to arise frequently in the case of international loans results sufficiently from the practice of lenders to settle in advance the issue of applicable law. Yet there are cases in which the dif-

the IBRD to: (1) *Corporación de Fomento de la Producción and Compañía Carbonífera e Industrial de Lota* (July 14, 1957, 228 U.N. Treaty Series 139, Art. V, Sec. 5.03), secured by "a hipoteca y prenda industrial of the first grade under the laws of the Republic of Chile"; (2) several Dutch shipping companies (July 15, 1948, 153 U.N. Treaty Series 211, 259, Art. VII, Sec. 1), secured by "a ship mortgage in accordance with the laws of the Kingdom of the Netherlands"; (3) *K.L.M. Royal Dutch Airlines* (March 20, 1952, 159 U.N. Treaty Series 207, Art. VI, Sec. 6.01), secured by a chattel mortgage on aircraft "executed in accordance with the laws of the respective states of the United States [California and New York], hereinafter specified"; or (4) *Vorarlberger Illwerke Aktiengesellschaft* (June 14, 1955, 221 U.N. Treaty Series 375, Art. V, Sec. 5.03), secured by "an assignment on account of payment (*Abtretung zahlungshalber*) within the meaning of the laws of the Guarantor . . ." [Austria], and by a mortgage on assets of the borrower (Secs. 5.04, 7.01(d) and 7.02(d) of the Loan Agreement).

⁶¹ See, e.g., Mann, "The Proper Law," pp. 41-43; Sommers, Broches and Delaume, *loc. cit.*, note 7 above, pp. 471-475.

⁶² An illustration is that of the IBRD bonds issued in the United States, the United Kingdom and Canada, which, unlike bonds issued by the IBRD on the Continent (see note 34 above), contain no stipulation of applicable law.

⁶³ Mann, "State Contracts," p. 21.

ficulty is real and the proper determination far from easy. The Young Loan was one of these cases,⁶⁴ and another example is that of the "Act of Pledge" of November 28, 1954, between the High Authority of the ECSC and the Bank for International Settlements (BIS).⁶⁵ This instrument, which is intended to secure the rights of creditors of the High Authority, present or future, by a pledge of the monetary claims for loans made by the High Authority to enterprises of the Community out of the proceeds of the High Authority's own borrowings and of the notes constituting or evidencing such claims, contains no stipulation of applicable law. The Act and Indentures supplemental thereto were executed in Luxembourg, where the seat of the Authority is located. The central place of business of the BIS is in Basel, Switzerland. One of the creditors, the first to make a loan to the Authority, is the United States Government; all other creditors are private investors in member countries of the Community and in Switzerland and the United States. The Act is drafted in English and reflects an extensive use of American legal phraseology.

Although every commentator agrees that the Act, to achieve its purpose, must be governed, as regards all creditors, by one and the same law, they disagree on the selection of the proper law. Some writers suggest that "American" law should govern, thereby treating the Act of Pledge as an accessory to the first United States Government loan to the High Authority,⁶⁶ a view which, whatever its somewhat doubtful original merits, is outdated, since the security created by the Act benefits also the many private lenders located in countries outside the United States. Other writers consider that Swiss law should be the applicable law, since it is in Switzerland that the BIS, which is the basic pivot of all the relationships arising under the Act, is incorporated and operates.⁶⁷

To avoid these controversies, Dr. Mann has recently submitted that "no solution other than the application of public international law would appear to be reasonable and practicable."⁶⁸ This conclusion is extremely suggestive in view of the apparent international complex resulting from the Act of Pledge and the diversified borrowings of the High Authority. Yet, a word of caution appears necessary, since this solution, however appealing, may not correspond entirely to the parties' intention. In this connection, the cautious wording of provisions of applicable law in recent loans raised by the High Authority in various private markets may not be without significance. Thus, the prospectus of the 5 $\frac{3}{8}$ % Secured Bonds (Thirteenth Series) of 1960, issued by the High Authority in the United States provides that the Indenture and the Bonds:

shall be governed by the laws of the State of New York, except that any question with respect to the interpretation or application of the Act of Pledge hereinafter mentioned, or with respect to the security

⁶⁴ *Ibid.* See Swiss Fed. Trib., May 26, 1936, *Aktiebolaget Obligationinteressenter v. the Bank for International Settlements*, R.O. 62, II, 140. All the decisions, including those of the lower courts in this case, have been reproduced in *League of Nations Doc. I.L. 18*, Geneva, Feb. 11, 1937.

⁶⁵ 238 U.N. Treaty Series 340.

⁶⁶ Blondeel and Vander Eycken, *loc. cit.* note 12 above, p. 274.

⁶⁷ Salmon 293; Sereni 163.

⁶⁸ Mann, "The Proper Law," p. 54.

afforded thereby, shall be determined in accordance with the law which would otherwise be appropriate for such determination.⁶⁹

This provision, although it is of little assistance in the solution of the difficulty, possibly implies that domestic, rather than international, law is the law contemplated by the parties, and that in the determination of the "proper law" the ordinary rules of the conflict of laws would be relevant. This last remark is, of course, tentative and has no purpose other than to show the complexity of the problem and the extreme circumspection with which a court would have to proceed in order to take into account all the factors relevant to the solution of the difficulty, should a judicial determination be required.

Bonds recently issued by the Republic of Panama in the United States raise an interesting situation, albeit a simpler one than that created by the Act of Pledge. The bonds, which are payable in U. S. dollars at the New York Head Office of the First National City Bank of New York, the Fiscal Agent, contain no stipulation of applicable law. The bonds are secured by an assignment of monies receivable by the Republic from the United States pursuant to treaty arrangements between the two countries. The terms of the security are set forth in specific provisions of the Fiscal Agency Contract, an agreement which provides that it shall be "construed" in accordance with the laws of New York. Pursuant to letters exchanged by the two governments, containing express reference to the Fiscal Agency Contract, the United States Government has agreed to pay annually to the Fiscal Agent a stated amount of the sums due under the treaty. There is no doubt that the treaty is governed by international law and that neither Panama nor the United States could, by unilateral action, alter its provisions and reduce the value of the security.⁷⁰ As between the bondholders-assignees and the United States, however, it would seem, especially in view of the express reference to the Fiscal Agency Contract in the United States' undertaking, that domestic law (presumably the law of New York) is the applicable law.⁷¹

⁶⁹ Prospectus, p. 26. See also the following provision in the prospectus relating to the High Authority 4½% Loan of 1956 issued in Switzerland:

"Le présent emprunt est régi par le droit suisse, sauf en ce qui concerne l'interprétation et l'application du Contrat de Nantissement qui reste soumis au droit qui lui est propre." (P. 4.)

⁷⁰ An issue of this kind arose in 1934. Pursuant to Art. XIV of the Panama Canal Convention of 1903, it was agreed that the United States would pay to Panama "the sum of ten million dollars in gold coin of the United States . . . and also an annual payment during the life of [the] Convention of two hundred and fifty thousand dollars in like gold coin. . . ." After the devaluation of the American dollar and the abrogation of gold clauses in 1933, the United States tendered payment in depreciated dollars. Panama refused to accept this payment and demanded instead that payment be made on a gold basis. The matter was finally settled by a new treaty increasing the balboa amount of the annuities payable by the United States while, simultaneously, the gold content of the balboa was reduced to that of the devalued U. S. dollar. See Broches 346-350. See also 5 Hackworth, Digest of International Law 630.

⁷¹ See prospectus of the Republic of Panama 4.80% External Secured Bonds of 1958, containing as Appendix I the Fiscal Agency Contract, together with the form of bonds and the letters exchanged by the Panamanian and United States governments.

B. *Subsequent Uncertainty*

(1) *Assignability of treaty rights of a financial character; sales of loans or portions of loans to private persons*

International financial agreements or loans not infrequently contemplate that the rights and obligations arising thereunder may be assigned or transferred, *in toto* or in part, to private persons. Should international law, applicable to the original transaction, continue to govern the post-transfer-relationship or should the latter be governed by domestic law?

In most instances, the loan or financial agreement is limited to authorizing the transfer;⁷² for example, by authorizing the creditor country to assign or otherwise transfer bonds or notes issued by the debtor in representation of the loan. A concrete example, which has been extensively used by Dr. Mann,⁷³ is that of post-World War I funding agreements providing for the issuance by debtor to creditor governments of bonds which could be exchanged for marketable obligations at the creditor's request. Some of the forms of bonds to be issued to the creditor governments state merely that the bonds are issued "pursuant to the agreement";⁷⁴ some other forms contain the additional statement that the bonds are "subject" to the agreement "to which reference is made for a further statement of [the] terms and conditions" of the bonds.⁷⁵

Taking note of the different wording of these provisions, which, according to Dr. Mann, "presumably was intentional,"⁷⁶ the eminent writer suggests that bonds in the first category, once assigned to private persons, would have been governed by domestic law, whereas bonds in the second class, *i.e.*, bonds "subject" to the original agreement, would have remained governed, like the agreement itself, by international law. The merits of this distinction are questionable. Indeed, the wording discrepancies, noted by Dr. Mann in respect of bonds, occur also, but not in the way that could be expected to support his opinion, in the provisions of the funding agreements regarding the execution of the marketable obligations for which the

⁷² Such is not always the case. Thus, the Agreement concerning Polish Reconstruction Debts of March 14, 1935 (7 Hudson, International Legislation 39 (1941)), providing for the issuance of bonds by Poland to creditor countries, stipulated (Art. 5) that the bonds would remain in the creditors' possession up to the date of their maturity. Other agreements are silent on the subject of the assignability of bonds issued thereunder, thereby probably excluding implicitly any assignment (see, *e.g.*, Financial Agreement dated April 9, 1946, between Canada and France, Arts. 6 and 9, 43 U.N. Treaty Series 43). In other cases, assignments are subject to various restrictions and conditions (see, *e.g.*, Loan Agreement dated Sept. 7, 1949, between Belgium and France, Arts. 5 and 6, 123 U.N. Treaty Series 14). See also Mann, "The Assignability of Treaty Rights," 30 Brit. Yr. Bk. of Int. Law 475 (1953).

⁷³ Mann, "State Contracts," pp. 28-31; "The Proper Law," pp. 56-57.

⁷⁴ See, *e.g.*, the Government of the United Kingdom 62-Year 3-3½% Gold Bond quoted by Mann, "State Contracts," pp. 28-29; the Rumanian Bond issued to the British Government, *ibid.*, p. 30.

⁷⁵ See, *e.g.*, the Finnish Bond issued to the United States Government, *ibid.*, p. 29; the French Bond issued to the United States Government, reproduced in Petit, *Le Règlement des Dettes Interalliées* (1919-22) 676 (1932).

⁷⁶ "State Contracts," p. 31.

bonds could be exchanged. Thus, while certain agreements provide that such obligations shall conform "in all respects" ⁷⁷ to the bonds, other agreements limit the identity of the bonds and obligations to the most essential provisions of the bonds and leave room for different or additional stipulations (which might well have been stipulations of applicable law, if those made the obligations more "suitable for sale to the public") in the obligations.⁷⁸ The curious thing, however, is that the latter provisions occur in those agreements in which the form of bonds is made expressly "subject" to the terms of the agreement, a kind of bonds which, according to Dr. Mann, would retain their international character even after being assigned to private persons. The former type of provision, paradoxically enough, is found in agreements relating to bonds which, not being expressly "subject" to the terms of the agreement, would allegedly be governed by domestic law, once in the hands of private holders. To see in these discrepancies more than mere drafting variations with which all lawyers, particularly in the international field, are familiar, is therefore probably to ascribe to the parties intentions foreign to them at the time of contracting.

Under the circumstances, it is believed that, had the assignment taken place, the bonds held by private persons would have been governed by domestic law.⁷⁹ Dr. Mann is perfectly right, of course, in pointing out that this solution leaves the question of the applicable law undetermined. This is, however, an altogether different problem, the solution of which might have been settled at the time of execution of the marketable obligations (at least to the extent that the form of such obligations could differ from that of the original bonds) or would have had to be found under the relevant rules of conflict of laws.

In this connection, reference must be made to the practice of the IBRD regarding sales from its loan portfolio. The IBRD frequently transfers to private investors portions of loans made by it. Such transfers may be accomplished through different techniques. Sometimes the transfer takes the form of an agreement between the IBRD and the investor, under which the IBRD undertakes to pay to the investor the principal and all or part of the interest and other charges which it receives on the account of the portion of the loan "sold" to the investor. Such an agreement will typically contain a provision according to which all matters relating to the administration and enforcement of the loan shall be administered solely by the IBRD, thereby making it clear that there is no privity of contract

⁷⁷ See, e.g., the Agreement dated Oct. 19, 1925, between Rumania and the British Government, Art. 5, 123 Brit. and For. State Papers 562 (1926, Pt. I). On the other hand, the Agreement dated June 18, 1923, between Great Britain and the United States relating to the bonds referred to in note 74 above (reprinted in Fischer Williams, Chapters on Current International Law and the League of Nations 361-370 (1929), Art. 9), conforms to the text of the Agreement between France and the United States referred to in the following note.

⁷⁸ See, e.g., the Agreement dated April 29, 1926, between France and the United States, Art. 7, reprinted in Petit, *op. cit.* note 75 above, at pp. 671, 674-675.

⁷⁹ See also Sereni 164.

between the participant and the borrower and/or the guarantor, and that the contractual relationship created by the agreement is one solely between the IBRD and the participant. Under the circumstances, it can be argued that no issue of applicable law can arise except as between the IBRD and the participant.

A different situation is presented when the IBRD requests a borrowing government to issue bonds in representation of the loan and the bonds are sold to private investors.⁸⁰ Unlike participation agreements, such bonds establish a direct relationship between the holder and the borrower, the latter undertaking a number of obligations, such as those regarding payment of principal and interest, exemption from taxation or exchange restrictions, which run directly to the holder. The bonds state that they are issued under the loan agreement between the borrower and the IBRD. However, they provide expressly that "No reference herein to the Loan Agreement shall confer upon the holder hereof any rights thereunder . . ."—a stipulation which is the counterpart of another provision of the Loan Regulations, according to which

No holder (other than the Bank) of any Bond shall, by virtue of being the holder thereof, be entitled to exercise any rights under the Loan Agreement or be subject to any of the conditions or obligations imposed upon the Bank thereby. The provisions of this Section shall not impair or affect any rights or obligations under the terms of any Bond. (Section 6.17.)

These provisions make clear that, as a consequence of the sale of bonds, there is adjunct to the relations between the borrower and the IBRD under the Loan Agreement, the legal regime of which remains unchanged, a set of relations between the borrower and the holder of the bonds. These relations are governed by domestic law.⁸¹ So far, no attempt has been made to stipulate in the bonds the particular law applicable thereto, and the determination of the proper law may not be free from difficulty.⁸² It is not inconceivable, however, that the occasion may arise which would make it desirable to include an express stipulation of applicable law in the bonds.

Notes issued to the DLF by its borrowers are substantially similar to the

⁸⁰ See Broches 359-362.

⁸¹ *Ibid.* at 361-362. See also Salmon 232.

⁸² Broches (pp. 361-362) lists the following relevant elements:

"The loan and guarantee agreements under which the bonds are issued are generally signed in Washington; the bonds may be executed and delivered in Washington, in the borrowing country or in the country in which they are payable; and the bonds (or the guarantees thereon) are obligations of sovereign governments. Moreover, the Bank frequently disburses more than one currency under a loan. Since the borrower must repay the loan in whatever currencies are loaned, most of the Bank's loans are repayable in more than one currency; that is to say, different portions of the loan are repayable in different currencies. And the same is true of the bonds which the Bank is entitled to receive. Furthermore, the several bonds issued under a loan agreement with the Bank are payable in the several countries in whose currencies they are payable. The points of contact with different jurisdictions are therefore likely to be more numerous than in the usual kind of international financial transactions, which normally involve only two jurisdictions, those of the lender and the borrower. This is likely to complicate the resolution of conflict of laws problems."

bonds issued to the IBRD; the DLF, however, has thought it appropriate to solve the conflict-of-laws issue by providing that these Notes, like the Loan Agreement under which they may be issued, shall be governed by the law of the District of Columbia.

(2) *Guaranteed loans; implementation of guarantees*

The determination of the law applicable to suretyship or guaranteeeship is still the object of controversy. Even in the simplest case of private loans, there is considerable difference of opinion as to whether the guarantee should be governed by its proper law or by the law applicable to the principal debt.⁸³ Cases in leading countries are about equally divided between the first⁸⁴ and the second⁸⁵ alternatives, and similar variations, due undoubtedly to the circumstances of each case rather than to a systematic preference for one or the other solution, are apparent from express stipulations of applicable law in private loans and guarantee agreements.⁸⁶

⁸³ See, e.g., 3 Rabel, *The Conflict of Laws* 345 *et seq.* (1950); Batiffol, *Les Conflits de Lois en Matière de Contrats* 423 *et seq.* (1938); Domke, "Les Garanties de Tiers dans les Emprunts Internationaux," 34 *Revue de Science et de Législation Financières* 598 (1936).

⁸⁴ See, e.g., Supreme Court of Austria, Sept. 5, 1934, *Rechtsprechung* 1934, p. 178, *Clunet* 1935, p. 190; Swiss Fed. Trib., Sept. 18, 1934, *Nathan Institut A.G. v. Schweizerische Bank fuer Kapitalanlagen*, 60 R.O. II, 294, J.T. 1935, p. 72, *Clunet* 1935, p. 1094. Cf. Swiss Fed. Trib., Feb. 28, 1950, *Inleyman v. Tungsram Elektrizitaets, A.G.*, 76 R.O. II, 33; *Cie Générale de Fourrures et Pelletteries v. Simon Herzig & Sons Co.*, 153 N.Y.S. 717, 89 Misc. 573 (1915).

⁸⁵ See, e.g., Swiss Fed. Trib., June 19, 1935, *Buetz v. Ettlinger*, 61 R.O. II, p. 181, *Clunet* 1936, p. 709, *Sirey* 1936.4.15, *Revue Critique de Droit International Privé*, 1936, p. 692; Supreme Court of Austria, April 24, 1936, *Nouvelle Revue de Droit International Privé*, 1936, p. 608, and *Clunet* 1937, p. 333; Supreme Court of Denmark, May 22, 1940, *Nicolayssen v. Weiss*, *Clunet* 1954, p. 496. Cf. Cass., Oct. 27, 1943, *Société des Grandes Minoterles Basset et Cie v. Crédit Foncier d'Algérie et de Tunisie*, *Sirey* 1946.1.17; *National Bank of Greece and Athens, S.A. v. Metliss*, [1958] A.O. 509. See also Art. 501, par. 4, of the Swiss Code of Obligations authorizing a surety domiciled in Switzerland to invoke the benefit of the foreign law applicable to the principal debt.

⁸⁶ A possible explanation for these variations might be the following: most stipulations making the law of the principal debt applicable also to the guarantor's obligations are found in contracts providing for a joint and several guarantee. When the guarantee is merely several, the law governing the guarantee is frequently different from that applicable to the principal debt.

Examples of the first category of stipulations are found in the following prospectuses respecting bond issues in (1) Switzerland: Anglo-American (O.F.S.) Housing Company Limited, Johannesburg, 4½% Loan of 1955 (Swiss law applicable); California Texas Corporation (Caltex) 4½% Loan of 1955 (Swiss law applicable); and (2) The Netherlands: Naphtachimie S.A. Paris, 4½% Loan of 1955 (Dutch law applicable).

Examples of the second kind of stipulations are found in a 1953 indenture between an American trustee and a German borrower and a German guarantor (law of New York applicable to the loan; German law applicable to the guarantee), and in a 1954 indenture between a Canadian trustee and a Canadian borrower and a New York guarantor (law of Ontario applicable to the borrower's obligations; law of New York applicable to the guarantee).

That broad generalizations are nevertheless dangerous is sufficiently illustrated by the fact that joint and several guarantees have sometimes been considered subject to a law

In the case of guaranteed loans involving both private and international persons, the difficulty is increased. A good example is that of the Austrian Guaranteed Loans. If one assumes, merely for the sake of argument, that government contracts with private persons are governed by the law of the obligor government and that the proper law of a guarantee relationship is not necessarily the same as that of the principal debt, one is led to the conclusion that in the Austrian case nine different municipal laws might govern respectively the relations between the lenders, Austria and the several guarantors, while international law would govern the relations between the guarantors and between any one of them and Austria,⁸⁷ a solution which is further complicated by the fact that, as a consequence of the implementation of the guarantees, the guarantors are expressly subrogated to the rights of the bondholders.⁸⁸

The best way to avoid such complex situations is, of course, to determine at the time of the loan the applicable law or system of law, and it is not surprising that provisions of applicable law have become increasingly popular in recent international loan instruments. These provisions currently reflect the desire of the parties to simplify as much as possible the legal status of their relations by bringing both the loan and the guarantee under a single system of law. Such is the obvious intent of Section 7.01 of the IBRD Loan Regulations and of specific submissions to domestic law, which may be the law of the lenders,⁸⁹ or of the market of

other than that applicable to the principal debt (*Schering, Ltd. v. Stockholms Bank*, [1946] 1 All E.R. 36, German law applicable to the principal debt, English law applicable to the guarantors' obligations), while the latter law has been held to govern also, or has been made contractually applicable to the guarantor's obligations in the case of ordinary guarantees. See, *e.g.*, *Indian and General Investment Trust Limited v. Borax Consolidated, Limited*, [1920] 1 K.B. 539 (English law applicable); *Aktieselskapet Union (Union Co.) Oslo*, 4¼% Loan of 1956 (Swiss law applicable); *Société Ferroviaire Internationale de Transports Frigorifiques (INTERFRIGO), Bruxelles*, 4½% Loan of 1959 (Swiss law applicable).

⁸⁷ See, *e.g.*, Schmitthoff, "The International Government Loan," 19 J. Comp. Leg. & Int. Law (3d Series) 179, at 193 (1937); Mann, "State Contracts," p. 32.

The Austrian Debt Settlement Plan reached at the 1952 Rome Conference would seem to support the view that different systems of law governed the relations between Austria and the bondholders, on the one hand, and, on the other, Austria and the guarantor governments, since the two sets of relations, although part of an over-all settlement plan, were the object of separate understandings. See Annex I regarding the claim of the guarantor governments against the Austrian Government, and Annex II concerning the agreement between Austria and the representative of the bondholders. It should be noted, however, that Annex I (par. 7) expressly provides that the guarantors "assume the rights of the bondholders" until the undertakings of the Austrian Government to the guarantors are finally discharged.

⁸⁸ See the preceding note. See also John Fischer Williams, "La Convention pour l'Assistance Financière aux Etats Victimes d'Agression," 34 Hague Academy Recueil des Cours 81 at 137-138 (1930); Mann, "State Contracts," at pp. 32-33.

⁸⁹ Provisions to that effect are most frequent in direct loans between private lenders, *e.g.*, in the United States or Switzerland, and foreign private or public entities when the loan is guaranteed by the borrower's government. The DLF also extends to the case of government-guaranteed loans the provision ordinarily stipulated in its loan agreements that the law of the District of Columbia shall be applicable.

issue,⁹⁰ or of the guarantor,⁹¹ in government-guaranteed loans issued in the private market and in guaranteed loans made to private borrowers by international organizations.

As a rule, however, such stipulations are limited in scope; while they specify the law governing the lender-borrower and lender-guarantor relationships, they normally contain no indication regarding the law applicable to the relations between the guarantor and the borrower or the right of contribution between guarantors. To preserve the simplicity of the juridical status intended by the parties, it would seem reasonable to bring the ancillary consequences of the guarantee within the scope of the law specified in the loan instruments. In view of the uncertainty of the law in this field, it cannot be said, nevertheless, that this solution might always prevail.

CONCLUSION

The foregoing observations make it clear that, in the opinion of lenders, the traditional distinction between the respective areas of application of municipal and public international law retains much of its practical usefulness. It is a fact that, notwithstanding the many instances in which lenders, both domestic and international, could have had valid reasons to select international law as the proper law of the contract, they have elected expressly to contract under municipal law. The only exception we have found is that of the IBRD (and possibly of the IADB and IDA in regard to transactions similar to those of the IBRD), which operates under very special conditions.

There is, therefore, a remarkable contrast between the practice of lenders and that which is said to obtain in respect to other transactions, especially concessions and similar agreements, between private and international persons. While in the latter case, an attempt has sometimes been made⁹² to

⁹⁰ See, *e.g.*, the prospectus of the Oesterreichische Donaukraftwerke A.G. 6% Bearer Bonds of 1959, issued in Germany with the Guarantee of the Republic of Austria and of two private companies; the prospectuses relating to the following bonds issued in Switzerland by the Belgian Congo (Guaranteed Loan 4% of 1952), the Régie des Télégraphes et Téléphones (Guaranteed Loan 4% of 1947), the Société Nationale de Crédit à l'Industrie (Guaranteed Loan 4% of 1950), all guaranteed by Belgium.

⁹¹ Such is the case of most guaranteed loans made by the EIB and the High Authority of the ECSC, since the law declared applicable is common to both the borrower and the guarantor. However, a different solution may obtain if the borrower and the guarantor belong to different countries. See note 13 above.

⁹² There appears to be a tendency in some of the current legal literature to overestimate the frequency of attempts to "internationalize" concession agreements. To base broad generalizations on a relatively small number of cases of contractual stipulations in point is to overlook the fact that no "internationalization" of concessions or other agreements is attempted in contracts between foreign enterprises and the governments of underdeveloped countries which, unlike those currently referred to, do possess a modern legal system. Such is the case of many African countries formerly under British or French control. See, *e.g.*, the concession and other agreements between Compagnie Minière de l'Ogooué (Comilog) and the Republics of Congo and Gabon, summarized in *The Status of Permanent Sovereignty over National Wealth and Resources* (Revised Study by the Secretariat, U.N. Doc. A/AC.97/5/Rev. 1, Dec. 27, 1960), and referred to in the Loan Agreement dated June 30, 1959, between the IBRD and

remove the relationship from domestic law by making it subject to international law, the general principles of law, or some "quasi-international" system of law the existence of which is far from established,⁹³ no evidence of any similar trend is noticeable in the majority of contemporary loan agreements.

Whether this means that the current practice of lenders should necessarily be construed as indicative of a definite stand in favor of the traditional distinction is another question. Submission of loans between private and international persons to municipal law may be motivated by a variety of reasons which have no bearing upon the solution of the present doctrinal controversy, such as: (1) a natural disinclination on the part of lenders to deviate from established patterns of transacting business; (2) the understandable wish to facilitate sales of bonds or loan participations by conforming to well-known rules familiar to potential investors;⁹⁴ or (3) fear that international law, as it now stands, is too rudimentary to supply all the answers to complex financial schemes.

Only time and experience will reveal whether these, and possibly other, considerations can be overcome. Although over-optimism as to the proximity of radical changes in the practice of lenders would be out of order, it may not be too much of an expectation to anticipate that new and imaginative solutions should emerge from the ever-increasingly frequent association of the private market, states, and governmental and international lending agencies, which is likely to constitute one of the most salient features of international economic co-operation in the years ahead.

Comilog, as well as in the Guarantee Agreements between the Republics of Congo and Gabon and the IBRD.

This fact lends support to Lord McNair's view that when the parties can be satisfied that the legal system within which they are to operate is sufficiently developed to govern their relations, they are likely to adopt it as the proper law of their contract. See McNair, "The General Principles," p. 19.

⁹³ Whether provisions in contemporary concessions effectively subject the relationship to international law or merely incorporate it, or some of it, into the agreement is still a matter of much controversy. See the literature referred to in notes 2 and 6 above.

⁹⁴ This last consideration is of special importance to international lending organizations. It is certainly not by attempting to upset dramatically the legal traditions of the private capital market that these organizations could expect to mobilize private capital and induce it to participate in their respective operations.

SOME ASPECTS OF THE VIENNA CONFERENCE ON DIPLOMATIC INTERCOURSE AND IMMUNITIES

BY ERNEST L. KERLEY

United States Delegation *

CONVOCATION AND PROCEDURAL ASPECTS

The United Nations Conference on Diplomatic Intercourse and Immunities met at the Neue Hofburg in Vienna from March 2 to April 14, 1961, pursuant to General Assembly Resolution 1450 (XIV) which stated the Assembly's decision to convene an international conference of plenipotentiaries to consider the question of diplomatic intercourse and immunities. The resolution invited "all States Members of the United Nations, States members of the specialized agencies and States parties to the Statute of the International Court of Justice" to attend the conference; eighty-one of them did.¹ Pursuant to the resolution, several specialized agencies and intergovernmental organizations were also represented at the Conference by observers.² Before the Conference as "the basis for its consideration of the question of diplomatic intercourse and immunities" were the International Law Commission's draft articles on that topic;³ a set of

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¹ The following states participated: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Central African Republic, Ceylon, Chad, Chile, China, Colombia, Congo (Leopoldville), Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Federation of Malaya, Finland, France, Ghana, Greece, Guatemala, Haiti, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Lebanon, Liberia, Libya, Liechtenstein, Luxembourg, Mali, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet Nam, Rumania, Saudi Arabia, Senegal, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia. U.N. Doc. A/CONF.20/10, April 15, 1961, Final Act; 55 A.J.I.L. 1062 (1961).

² International Labor Organization, Food and Agriculture Organization of the United Nations, United Nations Educational, Scientific and Cultural Organization, League of Arab States, Asian-African Legal Consultative Committee. The International Atomic Energy Agency was also represented by an observer delegation. *Ibid.*

³ International Law Commission, Report covering Its 10th Session, 1958, U.N. General Assembly, 13th Sess., Official Records, Supp. No. 9 at 11-27 (A/3859) (1958); 53 A.J.I.L. 230 at 254 (1959).

the Commission's articles on *ad hoc* diplomacy had also been referred to the Conference, but time did not permit substantial consideration of them.⁴

From the discussions in the Committee of the Whole and the Plenary Conference, presided over by Ambassador Arthur S. Lall and Mr. Alfred Verdross, respectively, there emerged a convention and several resolutions. The full text of these instruments is reproduced elsewhere.⁵ This article is concerned primarily with the convention. It seeks to avoid the length and limited interest inherent in an article-by-article discussion, but it does not attempt to single out the one or two key issues which dominated the Conference, because there were no such issues. The topics were chosen on the basis of general interest, a process which the reader will approve or reject according to his own conception of what is interesting. To the author, such interest arises in instances where articles adopted differ from what had previously been accepted as the law of diplomatic immunities, or where the Conference history especially illuminates the text adopted.⁶ An effort has also been made to reflect the Conference itself as a political phenomenon; it should be acknowledged that some articles in the Vienna Convention possess their present form precisely because it was a large international conference, rather than a small committee of technicians, which prepared them.

TITLE

The Conference entitled the principal instrument to emerge from its deliberations the "Vienna Convention on Diplomatic Relations." The reference to the site of the Conference undoubtedly arose in part in response to the conspicuously generous hospitality of the Federal Government of Austria,⁶ which hospitality also stimulated a formal resolution of the Conference expressing its gratitude.⁷ In part it also reflected recognition of the fact that the convention would in any event become "The Vienna Convention" in common usage, just as the 1958 Conventions on the Law of the Sea are generally termed "The Geneva Conventions," though they

⁴ The Commission's articles on *ad hoc* diplomacy were transmitted to the General Assembly in the I.L.C. Report covering Its 12th Session, 1960, U.N. General Assembly, 15th Sess., Official Records, Supp. No. 9 at 36-37 (A/4425) (1960); 55 A.J.I.L. 223 at 303 (1961). By Res. 1504 (XV), the General Assembly referred these articles to the Conference. U.N. General Assembly, 15th Sess., Official Records, Supp. No. 16 at 59 (A/4684) (1960). A special committee set up to consider these articles at the plenary meeting considered that a substantial period of discussion would be required to incorporate the articles in the convention under preparation, and concluded that the topic should be referred back to the General Assembly with the recommendation that the Commission be requested to give this topic further study. The recommendation of the Committee on Special Missions was subsequently adopted by the Conference. U.N. Doc. A/CONF.20/SR.4 at 2 (1961). It should be noted that this and subsequent footnotes cite the provisional Conference records, since the final records were not available at the time of preparation of this article. ⁵ 55 A.J.I.L. 1062 (1961).

⁶ The Federal Government of Austria, in addition to providing facilities for the Conference and a number of social events for the delegates, compensated the United Nations for the increased cost of holding the Conference in Vienna rather than at the European Headquarters of the United Nations at Geneva. U.N. Doc. A/4370 at 10 (1960).

⁷ U.N. Doc. A/CONF. 20/10/ Add. 1 at 3 (1961).

were not formally so designated. In part, also, the reference in the title to the site of the Conference arose in response to the efforts of the Communist bloc to designate the Federal Government of Austria as the depositary authority of the convention. Many states, including the United States, felt it necessary in the political context of the present Communist attack on the United Nations Secretary General, to insist on adherence to the normal practice of designating the Secretary General the depositary of conventions concluded under United Nations auspices, while finding other means of recognizing the generosity of the host state as well as its historic rôle in the development of the law of diplomatic privileges and immunities.

At its forty-first meeting the Committee of the Whole considered several similar proposals regarding the title of the convention: Convention of Vienna (Poland and Czechoslovakia);⁸ Convention of Vienna on Diplomatic Intercourse and Immunities (Italy, Liberia, Mexico, Peru, Philippines, Turkey, and the United States);⁹ Convention of Vienna on Diplomatic Intercourse and Immunities, 1961 (Nigeria);¹⁰ The Vienna Convention on Diplomatic Intercourse and Immunities (Ghana,¹¹ Ecuador and Venezuela).¹² Its decision was to refer the proposals to the Drafting Committee.¹³ The title decided upon by the Drafting Committee embodies its decision regarding the most appropriate reference to the site of the Conference, and also replaces the term "diplomatic intercourse" by "diplomatic relations," since it was generally thought that the former term was lacking in dignity. This change had been suggested by the International Law Commission in its final report on this topic.¹⁴ At its fourth plenary meeting the Conference unanimously adopted the title of the convention.¹⁵

PREAMBLE

(The preamble of the convention is as follows:

The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

⁸ U.N. Doc. A/CONF. 20/C.1/L.175 (1961).

⁹ U.N. Doc. A/CONF.20/C.1/L.289 (1961); Mexico had originally proposed this title in U.N. Doc. A/CONF.20/C.1/L.193 (1961).

¹⁰ U.N. Doc. A/CONF. 20/C.1/L.311 (1961).

¹¹ U.N. Doc. A/CONF. 20/C.1/L.313 (1961).

¹² U.N. Doc. A/CONF. 20/C.1/L. 332 (1961).

¹³ U.N. Doc. A/CONF. 20/C.1/SR.41 at 11 (1961).

¹⁴ I.L.C. Report covering its 10th Session, U.N. General Assembly, 13th Sess., Official Records, Supp. No. 9 at 11, footnote (A/3859) (1958); 53 A.J.I.L. 230 at 253 (1959).

¹⁵ U.N. Doc. A/CONF. 20/SR.4 at 2 (1961).

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

The draft articles prepared by the International Law Commission did not contain a preamble, nor is the need for a preamble to a convention of this nature beyond question. A major factor in the adoption of this preamble was the need to avert a less acceptable one.

A proposal sponsored by the Czechoslovak Delegation proposed the following additional paragraph for Article 2:

Differences in constitutional, legal and social systems shall not prevent the establishment and maintenance of diplomatic relations between states.¹⁶

This concept is, of course, part of the Communist "peaceful co-existence" formula; its purpose, according to its sponsor, was to prevent a state or group of states from "isolating" another state.¹⁷ When this proposal was discussed at the seventh meeting of the Committee of the Whole, several delegations opposed its adoption.¹⁸ Speaking for the United States, Mr. Cameron commented:

This proposal, in our view, is purely and simply an effort to write into this treaty certain political arguments with which we are all familiar. Such political arguments have no place in codifications of international law. The plain fact is, sovereign states are entirely free to decline to enter into diplomatic relations for whatever reason they see fit.

The suggestion of the Chair that the Czechoslovak proposal be embodied in a preamble to the convention, which the Committee accepted, elicited from the United States representative a reservation of position.

The Hungarian Delegation introduced a proposed preamble, one of whose paragraphs essentially reproduced the Czechoslovak proposal.¹⁹ It was also open to criticism on the ground that it elaborated further on the "peaceful co-existence" formulation, and on the more general ground that, as a political rather than a technical statement, it did not contribute to the juridical stature of the convention.

[At the twentieth meeting of the Committee of the Whole a Mexican proposal²⁰ for a new article stating the "functional necessity" theory of diplomatic privileges and immunities—that privileges and immunities are granted for the purpose of facilitating the performance of the functions of the mission rather than for the personal benefit of the members of the

¹⁶ U.N. Doc. A/CONF. 20/C.1/L.6 (1961).

¹⁷ U.N. Doc. A/CONF. 20/C.1/SR. 7 at 10 (1961).

¹⁸ U.N. Doc. A/CONF. 20/C.1/SR. 7 at 8-11 (1961).

¹⁹ U.N. Doc. A/CONF. 20/C.1/L.148 (1961). The proposed preamble also incorporated a proposal previously sponsored by the Rumanian Delegation. U.N. Doc. A/CONF. 20/C.1/L.29 (1961).

²⁰ U.N. Doc. A/CONF. 20/C.1/L.127 (1961).

mission—was deferred for consideration in conjunction with the preamble.²¹ In the debate which preceded this action the issues which were to be disputed and decided in connection with the preamble were made clear. The issue raised was whether the “functional necessity” theory was to be accepted as the basis of the convention; on this issue the International Law Commission, in its commentary on the articles, had been equivocal:

(1) Among the theories that have exercised an influence on the development of diplomatic privileges and immunities, the Commission will mention the “extritoriality” theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the “representative character” theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State.

(2) There is now a third theory which appears to be gaining ground in modern times, namely, the “functional necessity” theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions.

(3) The Commission was guided by this third theory in solving problems on which practice gave no clear pointers, *while also bearing in mind the representative character of the head of the mission and of the mission itself.*²²

The issue was not of purely theoretical interest. One delegate, while supporting the Mexican proposal, asserted that its insertion in the operative part of the text would imply an obligation on the part of the sending state to waive immunity where the mission's functions would not thereby be impeded.²³ It was also noted that such an obligation is specifically stated in the General Convention on the Privileges and Immunities of the United Nations.²⁴ A third representative apprehended that the question whether an action had been within the functions of the mission might be decided by the receiving state.²⁵

A draft preamble, sponsored by Brazil, Colombia, Japan, Mexico, Nigeria, Norway, Pakistan, Senegal, Spain, Turkey, the United Kingdom, and the United States, was subsequently issued:

The States Parties to the Present Convention,

Recalling that the peoples of all nations from ancient times have in practice and by conviction respected the status of diplomatic officers;

Considering that an international convention regarding the rights and duties of diplomatic officers would contribute to the development of peaceful and neighbourly relations among states irrespective of their divergences or the relative stages and nature of their political, economic and social development;

Recognizing that diplomatic privileges and immunities are granted in order to ensure that diplomatic missions shall not be impeded in the

²¹ U.N. Doc. A/CONF. 20/C.1/SR. 20 at 9 (1961).

²² Emphasis added. I.L.C. Report, cited note 3 above, at 16-17.

²³ The representative of Yugoslavia. U.N. Doc. A/CONF. 20/C.1/SR. 20 at 4-5 (1961).

²⁴ The representative of Venezuela. *Ibid.* at 4.

²⁵ The representative of Rumania. *Ibid.* at 8.

performance of their functions and not for the personal benefit of the persons concerned;

Convinced that the above principles should guide the States Parties in their observance of the present convention;

Have agreed on the following provisions: ²⁶

The third paragraph of this document reproduced the Mexican proposal. While the implications of the "functional necessity" theory would appear less significant when it is stated in the preamble than in the operative part of the convention, the discussion in the Committee concentrated almost entirely on this paragraph. The other paragraphs reflected, not originality, but an effort to draw support to the proposal. The first paragraph was based on a preamble previously adopted by the Asian-African Legal Consultative Committee.²⁷ The second paragraph was based on a resolution on peaceful and neighborly relations among states, which had been adopted without objection at the Twelfth Session of the General Assembly after being introduced as a compromise text by a number of states.²⁸ Only the fourth and fifth paragraphs were original.

The delegations of Burma, Ceylon, India, Indonesia and the United Arab Republic also proposed a preamble,²⁹ issued March 30, which closely resembled the twelve-Power proposal. Proposed preambles were also introduced by Ghana³⁰ and Switzerland.³¹ Prior to discussions in the Committee of the Whole, discussions in the corridors had indicated a willingness on the part of sponsors of proposed preambles to withdraw their texts on the understanding that the five-Power text would be the basis of discussion. Switzerland, while willing to withdraw most of its proposal, insisted³² that the following paragraph of its proposed preamble be put to a vote:

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the articles of this Convention.

At the thirty-ninth meeting of the Committee the various sponsors expressed agreement that proposals other than the five-Power proposal and the indicated paragraph of the Swiss proposal not be put to the vote. In the voting, the Swiss paragraph was adopted by a vote of 38 (U.S.)-11-19.³³ An oral amendment by the Soviet Union Delegation to add the words "as representatives of states" after the words "functions of diplomatic missions" in the fourth paragraph was adopted by a vote of 39-5-23 (U.S.). Australian and Hungarian proposals to delete the words "and not for the

²⁶ U.N. Doc. A/CONF. 20/C.1/L. 318 (1961).

²⁷ The report of the Committee had been issued as a Conference document. U.N. Doc. A/CONF. 20/6, Annex I at 1 (1961).

²⁸ General Assembly Res. 1236 (XII), U.N. General Assembly, 12th Sess., Official Records, Supp. No. 18 at 5 (A/3805) (1957).

²⁹ U.N. Doc. A/CONF. 20/C.1/L.329 (1961).

³⁰ U.N. Doc. A/CONF. 20/C.1/L.323 (1961).

³¹ U.N. Doc. A/CONF. 20/C.1/L.322 (1961).

³² U.N. Doc. A/CONF. 20/C.1/SR. 39 at 5 (1961).

³³ *Ibid.* at 11-12.

personal benefit of members of such missions'' in the fourth paragraph were adopted by a vote of 35-19 (U.S.)-18. The fourth paragraph as amended was adopted by a vote of 45-9 (U.S.)-14. The preamble as a whole was adopted and referred to the Drafting Committee, along with several suggestions for drafting changes, by a vote of 66 (U.S.)-0-4.

As amended in the Committee of the Whole, the fourth paragraph, which was the heart of the preamble, corresponded closely to the comment of the International Law Commission:

Realizing that the purpose of such privileges and immunities is to ensure the efficient performance of the functions of diplomatic missions as representing States.

The formulation was criticized as placing undue emphasis on the "representative character" theory.³⁴ At the fourth plenary meeting the Conference adopted by a vote of 68 (U.S.)-0-4³⁵ the proposal of the United Kingdom³⁶ that the words "not to benefit individuals but" be inserted in the fourth paragraph. While no greater improvement appears to have been tactically possible, this amendment obviously did not succeed in converting the preamble into an unequivocal statement of the "functional necessity" theory.

FUNCTIONS OF DIPLOMATIC MISSION

Article 3 of the convention is as follows:

1. The functions of a diplomatic mission consist *inter alia* in:

- (a) representing the sending State in the receiving State;
- (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) negotiating with the Government of the receiving State;
- (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

As drafted by the Commission, this article provided as follows:

The functions of a diplomatic mission consist *inter alia* in:

- (a) Representing the sending State in the receiving State;
- (b) Protecting in the receiving State the interests of the sending State and of its nationals;

³⁴ The representative of Ireland. *Ibid.* at 11.

³⁵ U.N. Doc. A/CONF. 20/SR. 4 at 2 (1961).

³⁶ U.N. Doc. A/CONF. 20/L.3 (1961).

- (c) Negotiating with the Government of the receiving State;
- (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

As formulated by the Commission, subparagraphs (a) through (d) appeared unobjectionable, and the use of the term "*inter alia*" in the head paragraph precluded the danger that present functions would be prejudiced by omission or that the development of new functions would be impeded.

Four amendments were submitted to subparagraph (b), relating to the mission's function of protecting the interests of the sending state and of its nationals. India proposed³⁷ to add to subparagraph (b) the words "to the extent recognized by international law"; this was equivalent to the Mexican proposal³⁸ to add the words "within the limits permitted by international law," and it was withdrawn in favor of the latter.³⁹ An amendment proposed by Ceylon⁴⁰ was of similar import. Although the usefulness of these amendments was questionable—presumably all the functions enumerated in the article might be exercised only within the limits set by international law⁴¹—the Committee of the Whole adopted the sense of the Mexican and Ceylonese amendments at the eighth meeting, leaving the precise formulation to the Drafting Committee.⁴² During the discussion of these amendments the representative of the Secretary General noted, without contradiction by any delegation, that in normal usage the term "national" would include both natural and juridical persons.⁴³

Cuba offered an amendment⁴⁴ which would have authorized the diplomatic mission merely to *help* to protect its nationals. At the eighth meeting of the Committee, the Delegation of Cuba vigorously defended this amendment as necessary to avert the danger of interference in the affairs of the receiving state, citing an incident in which it was asserted that a diplomatic mission in Cuba had placed notices on premises claiming that they and the persons therein were under the protection of the mission.⁴⁵

The Delegation of Spain also proposed⁴⁶ a new subparagraph making it a function of the diplomatic mission to perform consular functions if the receiving state does not object. The question of the performance of consular functions by a diplomatic mission had been discussed in the International Law Commission at its Eighth Session.⁴⁷ Mr. Zourek, supported by

³⁷ U.N. Doc. A/CONF. 20/C.1/L.3 (1961).

³⁸ U.N. Doc. A/CONF. 20/C.1/L.33 (1961).

³⁹ U.N. Doc. A/CONF. 20/C.1/SR. 8 at 3 (1961).

⁴⁰ U.N. Doc. A/CONF. 20/C.1/L.27 (1961).

⁴¹ In addition, note the comments of the representative of the U.A.R. on the applicability of Art. 40. U.N. Doc. A/CONF. 20/C.1/SR. 8 at 5 (1961).

⁴² *Ibid.* at 9.

⁴³ *Ibid.* at 6.

⁴⁴ U.N. Doc. A/CONF. 20/C.1/L.82 (1961).

⁴⁵ U.N. Doc. A/CONF. 20/C.1/SR. 8 at 3,8 (1961).

⁴⁶ U.N. Doc. A/CONF. 20/C.1/L.30 (1961).

⁴⁷ U.N. Doc. A/CN.4/SER.A/1958 at 92-93 (58. V.1, Vol. 1) (1958).

Mr. Tunkin, had urged that in present practice the diplomatic function includes the consular function, since consular sections are often established in diplomatic missions. In reply, both Mr. François and Sir Gerald Fitzmaurice had emphasized that the consular and diplomatic functions are quite distinct, even if exercised by the same person. Sir Gerald Fitzmaurice and Mr. Amado had also noted the right of the receiving state to require that any member of the mission exercising the consular function obtain an *exequatur*. In view of the response, Mr. Zourek had not pressed his suggestion, and the Commission had not included a reference to consular functions in Article 3.

When the Spanish proposal was discussed in the Committee of the Whole, a variety of viewpoints emerged. The Communist delegations urged that diplomatic missions are entitled to perform consular functions; they opposed the Spanish proposal because it permitted the performance of such functions only if the receiving state did not object.⁴⁸ Venezuela expressed opposition to the performance of consular functions under any circumstances;⁴⁹ Italy was willing to acquiesce in their performance only with the prior consent of the receiving state.⁵⁰ A number of delegations favored the performance of consular functions by a diplomatic mission, either on the grounds that the existence of such a rule would be desirable as involving a reduction of expenses,⁵¹ or on the grounds that the practice exists, in some cases without inquiring whether the practice, as it exists, is subject to objection by the receiving state.⁵² At the ninth meeting of the Committee of the Whole the Spanish proposal was withdrawn and the Committee accepted the suggestion of the Chairman that the Committee decide in principle that consular functions may be performed by a diplomatic mission, allowing the Drafting Committee to draft a text embodying this decision.⁵³ The Chairman's proposal would appear to reflect accurately the views of the Committee. While it is unlikely that the Spanish proposal would have been adopted, the principle that consular functions could be performed by diplomatic missions was widely supported. It seems unlikely that a provision limiting that performance by a requirement of consent or non-objection on the part of the receiving state would have been adopted.

The Drafting Committee incorporated the decision of the Committee of the Whole in the present paragraph 2 of Article 3. A simple disclaimer, it left the existing regime unchanged; in effect, it postponed the decision until the forthcoming conference on consular privileges and immunities. Consideration of this text in the plenary meeting renewed the debate which

⁴⁸ U.N. Docs. A/CONF. 20/C.1/SR.8 at 9, 12, 14; A/CONF. 20/C.1/SR.9 at 3, 4 (1961).

⁴⁹ U.N. Doc. A/CONF. 20/C.1/SR.8 at 10 (1961).

⁵⁰ *Ibid.* at 12.

⁵¹ *Ibid.* at 10-11 (Spain), 11 (Mali, Viet Nam), 13 (Ireland, Israel); U.N. Doc. A/CONF. 20/C.1/SR.9 at 3 (Burma) (1961).

⁵² U.N. Docs. A/CONF. 20/C.1/SR.8 at 13 (Argentina), 14 (Union of South Africa), 15 (Colombia); A/CONF. 20/C.1/SR.9 at 2 (Norway, Liberia), 3 (Burma) (1961).

⁵³ *Ibid.* at 4-5.

had occurred in the Committee of the Whole: the Communist states⁵⁴ sought diligently to portray the text as an affirmation of the "right" of the diplomatic mission to perform consular functions; other delegations sought to qualify the paragraph with a requirement of consent on the part of the receiving state;⁵⁵ a few delegations apparently considered that those states favoring the requirement of consent on the part of the receiving state had fared better than the tactical situation might have led them to expect.⁵⁶ After protracted debate, the Conference adopted the paragraph by a vote of 51 (U.S.)-7-14, and the article as a whole by a vote of 67 (U.S.)-0-4.⁵⁷

SIZE OF STAFF OF THE DIPLOMATIC MISSION

Article 11 of the convention provides:

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

As Article 10 of the International Law Commission's draft text, this article was as follows:

1. In the absence of specific agreement as to the size of the mission, the receiving State may refuse to accept a size exceeding what is reasonable and normal, having regard to circumstances and conditions in the receiving State, and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

The first paragraph of the Commission's Article 10 established "what is reasonable and normal," as a standard for resolving a disagreement between the sending and receiving state on the size of the mission. The Commission acknowledged that this was a vague standard, but noted that criteria for resolving conflicting interests are often vague.⁵⁸ The significance of the standard, however, lay in the fact that it made the size of the mission a justiciable question, permitting it to be referred to arbitration or judicial settlement. This possibility, too, was reflected in the Commission's commentary. In both its 1957⁵⁹ and its 1958⁶⁰ comments to the Commission, the United States had expressed the view that it was not practical to establish a rule controlling the discretion of the receiving state with regard to the size of the mission.

⁵⁴ Only Rumania and the Soviet Union spoke, each twice. U.N. Doc. A/CONF. 20/SR. 4 at 5,7,8 (1961).

⁵⁵ *Ibid.* at 7 (Argentina, Switzerland), 8 (Malaya).

⁵⁶ *Ibid.* at 6 (Ghana), 8 (U.K.).

⁵⁷ *Ibid.* at 10.

⁵⁸ I.L.C. Report, cited note 3 above, at 14.

⁵⁹ *Ibid.* at 56.

⁶⁰ U.N. Doc. A/4164 at 43 (1959).

Paragraph 2, relating to refusal to accept categories of officials, was bounded by the same limitations as paragraph 1, which presumably meant that the refusal to accept categories of officials had to be reasonable and normal, and by an additional requirement of non-discrimination as well. In its 1957 comments to the Commission the United States had opposed this paragraph:

It [paragraph 2] not only fails to mention the principle of reciprocity, but apparently contemplates that the receiving State must treat all foreign missions alike, without regard to how the sending State treats representatives of the receiving State. . . . [T]he sending State and the receiving State concerned alone are in a position to determine the circumstances and conditions which may affect the . . . composition of their respective missions. . . .⁶¹

After discussion of this comment, the Commission had decided on the adoption of a general article on non-discrimination, applicable to the entire convention, and containing an exception relating to reciprocity. The Commission did not, however, delete the specific reference to non-discrimination in Article 10.⁶² Thus, the problem to which the United States had referred remained unsolved. While the general non-discrimination article (Article 44) contained an exception for reciprocity in paragraph 2, the non-discrimination provision in Article 10 remained, and the applicability of Article 44 (2) to it was not specifically stated. In its 1958 comments the Netherlands Government pointed out that the reciprocity exception in Article 44 (2) was apparently inapplicable to Article 10 (2), a situation which that government thought "is by no means desirable and probably is unintentional."⁶³

When Article 10 was considered at the fourteenth meeting, the Committee of the Whole had before it an amendment by Argentina⁶⁴ to replace the words "what is" in paragraph 1 by the words "what it considers"; an equivalent amendment by Tunisia⁶⁵ had been withdrawn in its favor. This amendment made the size of the mission determinable by the receiving state alone. An amendment by Italy⁶⁶ made the importance of the relations between the two states the factor in establishing the size of the mission. An amendment by Viet Nam⁶⁷ tended toward the proposition that missions between two states should be of the same size. An amendment by Spain⁶⁸ would have substituted the standard of appropriateness for "reasonable and normal." The Argentine amendment was adopted by

⁶¹ I.L.C. Report, cited note 3 above, at 56-57.

⁶² U.N. Doc. A/CN.4/SER. A/1958 at 112 (58. V.1, Vol. 1) (1958).

⁶³ U.N. Doc. A/4164 at 17 (1958).

⁶⁴ U.N. Doc. A/CONF. 20/C.1/L.119 (1961).

⁶⁵ U.N. Doc. A/CONF. 20/C.1/L.65 (1961), withdrawn at the fourteenth meeting of the Committee of the Whole. U.N. Doc. A/CONF. 20/C.1/SR.14 at 6 (1961).

⁶⁶ U.N. Doc. A/CONF. 20/C.1/L.86 (1961).

⁶⁷ U.N. Doc. A/CONF. 20/C.1/L.88 (1961). The thesis that the diplomatic missions exchanged between two states should be of the same size had previously been expressed in the 1957 Japanese comments to the Commission. I.L.C. Report, cited note 3 above.

⁶⁸ U.N. Doc. A/CONF. 20/C.1/L.80 (1961).

a vote of 33 (U.S.)-26-7.⁶⁹ The other amendments were not put to the vote.

The amendment of Spain also proposed the following paragraph:

The receiving State may equally, both in general and subject to reciprocity, refuse to accept members of the mission having certain specific functions.

This proposal was rejected by a vote of 18 (U.S.)-30-18.⁷⁰ The Commission's text of paragraph 2 was then adopted by a vote of 38-17 (U.S.)-17.⁷¹ At the fifth plenary meeting the representative of the Soviet Union requested a separate vote on the words added in the Committee of the Whole by adoption of the Argentine amendment.⁷² The words were retained by a vote of 42 (U.S.)-19-6.⁷³ The article was then adopted by a large majority.⁷⁴

As adopted by the Conference, Article 11 (1) clearly leaves the ultimate right of decision as to the size of the mission with the receiving state. In the Committee of the Whole the Soviet representative had objected to this on the grounds that the paragraph would thus lose its "legal character."⁷⁵ This is, of course, correct, but it was interesting to hear this argument made by a delegation which was subsequently to oppose vigorously the adoption of an article calling for the arbitration or judicial settlement of disputes arising under the convention, since it is by those processes that the legal character of Article 11 might have been implemented. Article 11(2), as has already been noted, is not altogether clear on the question of reciprocity.

ACCOMMODATION

Article 21 is as follows:

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

As drafted by the International Law Commission, this subject appeared in Article 19:

The receiving State must either permit the sending State to acquire on its territory the premises necessary for its mission, or ensure adequate accommodation in some other way.

This article was drafted by the Commission in the alternative. A receiving state could meet its obligations merely by permitting the sending state to

⁶⁹ U.N. Doc. A/CONF. 20/C.1/SR. 14 at 11 (1961).

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at 12.

⁷² U.N. Doc. A/CONF. 20/SR.5 at 7 (1961). The text of Art. 10 had been slightly revised by the Drafting Committee.

⁷³ *Ibid.* at 9.

⁷⁴ *Ibid.*

⁷⁵ U.N. Doc. A/CONF. 20/C.1/SR. 14 at 8 (1961).

acquire mission premises, and it was not under an obligation to ensure adequate accommodations for the mission unless it prohibited such acquisition. This was reflected in the commentary to the article, which noted that laws and regulations in the receiving state may make it impossible for the mission to acquire premises, and that it had included this article for that reason.⁷⁶ The term "mission premises" was not defined in the article, or in the general definitions article, but a definition appeared in the commentary to Article 20 of the Commission's draft.⁷⁷ The Conference subsequently adopted a proposal by Japan to include a definition of the term "premises of the mission" in the general definitions article.⁷⁸

When the Committee of the Whole initiated consideration of this article at its twentieth meeting, it had before it proposals sponsored by Malaya,⁷⁹ China,⁸⁰ Mexico,⁸¹ Venezuela,⁸² Switzerland,⁸³ India,⁸⁴ and Viet Nam,⁸⁵ all intended to reduce the obligation of the receiving state.⁸⁶ During the debate the other proposals were withdrawn in favor of the proposal of India.⁸⁷ The Indian proposal, as orally amended by Venezuela and with the addition of the second paragraph of the Venezuelan proposal, which had been reintroduced by the Soviet representative,⁸⁸ was adopted by a vote of 63-1-6 (U.S.).⁸⁹ It was subsequently adopted unanimously in the plenary session.⁹⁰

In view of the stated intention of the sponsors of the proposals with-

⁷⁶ I.L.C. Report, cited note 3 above, at 17. ⁷⁷ *Ibid.*

⁷⁸ The amendment was proposed by Bulgaria and the Byelorussian S.S.R., U.N. Doc. A/CONF. 20/C.1/L. 25 (1961), and subsequently amended by Japan, U.N. Doc. A/CONF. 20/C.1/L.305 (1961).

⁷⁹ U.N. Doc. A/CONF. 20/C.1/L.113 (1961).

⁸⁰ U.N. Doc. A/CONF. 20/C.1/L.122 (1961).

⁸¹ U.N. Doc. A/CONF. 20/C.1/L.128 (1961).

⁸² U.N. Doc. A/CONF. 20/C.1/L.142 (1961).

⁸³ U.N. Doc. A/CONF. 20/C.1/L.157 (1961).

⁸⁴ U.N. Doc. A/CONF. 20/C.1/L.160/Rev. 1 (1961).

⁸⁵ U.N. Doc. A/CONF. 20/C.1/L.169 (1961).

⁸⁶ See statements of sponsors. U.N. Docs. A/CONF. 20/C.1/SR. 20 at 10, 11; A/CONF. 20/C.1/SR. 21 at 2-4 (1961). ⁸⁷ *Ibid.* at 4.

⁸⁸ Prior to the withdrawal of other proposals the Soviet representative, while supporting the Indian proposal, suggested that it be amended by the addition of the second paragraph of the Venezuelan proposal. U.N. Doc. A/CONF. 20/C.1/SR.21 at 3 (1961). After the withdrawal of all other proposals, including the Venezuelan, the statement of the Indian representative did not respond to the Soviet suggestion. *Ibid.* at 5. The Soviet representative then noted that India had not objected to his suggestion, and that the second paragraph of the Venezuelan proposal could thus be retained. *Ibid.* The Soviet tactic appears to have been an effort to gain for the second paragraph of the Venezuelan proposal the status of an amendment to the Indian proposal accepted by the latter. As such, it would have been voted on with the original Indian proposal as a single proposal. While the proposition that suggestions are deemed accepted unless their recipients specifically reject them is disputable, the tactic was adroitly handled and initially successful. It was countered, however, by Norway, which requested a separate vote on the second paragraph. *Ibid.* The effect of the Soviet effort, therefore, was merely the reintroduction of the second paragraph of the Venezuelan proposal.

⁸⁹ *Ibid.*

⁹⁰ U.N. Doc. A/CONF. 20/SR.6 at 3 (1961).

drawn in favor of the Indian proposal, and of the Indian Delegation, interpretation of Article 21 presents difficulty. Although these sponsors favored reducing the burden imposed on the receiving state, the substitution of the word "facilitate" for "permit" may have enlarged the obligation considerably. States whose laws do not prohibit the acquisition of real property by foreign diplomatic missions would have had no obligations at all under the text of the article as formulated by the Commission; they would nevertheless be obligated to "facilitate" the acquisition of property under the Indian formulation. The United States representative sought to clarify the type of action contemplated by the term "facilitate" by requesting an explanation of the term;⁹¹ the sponsor did not, however, answer the question. Given the Conference history, it is possible that the term "facilitate" requires merely the avoidance of government-imposed obstacles to the acquisition of premises, though this is obviously not certain.

The obligation to "facilitate" acquisition of premises is qualified by the phrase "in accordance with its laws." This phrase, based on the Venezuelan proposal, is of uncertain effect. Where the obligation to "facilitate" can be met by processes set out in domestic legislation, the receiving state may undoubtedly do so, but where its legislation does not provide for, or perhaps does not even permit, such "facilitation," may the receiving state rely on its domestic legislation to resist the obligation? If so, of what use is the article; if not, of what use is the phrase?

When the twenty-first meeting of the Committee of the Whole had ended, one representative commented ruefully, "Now we are all in the real estate business." On reflection, it seems unlikely that this is the case. The expression of the article will accommodate a variety of practices on the part of receiving states, and it is unlikely that a failure to "facilitate" would be made the subject of an arbitral or judicial settlement even among states parties to the Optional Protocol.

INVIOABILITY OF MISSION PREMISES

Article 22 of the convention is as follows:

- ✓ 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

This article, as Article 20 of the Commission's draft, was as follows:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, save with the consent of the head of the mission.

⁹¹ U.N. Doc. A/CONF. 20/C.1/SR. 21 at 4,5 (1961).

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission and their furnishings shall be immune from any search, requisition, attachment or execution.

Four of amendments submitted in the Committee of the Whole related to the subject matter of the first paragraph. Japan proposed⁹² an additional paragraph amplifying paragraph 1 by a specific prohibition against service of a writ by a process-server within mission premises. The comment accompanying the proposal indicated that the sponsor's intention was to clarify the legality of service by mail, which was approved in the International Law Commission's commentary,⁹³ but had been held to be invalid by a decision of the Supreme Court of Japan. At the twenty-second meeting of the Committee this amendment was withdrawn by its sponsor, who stated that discussion within the Committee had established a unanimous consensus that service could be effected by mail.⁹⁴ Whether or not there was in fact such a consensus, the Conference records do not reflect it—only five delegations discussed the Japanese amendment⁹⁵ and one of these opposed service by mail.⁹⁶

Two amendments sought to limit the effect of paragraph 1 in cases of public emergency. Mexico proposed⁹⁷ a provision that "the head of mission shall co-operate with local authorities in case of fire, epidemic or other extreme emergency." Ireland and Japan proposed⁹⁸ a new paragraph stating that the article did not prevent the receiving state from taking measures essential for the protection of life and property in exceptional circumstances of public emergency or danger. The International Law Commission had considered this question at its 1957⁹⁹ and 1958¹⁰⁰ sessions, and had decided against incorporation of a provision on this question in the draft. While generalizations are necessarily partially inaccurate, the Commission's attitude on this question may be stated in the following characteristically perceptive comment by Dr. Amado:

⁹² U.N. Doc. A/CONF. 20/C.1/L.146 (1961).

⁹³ "A special application of this principle [of inviolability] is the rule that no writ may be served within the premises of the mission, and that no summons to appear before a court may be served in the premises by a process server. . . . There is nothing to prevent service through the post if it can be effected in that way." I.L.C. Report, cited note 3 above, at 17.

⁹⁴ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 13 (1961).

⁹⁵ U.N. Docs. A/CONF. 20/C.1/SR. 21 at 9 (Mexico), 10 (Argentina); A/CONF. 20/C.1/SR. 22 at 8 (Spain), 7 (Ghana), 10 (Turkey) (1961).

⁹⁶ Argentine statement: "The Argentine delegation approved the idea behind the Japanese amendment but, if it were to be interpreted as permitting the service of a writ through the post, it would vote against it." U.N. Doc. A/CONF. 20/C.1/SR. 21 at 10 (1961).

⁹⁷ U.N. Doc. A/CONF. 20/C.1/L. 129 (1961).

⁹⁸ U.N. Doc. A/CONF. 20/C.1/L.163 (1961).

⁹⁹ 1 I.L.C. Yearbook (1957) 57-60 (A/CN.4/SER.A/1957).

¹⁰⁰ 1 I.L.C. Yearbook (1958) 127-130 (A/CN.4/SER.A/1958).

Mr. AMADO thought that it was impossible to make provision for every contingency in the draft. It was hardly conceivable that a head of mission would fail to cooperate with the authorities in an emergency and he was opposed to the idea of a body of international lawyers solemnly telling heads of missions what their elementary duties as human beings were.¹⁰¹

When these amendments were discussed at the twenty-first through the twenty-third meetings of the Committee of the Whole, the United States did not make a statement. In its 1957¹⁰² and 1958¹⁰³ comments to the Commission, it had supported the Commission's formulation of this paragraph, though it noted in 1957 that "consent [of the head of mission] *will be presumed* when immediate entry is necessary to protect life and property."

In the discussion in the Committee the Irish-Japanese text fared less well, because it was cast in the form of a residual right of the receiving state, than the Mexican amendment, which dealt with the problem in terms of co-operation between the local authorities and the head of mission.¹⁰⁴ The Irish-Japanese amendment was withdrawn in favor of the Mexican amendment at the twenty-second meeting.¹⁰⁵ Support for the Mexican amendment was not strong, however, and it too was withdrawn by its sponsor, who asserted the understanding that the duties of the head of mission were not in doubt.¹⁰⁶

Other proposals for the addition of new paragraphs which related to the proposition stated in paragraph 1, were the Mexican amendment, which required the sending state to vacate, after a reasonable period, mission premises needed by the receiving state to carry out public works, and the Indian amendment,¹⁰⁷ which reserved a right of periodic inspection by the owner in the case of premises leased to the mission. The latter amendment was criticized as appropriate for inclusion in a lease rather than in a codification of international law.¹⁰⁸ It was withdrawn by its sponsor.¹⁰⁹ The essence of the Mexican proposal had been considered by the International Law Commission,¹¹⁰ which noted in the commentary that "the inviolability of the premises may enable the sending State to prevent the receiving State from using the land on which the premises of the mission are situated, in order to carry out public works," and stated that the send-

¹⁰¹ *Ibid.* at 129-130.

¹⁰² I. L. C. Report, cited note 38 above, at 57-58.

¹⁰³ U.N. Doc. A/4164 at 43 (1959).

¹⁰⁴ See statements of Argentina and Spain. U.N. Docs. A/CONF. 20/C.1/SR.21 at 10; A/CONF. 20/C.1/SR.22 at 2 (1961). ¹⁰⁵ *Ibid.* at 3.

¹⁰⁶ *Ibid.* at 14. The receiving state would in any event not lack a remedy in such cases. During the Commission's discussion of this problem Mr. Bartos recalled an analogous case in which the Yugoslav Government, after formally recognizing the rights of the diplomatic agent, declared him *persona non grata* on the grounds that he lacked human feeling. 1 I.L.C. Yearbook (1958) 130 (A/CN.4/SER.A/1958).

¹⁰⁷ U.N. Doc. A/CONF. 20/C.1/L. 161 (1961).

¹⁰⁸ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 3 (Spain), 6 (Yugoslavia), 7 (Ghana) (1961). ¹⁰⁹ *Ibid.* at 7.

¹¹⁰ 1 I.L.C. Yearbook (1958) 132-134 (A/CN. 4/SER.A/1958).

ing state had a moral duty to co-operate.¹¹¹ In its comments to the Commission the United States had stated:

[T]he United States Government is of the view that international law does not absolutely preclude the requisition of such property or its taking by exercise of right of eminent domain. This right, of course, could only be exercised under very limited circumstances. . . .¹¹²

The Mexican amendment attracted some support¹¹³ but was eventually withdrawn with a statement by its sponsor stressing that inviolability could not be invoked by the sending state in matters regarding expropriation, except with regard to matters of execution.¹¹⁴ This position was reaffirmed in the plenary meeting.¹¹⁵ It is by no means clear that the deliberations of the Conference support this conclusion.

With regard to paragraph 2, Malaya proposed¹¹⁶ to change "The receiving State is under a special duty to take all appropriate steps to protect the premises . . ." to "The receiving State is under a special duty and shall take all appropriate steps to protect the premises. . . ." This amendment embodied, in the view of its sponsor,¹¹⁷ a substantive rather than a drafting change; its stated purpose was to make clear that the duty of protection imposed by this paragraph was one of result and not of means. While the relationship was not expressly stated, this amendment may have been inspired by a discussion which occurred in the Committee of the Whole early in the Conference. At the Committee's first meeting the representative of Belgium referred to a recent incident in which a Belgian Embassy had been burned and ransacked, and the members of the mission had been endangered. He asserted that not only had the police assigned to guard the Embassy been withdrawn, but also that no apology or promise of compensation had subsequently been forthcoming from the receiving state.¹¹⁸ While the state against which these charges were directed was not identified, they were generally assumed to refer to the United Arab Republic, an assumption confirmed immediately after the Belgian statement, when the representative of the United Arab Republic objected to the statement on a point of order.¹¹⁹ At the following meeting the representative of the United Arab Republic expressed regret for the incident in Cairo; he stated it was not an official act of his government but a spontaneous demonstration, aroused by the events in the Congo, which his government had been unable to prevent.¹²⁰

¹¹¹ I.L.C. Report, cited note 3 above, at 17-18.

¹¹² U.N. Doc. A/4164 at 43 (1959).

¹¹³ U.N. Docs. A/CONF. 20/C.1/SR. 21 at 10 (Argentina); A/CONF. 20/C.1/SR. 22 at 2 (Spain), 4 (Tunisia), 12 (Indonesia), 14 (U. A. R.) (1961).

¹¹⁴ U.N. Doc. A/CONF. 20/C.1/SR. 23 at 2 (1961).

¹¹⁵ U.N. Doc. A/CONF. 20/SR. 6 at 4 (1961).

¹¹⁶ U.N. Doc. A/CONF. 20/C.1/L. 114 (1961).

¹¹⁷ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 15-16 (1961).

¹¹⁸ U.N. Doc. A/CONF. 20/C.1/SR. 1 at 4 (1961). See the U. S. statement at the second meeting, which was more specific than the summary record suggests. U.N. Doc. A/CONF. 20/C.1/SR. 2 at 3 (1961).

¹¹⁹ U.N. Doc. A/CONF. 20/C.1/SR. 1 at 5 (1961).

¹²⁰ U.N. Doc. A/CONF. 20/C.1/SR. 2 at 2 (1961).

In the discussion of Article 20 Belgium spoke specifically to the stated rationale of the Malayan amendment: that the obligation was one of result and not of means.¹²¹ Norway¹²² and Sweden¹²³ also took this position, though less specifically. These delegations did not, however, state their support of the Malayan amendment, the implications of which they appear to have overlooked, as, apparently, did a number of other delegations, which treated it as a drafting amendment. The fact that the Malayan Delegation explained its amendment¹²⁴ relatively late in the discussion contributed to this lack of appreciation. The conception of the Malayan amendment as a drafting change adhered throughout the discussion; the Committee of the Whole eventually referred it to the Drafting Committee,¹²⁵ where it was not embodied in the final text. It does not appear that the Malayan amendment stated very effectively what was intended, but had it been supported and adopted in the Committee, a more articulate formulation of it might have emerged from the Drafting Committee.

Three amendments related to the immunity of mission premises and furnishings provided for in paragraph 3. China proposed¹²⁶ the deletion of paragraph 3, and the insertion of a reference to furnishings in paragraph 1. It attracted little support and was withdrawn.¹²⁷ Spain proposed¹²⁸ a major revision of the entire article, but withdrew most of its amendments very early in the debate;¹²⁹ the portion of the amendment not immediately withdrawn would have extended inviolability to the means of transport of the mission, regardless of location. This proposal was described by the Italian delegate as an interesting idea, but for a different article.¹³⁰ It attracted little support and was withdrawn at the twenty-second meeting.¹³¹

The third amendment to paragraph 3 was submitted by the Delegation of the Ukrainian Soviet Socialist Republic.¹³² It proposed to supplement paragraph 3 so that it encompassed mission property in addition to the mission premises. At issue here was the scope of the word "furnishings" in the Commission's text.¹³³ Did it extend to cover all the property of the mission, or was it more limited? The Ukrainian delegate considered his amendment substantial, in that he considered it necessary to "complete" the provisions of paragraph 3.¹³⁴ Subsequently the delegate of the Soviet Union treated the Ukrainian amendment as a drafting change;¹³⁵ the dis-

¹²¹ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 10 (1961).

¹²² U.N. Doc. A/CONF. 20/C.1/SR. 21 at 10 (1961).

¹²³ *Ibid.* at 8.

¹²⁴ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 15 (1961).

¹²⁵ *Ibid.* at 16.

¹²⁶ U.N. Doc. A/CONF. 20/C.1/L. 123 (1961).

¹²⁷ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 12 (1961).

¹²⁸ U.N. Doc. A/CONF. 20/C.1/L. 168 (1961).

¹²⁹ U.N. Doc. A/CONF. 20/C.1/SR. 21 at 7 (1961).

¹³⁰ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 10 (1961).

¹³¹ *Ibid.* at 13.

¹³² U.N. Doc. A/CONF. 20/C.1/L. 132 (1961).

¹³³ In the French text: aménagement. I.L.C. Report, cited note 3 above, at 17.

¹³⁴ U.N. Doc. A/CONF. 20/C.1/SR. 21 at 7 (1961).

¹³⁵ *Ibid.* at 9.

cussion which followed in the Committee tended to accept this construction of the amendment as the intent of the sponsor.¹³⁶ That discussion further clarified the scope of the amendment as relating only to property located on the premises of the mission,¹³⁷ a point which had not been clear in the English and French texts as originally introduced. This clarification was reflected in the Drafting Committee's redraft of the article.¹³⁸ At its twenty-second meeting the Committee adopted the Ukrainian amendment by a vote of 60 (U.S.)-0-10. Article 20, as amended, was adopted by a vote of 68 (U.S.)-0-2.¹³⁹

When the Drafting Committee's text was considered at the sixth plenary meeting of the Conference, the Spanish delegate expressed surprise that the reference to property in paragraph 3 was limited to property within the premises of the mission, and proposed the addition of the words "and also its means of transport."¹⁴⁰ Although the limitation had been made explicit during the discussions in the Committee of the Whole prior to the adoption of Article 20 as amended by the Ukrainian amendment, and although the Spanish amendment in the Committee had manifested little strength, the Conference adopted the Spanish amendment by a vote of 41-7-16 (U.S.). The article was then adopted 67 (U.S.)-0-3.¹⁴¹ It is difficult to rationalize the attitudes of the Committee and the plenary session on the question of means of transport off the mission premises. To say that the Conference changed its mind is an oversimplification in view of the almost complete lack of discussion which preceded the adoption of the Spanish amendment in the plenary session. It should be noted that the plenary decision was made during a period of extremely rapid voting, twelve articles having been decided upon during a single meeting.

Two issues connected with Article 20 of the Commission's draft, the discussion of which had been apprehended as likely to engender political controversy, were not discussed. The discussion of diplomatic asylum was precluded by the Chairman of the Committee, who implied at the beginning of the discussion of Article 20 that he would consider discussion of the question of asylum to be out of order.¹⁴² Similarly, discussion of specific incidents in which the inviolability of mission premises had not been maintained, such as the earlier discussion of the burning of the Belgian Embassy in Cairo,¹⁴³ might have departed from the moderation which characterized the earlier discussion and developed into a bitter political controversy. Since the proposition that people should not burn embassies was not in dispute, protracted discussion would have consisted of acrimonious political charges and countercharges. Indications that the Chairman

¹³⁶ See, e.g. *ibid.* at 10 (Norway); U.N. Doc. A/CONF. 20/C.1/SR. 22 at 5 (Yugoslavia), 10 (Turkey), 11 (Rumania).

¹³⁷ *Ibid.* at 11 (U. K.), 16 (U. S., Ukrainian S.S.R.).

¹³⁸ U.N. Doc. A/CONF. 20/L.2/Add. 1 at 7 (1961).

¹³⁹ U.N. Doc. A/CONF. 20/C.1/SR. 22 at 16 (1961).

¹⁴⁰ U.N. Doc. A/CONF. 20/SR. 6 at 3 (1961).

¹⁴¹ *Ibid.* at 4.

¹⁴² U.N. Doc. A/CONF. 20/C.1/SR. 21 at 6 (1961).

¹⁴³ Above, at p. 104.

would rule such discussion out of order, coupled with a desire on the part of delegations not to disrupt discussions which were obviously leading to a generally acceptable treaty, prevailed.

EXEMPTION OF MISSION PREMISES FROM TAX

Article 23 of the convention provides:

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

As drafted by the Commission, this article was Article 21:

The sending State and the head of the mission shall be exempt from all national, regional or municipal dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

The general principle embodied in this article was not disputed in the discussion, which centered around the question whether the exemption extended to leased premises, the taxes on which would normally be paid by the owner. While the text of the article was not clear on this point, it was specifically covered in the Commission's commentary:

The provision does not apply to the case where the owner of the leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes a part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable.¹⁴⁴

In both its 1957¹⁴⁵ and 1958¹⁴⁶ comments the United States had drawn attention to the fact that the scope of the exemption granted was not clear with regard to the assumption by the mission of the lessor's tax obligations on the premises; it had expressed agreement to the application of the exemption granted by this article to taxes for which the foreign government would be liable, but not to taxes for which the owner would be liable.

Most of the amendments proposed were intended to deal in some way with the problem of taxes on leased mission premises.¹⁴⁷ Mexico proposed¹⁴⁸ an additional paragraph providing that the exemption granted should not apply to taxes payable under the law of the receiving state by persons contracting with the sending state or head of mission. Venezuela

¹⁴⁴ LL.C. Report, cited note 3 above, at 18.

¹⁴⁵ *Ibid.* at 58.

¹⁴⁶ U.N. Doc. A/4164 at 45 (1959).

¹⁴⁷ One amendment did not relate to this question. Belgium proposed to add after the words "head of mission" the words "acting as such." At the suggestion of its sponsor (U.N. Doc. A/CONF. 20/C.1/SR. 23 at 10 (1961)) it was referred to the Drafting Committee (*ibid.* at 15), which did not incorporate it in its draft articles.

¹⁴⁸ U.N. Doc. A/CONF. 20/C.1/L. 130 (1961).

proposed¹⁴⁹ that the article be redrafted to apply only to premises owned by the sending state. Burma and Ceylon proposed¹⁵⁰ the deletion of the words "whether owned or leased" and the addition of a provision that the exemption did not extend to leased premises. Austria and Spain¹⁵¹ proposed the addition of a provision that the exemption did not apply to a lease signed by a person enjoying exemption, which expressly stated that the dues and taxes would be payable by the lessee. In view of the common intent of these amendments, it was to be expected that the sponsors would combine in support of a single text. At the beginning of the discussion in the Committee of the Whole, Spain and Austria withdrew their amendment to become co-sponsors of the Mexican amendment.¹⁵² Venezuela,¹⁵³ Burma and Ceylon,¹⁵⁴ subsequently withdrew their amendments in favor of the Mexican text.

In the discussion in the Committee a number of delegations supported the Mexican proposal,¹⁵⁵ though several, led by the United Kingdom, considered that its text required clarification in the Drafting Committee.¹⁵⁶ The position of the Communist states, however, was interesting. Early in the debate the Soviet Union representative expressed his concurrence¹⁵⁷ with an interpretation of the Commission's text previously stated by the representative of Iran:¹⁵⁸ the premises of the mission were exempt if owned by the sending state; if the premises belonged to a private person who leased them to the mission, that person was obliged to pay taxes. The Soviet representative then argued that no amendments were necessary; he criticized the Mexican amendment as a "legal redundancy," but indicated he would not oppose it. The interpretation of the Commission's text suggested above obviously fails to deal with the problem to which the Mexican amendment was directed: the situation in which the sending state, whose exemption from taxes is acknowledged, has undertaken payment in an agreement with the lessor, who is not exempt. It is improbable that the deficiencies of this analysis eluded the Soviet representative, and the decision not to oppose the Mexican amendment may have been based on an impression gained in the early stages of the discussion that it would be adopted by a large majority. As the discussion progressed it became less clear that the Mexican amendment would be fully supported, especially by the Asian-African states.¹⁵⁹ Late in the debate the representative of Hungary stated a position sharply different from that previously taken by the Soviet representative; he argued that in the case of leased premises the

¹⁴⁹ U.N. Doc. A/CONF. 20/C.1/L. 143 (1961).

¹⁵⁰ U.N. Doc. A/CONF. 20/C.1/L. 159 (1961).

¹⁵¹ U.N. Doc. A/CONF. 20/C.1/L. 166 (1961).

¹⁵² U.N. Doc. A/CONF. 20/C.1/SR. 23 at 9 (1961).

¹⁵³ *Ibid.* at 11.

¹⁵⁴ *Ibid.* at 13.

¹⁵⁵ *Ibid.* at 10 (U. K.), 11 (Nigeria, Venezuela, France, Italy, U. S.), 12 (Liberia, Brazil), 13 (Ceylon, Malaya, Morocco, Chile, Luxembourg).

¹⁵⁶ *Ibid.* at 10 (U. K.), 11 (France, Italy, U. S.), 13 (Malaya, Morocco, Luxembourg).

¹⁵⁷ *Ibid.* at 12.

¹⁵⁸ *Ibid.* at 11.

¹⁵⁹ A number of states spoke against the amendment later in the debate. *Ibid.* at 12 (Ghana), 13 (Iraq), 14 (Senegal, Tunisia).

owner can recover taxes by including them in the rent, and he urged that when the lessee was a state it should be exempt from this indirect taxation as well. The Hungarian Delegation therefore did not consider the Mexican amendment "suitable."¹⁶⁰

At its twenty-third meeting the Committee of the Whole adopted the Mexican amendment by a vote of 44 (U.S.)-2-27, the Communist states abstaining. The article as amended was adopted by a vote of 72 (U.S.)-0-1.¹⁶¹ This voting made clear that a majority of delegations favored the Mexican amendment, but that the two-thirds majority which would be necessary for adoption in the plenary session would be lacking if the states which abstained were to switch to a negative vote.

When this article was considered in the plenary meeting, the second paragraph, which had been the Mexican amendment, was practically unchanged from the form in which it had originally been adopted in the Committee of the Whole. The suggestions by a number of delegations in the Committee of the Whole that the text of the Mexican amendment, while basically acceptable, should be clarified in the Drafting Committee had not been implemented. It may be that the supporters of the Mexican amendment considered that reformulation in the Drafting Committee would be tactically unwise, since it would be easier for delegations to depart in the plenary session from the voting position they had taken in the Committee if the text of the paragraph had been changed. Rumania¹⁶² and Hungary¹⁶³ unequivocally opposed the second paragraph as undermining the principle stated in the first paragraph, and requested a paragraph-by-paragraph vote. Paragraph 1 was adopted by a vote of 69 (U.S.)-1-2; paragraph 2 was adopted by a vote of 48 (U.S.)-12-9, the Communist bloc voting against; the article as a whole was adopted by a vote of 69 (U.S.)-0-1.¹⁶⁴ It is likely that neither the supporters nor the opponents of the Mexican amendment were able to undertake the normal amount of corridor work prior to this vote because of the rapid pace of the voting in the plenary session.

Since the term "premises of the mission" is defined in Article 1(i) of the convention, the property to which the exemption granted by this article applies is determinable: it applies to the buildings or parts of buildings and the land ancillary thereto used for the purposes of the mission, including the residence of the head of mission. Whether realty held by the sending state as residences for members of the staff of the mission would be immune, would depend on the scope of the term "purposes of the mission." Is the housing of members of the staff of the mission, especially the senior personnel who are expected to entertain members of other missions and of the government of the receiving state, a mission purpose? The use of the word "including" in Article 1(i) does not exclude an affirmative answer. This same question arises in connection with the interpretation of Article 31(1) (b). The discussions at the Conference do not clarify this problem.

¹⁶⁰ *Ibid.* at 14.

¹⁶¹ *Ibid.* at 14-15.

¹⁶² U.N. Doc. A/CONF. 20/SR. 6 at 4.

¹⁶³ *Ibid.* at 5.

¹⁶⁴ *Ibid.*

FREEDOM OF COMMUNICATION

Article 27 of the Vienna Convention is as follows:

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

As drafted by the International Law Commission, this article was Article 25, which provided as follows:

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher.

2. The official correspondence of the mission shall be inviolable.

3. The diplomatic bag shall not be opened or detained.

4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.

5. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

The drafting history of this article is complex; twenty amendments were submitted and the text was discussed during four meetings of the Committee of the Whole. Except for two questions warranting more detailed study, this drafting history will be summarized at the end of this section. At-

tention will be directed principally to the language on wireless transmitters which the Conference added to the first paragraph, and the language on rejecting the diplomatic bag, which it did not add to the third.

A. Radio Transmitters

The right of freedom of communication stated in the first paragraph of the Commission's draft extended to "all appropriate means, including diplomatic couriers and messages in code or cipher." The omission of a reference to radio transmitters was not inadvertent. The Commission stated in the commentary to this article:

If a mission wishes to make use of its own wireless transmitter it must, in accordance with the international conventions on telecommunications, apply to the receiving state for special permission. Provided that regulations applicable to all users of such communications are observed, such permission must not be refused.¹⁶⁶

This language had been a compromise text agreed upon within the Commission at its Ninth Session in 1957. In discussing the special rapporteur's text, which provided that the receiving state should "permit and protect communication by whatever means,"¹⁶⁶ the Commission found itself divided on the question of radio transmitters. Two of its members, Sir Gerald Fitzmaurice¹⁶⁷ and Mr. Georges Scelle,¹⁶⁸ while not asserting that the right of the diplomatic mission to use wireless was recognized in present international law, strongly favored the inclusion of a provision establishing such a right in the Commission's text, and for this reason supported the special rapporteur's formulation of the article. Other members of the Commission considered that the receiving state could refuse to permit the operation of a radio transmitter,¹⁶⁹ and some suggested that the receiving state would have to control the operation of wireless transmitters operated by diplomatic missions in order to ensure fulfillment of its obligations under pertinent telecommunications conventions.¹⁷⁰ A psychological consideration was raised by Mr. Spiropoulos, who noted that "public opinion was suspicious of private wireless stations operated by diplomatic missions, and would not agree to their free use."¹⁷¹

When the Commission considered this matter again in 1958 it decided against reopening discussion of the compromise it had decided upon the previous year.¹⁷² It therefore retained the language in the commentary which has already been quoted.

When the Committee of the Whole began consideration of the Commission's text of Article 25, a number of amendments relating to this question had been submitted. All proposed to insert in paragraph 1 of the Commission's Article 25 some statement on the limitations on the use of wireless

¹⁶⁶ I.L.C. Report, cited note 3 above.

¹⁶⁶ 1 I.L.C. Yearbook (1957) 74 (A/CN.4/SER.A/1957).

¹⁶⁷ *Ibid.* at 76.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.* at 76 (Padilla Nervo, Zourek), 77 (Khoman).

¹⁷⁰ *Ibid.* at 76 (Zourek, El Erian).

¹⁷¹ *Ibid.* at 77.

¹⁷² 1 I.L.C. Yearbook (1958) 142 (A/CN.4/SER.A/1958).

by a diplomatic mission. Indonesia¹⁷³ and the United Arab Republic¹⁷⁴ each proposed amendments providing that the use of wireless required the permission of the receiving state. Venezuela¹⁷⁵ proposed the requirement, in addition to the consent of the receiving state, that use of the transmitter conform to the regulations of the receiving state. Switzerland¹⁷⁶ proposed, in addition to the requirement of the permission of the receiving state, that the use of wireless be in accordance with pertinent international conventions. India¹⁷⁷ and Mexico¹⁷⁸ sponsored amendments embodying all three requirements: permission of the receiving state and compliance with the regulations of the receiving state and the pertinent international conventions. A United States amendment¹⁷⁹ was silent as to whether the consent of the receiving state was required; it required merely compliance with international conventions. An amendment submitted by Argentina¹⁸⁰ appears also to have contemplated that permission to use wireless would not be refused by the receiving state if international conventions were complied with. Prior to the beginning of the debate in the Committee of the Whole, Indonesia, the United Arab Republic, Argentina, and India¹⁸¹ joined in co-sponsorship of a new amendment replacing their four previous individual amendments. The four-Power amendment differed little from the original Indian amendment.

The four-Power amendment became the focus of efforts in the Committee of the Whole to restrict the use of wireless by diplomatic missions. These efforts were countered by the British and French delegations, which took substantially the same position their nationals had taken in the International Law Commission, and by the Communist states, which strongly supported the right of the diplomatic mission to use wireless, although Mr. Zourek had disputed that right and Mr. Tunkin had remained silent during the Commission's consideration of this question in 1957.

In the debates in the Committee of the Whole, arguments against the unfettered use of diplomatic wireless ranged from the jurisprudential (the articles are based on the "functional necessity" rather than the "extritoriality" theory)¹⁸² to the severely practical (certain explosive charges can be detonated by radio).¹⁸³ The United Kingdom Delegation said that the mission would in any event co-operate with the receiving state in the use of wireless, to avoid findings of *persona non grata*;¹⁸⁴ the Polish Delegation said the mission would do so to avoid jamming.¹⁸⁵ It was disputed whether the obligation to respect local law, stated in another article of the

¹⁷³ U.N. Doc. A/CONF. 20/C.1/L. 147 (1961).

¹⁷⁴ U.N. Doc. A/CONF. 20/C.1/L.140 (1961).

¹⁷⁵ U.N. Doc. A/CONF. 20/C.1/L. 145 (1961).

¹⁷⁶ U.N. Doc. A/CONF. 20/C.1/L. 158 (1961).

¹⁷⁷ U.N. Doc. A/CONF. 20/C.1/L. 165 (1961).

¹⁷⁸ U.N. Doc. A/CONF. 20/C.1/L. 131 (1961).

¹⁷⁹ U.N. Doc. A/CONF. 20/C.1/L. 154 (1961).

¹⁸⁰ U.N. Doc. A/CONF. 20/C.1/L. 138 (1961).

¹⁸¹ U.N. Doc. A/CONF. 20/C.1/L. 264 (1961).

¹⁸² U.N. Doc. A/CONF. 20/SR. 25 at 9 (India) (1961).

¹⁸³ *Ibid.* at 11 (India).

¹⁸⁴ *Ibid.* at 16.

¹⁸⁵ U.N. Doc. A/CONF. 20/SR. 26 at 4 (1961).

Commission's text, made the requirement that the consent of the receiving state be obtained for the use of diplomatic wireless appropriate, as urged by India,¹⁸⁶ or superfluous, as urged by Poland.¹⁸⁷ Some delegations considered it essential that it be stated that the article was subject to pertinent provisions of the telecommunications conventions;¹⁸⁸ in reply, it was urged that, if diplomatic wireless came within the terms of the telecommunications conventions, the problems should be left to the signatories of those conventions.¹⁸⁹

It seems improbable, however, that the considerations indicated played a substantial rôle in the outcome of this question. Few questions at the Conference reflected a division of real or assumed national interest between the large states and the small states as clearly as did the question of diplomatic wireless. The opposition of the small states to the use of diplomatic wireless may have been stimulated by feelings of envy; representatives urged that no genuine reciprocity existed in the exercise of this right, since only the large states had the facilities to set up an effective wireless network.¹⁹⁰ Similarly, it was urged that the small state must defend itself against "abuse" of the wireless by diplomatic missions of large states;¹⁹¹ if this argument was somewhat cryptic, another delegation put it more clearly:

in young countries where the situation was not completely stable . . . the diplomatic mission of a country which did not entirely support the party in power might have the opportunity of interfering in the internal affairs of the receiving state.¹⁹²

The anxiety that diplomatic wireless would be employed for purposes other than communication with the sending state was so deeply felt that, as will be seen, even a specific prohibition in the text of the article was insufficient to provide the necessary reassurance.

Article 25 of the Commission's text was debated from the twenty-fourth through the twenty-sixth meeting, and at the twenty-ninth meeting, of the Committee of the Whole. At the twenty-sixth meeting, after the amendment of Argentina, India, Indonesia and the United Arab Republic had received considerable support, the representative of Spain moved adjournment of the debate, under Rule 25 of the Conference Rules of Procedure, to permit the combination of amendments and simplify the voting.¹⁹³ Unlike adjournment of the meeting under Rule 27, adjournment of debate would result in the Committee's beginning debate on the next article, deferring decisions on the article under consideration until a subsequent meeting. Tunisia¹⁹⁴ and Venezuela¹⁹⁵ opposed this motion, apparently in

¹⁸⁶ U.N. Doc. A/CONF. 20/SR. 25 at 9-10 (1961).

¹⁸⁷ U.N. Doc. A/CONF. 20/SR. 26 at 4 (1961).

¹⁸⁸ U.N. Doc. A/CONF. 20/SR. 25 at 7 (U.S.), 9 (India) (1961).

¹⁸⁹ *Ibid.* at 16.

¹⁹⁰ U.N. Doc. A/CONF. 20/SR. 26 at 10 (Iran), 19 (Libya) (1961); but see the statement of Israel that the use of radio transmitters reduced the expenses of smaller states, U.N. Doc. A/CONF. 20/SR. 25 at 17 (1961).

¹⁹¹ U.N. Doc. A/CONF. 20/SR. 26 at 8 (Tunisia), 11 (Morocco) (1961).

¹⁹² U.N. Doc. A/CONF. 20/SR. 29 at 13 (Nigeria) (1961).

¹⁹³ U.N. Doc. A/CONF. 20/SR. 26 at 11 (1961).

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

the belief that the four-Power amendment would be adopted if the amendments were voted on in their existing form. The delegates of the Soviet Union¹⁹⁶ and the United Kingdom,¹⁹⁷ which had both opposed the four-Power amendment, supported the motion. The motion was adopted by a vote of 46 (U.K., U.S., U.S.S.R.)-18-6.¹⁹⁸

While the size of the vote supporting adjournment of debate was a hopeful sign for the opponents of the four-Power amendment, the hope appears in retrospect to have been illusory. In view of the support eventually manifested for the four-Power amendment, it is likely that the motion was successful because it was put at a time when the meeting would ordinarily have adjourned, and was equated by many delegations with a motion to adjourn the meeting under Rule 27. In fact, it had the effect of a motion to adjourn the meeting, since the Chair, upon adoption of the Spanish motion, adjourned the meeting rather than initiating debate on the next article.

When discussion of this article was resumed at the twenty-ninth meeting of the Committee of the Whole, the representative of the United Kingdom stated¹⁹⁹ that consultations had not led to an agreed compromise text, and introduced his delegation's amendment,²⁰⁰ which sought to allay the fears expressed by many delegations concerning diplomatic wireless. The United Kingdom amendment authorized the use of radio transmitters for telegraphic communication between the government of the sending state and its missions or consulates; it required that the mission notify the receiving state of the installation of a wireless transmitter; it provided that nothing in the article should prejudice the application of international telecommunications conventions and regulations. In presenting his amendment the United Kingdom representative noted that telegraphic communication, to which the amendment referred, was unsuited to the dissemination of propaganda, which required voice transmission. While the United Kingdom amendment was responsive to the fears of abuse which had previously been expressed in the Committee's debate, response to it was not encouraging. The Mexican delegate spoke immediately after the United Kingdom;²⁰¹ in opposition to the United Kingdom amendment he stated that the discussion had shown serious and well-founded fears in the use of diplomatic wireless, but did not explain why the carefully-limited United Kingdom amendment failed to meet them. The representative of India, in support of the four-Power amendment, stated²⁰² that the amendment merely followed the commentary of the International Law Commission. This as-

¹⁹⁶ The Soviet representative supported the Spanish motion on the grounds that his government "had always believed that decisions should be reached by persuasion." *Ibid.*

¹⁹⁷ The U. K. representative supported the Spanish motion on the grounds that the rapid pace of debate had left little time for consultation among delegations. *Ibid.* at 12.

¹⁹⁸ *Ibid.*

¹⁹⁹ U.N. Doc. A/CONF. 20/SR. 29 at 11 (1961).

²⁰⁰ U.N. Doc. A/CONF. 20/C.1/L. 291 (1961).

²⁰¹ U.N. Doc. A/CONF. 20/SR. 29 at 11 (1961).

²⁰² *Ibid.* at 12.

section was incorrect, in that the Commission's commentary did not contemplate that permission to operate a wireless could be refused by the receiving state if the requirements of the telecommunications conventions and regulations had been met. The Indian assertion was countered by the representative of the Soviet Union, who, while supporting the United Kingdom amendment, made clear²⁰³ that he would prefer the Commission's formulation. The United States withdrew its amendment to paragraph 1 of the article²⁰⁴ and supported the United Kingdom amendment. Other delegations restated their support of the four-Power amendment.²⁰⁵

At the voting, the four-Power amendment was put to the vote first.²⁰⁶ It was adopted by a vote of 41-20 (France, U.K., U.S.S.R., U.S.)-9. It is reflective of the subject matter of the Conference that on this issue, as a number of others, the interests of the major Powers cut across cold-war tensions; it is reflective of the new strength of the smaller states in international organizations that the major Powers, even when joined in strong opposition to an amendment, could not defeat it, and were able to influence less than a third of the votes. Other amendments to the first paragraph were not adopted.

When the question of wireless transmission was considered in the plenary meeting, the delegations opposed to the use of diplomatic wireless drew back somewhat from the position taken in the Committee. Fourteen states, with India acting as their spokesman, introduced²⁰⁷ an amendment²⁰⁸ to the text adopted in the Committee of the Whole which limited the requirements for operation of a diplomatic wireless to the consent of the receiving state. Following a short discussion, during which the United Kingdom representative welcomed the amendment, indicating he would abstain on it, and the sponsors indicated their interpretation that the consent of the receiving state could be withdrawn at any time, the Conference adopted the fourteen-Power amendment by a vote of 57 (U.S.)-1-12.²⁰⁹

The reasons for this conciliatory move were not stated during the debate in the plenary session, but two considerations may be suggested. First, the four-Power amendment had just barely received in the Committee of the Whole the two-thirds majority which would be required for its adoption in the plenary session. Failure of the Conference to adopt any provision on radio transmission would, in the light of the International Law Commission's commentary, have left the receiving state with an uncertain juridical basis for claiming a right of control over diplomatic wireless in cases where

²⁰³ *Ibid.* at 17.

²⁰⁴ *Ibid.* at 14. The part of the U. S. amendment to the first paragraph which extended the right of communication to officials of the sending state in the receiving state and third states was not withdrawn. It failed of adoption by a vote of 19-19-28. *Ibid.* at 18.

²⁰⁵ *Ibid.* at 13 (Nigeria), 15 (Tunisia), 16 (Spain, Colombia).

²⁰⁶ *Ibid.* at 18.

²⁰⁷ U.N. Doc. A/CONF. 20/SR. 6 at 7 (1961).

²⁰⁸ U.N. Doc. A/CONF. 20/L.15 (1961).

²⁰⁹ U.N. Doc. A/CONF. 20/SR.6 at 10 (1961).

pertinent international conventions had been complied with. Secondly, the success of the Conference depended on the conclusion of a convention to which most states, and preferably all the major Powers, would become parties. To respond to this consideration by a conciliatory gesture would be an act of responsible statesmanship. It is unlikely that either of these considerations eluded the thinking of those delegations opposed to diplomatic wireless.

B. Opening the Diplomatic Bag

Paragraph 3 of Article 27 was adopted without change from the Commission's text of Article 25(3). The Commission's commentary provided pertinently as follows:

The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article [which limits the contents of the diplomatic bag to diplomatic documents or articles intended for official use], and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.²¹⁰

The provision in the commentary resulted from extended discussion²¹¹ within the Commission, in which a compromise was sought between the need to protect the inviolability of the diplomatic bag and the need to protect the receiving state against abuse of the diplomatic bag. The wording of paragraph 3 of the article had been proposed by Mr. Tunkin.²¹² A proposal to state in the commentary that the diplomatic bag could be inspected on serious grounds of suspicion of abuse had been made by Mr. François, and adopted by the Commission.²¹³ While members of the Commission had criticized these decisions as incompatible,²¹⁴ the commentary, as finally drafted by the Commission, would appear to have resolved any ambiguity in favor of the principle of inviolability.

When discussion of this article began in the Committee of the Whole on March 22, several proposals had been introduced to permit the receiving state to deal directly with abuses of the diplomatic bag. France proposed²¹⁵ to replace the third and fourth paragraphs of the Commission's text with a single paragraph providing that the diplomatic bag, which must bear visible external markings, must contain only diplomatic documents or official articles, and that the Ministry for Foreign Affairs of the receiving state may authorize the opening of the bag, in the presence of a representative of the mission, where there are especially serious reasons

²¹⁰ I.L.C. Report, cited note 3 above, at 19.

²¹¹ 1 I.L.C. Yearbook (1957) 77-83, 208-209, 227 (A/CN.4/SER.A/1957).

²¹² *Ibid.* at 81.

²¹³ *Ibid.* at 82.

²¹⁴ *Ibid.* 82 (Spiropoulos, Padilla Nervo, Matine-Daftary, Tunkin, Salle), 83 (Zourek).

²¹⁵ U.N. Doc. A/CONF. 20/C.1/L. 125 (1961).

to suspect that the bag is being used for other purposes. The United States proposed,²¹⁶ similarly, that the bag must bear visible external markings, and that, if the receiving state has serious grounds for believing the pouch contains articles whose import or export is prohibited by law, the bag may be opened with the permission of the Ministry of Foreign Affairs and the mission concerned, which may have a representative present if it desires. In the event that the mission concerned refuses permission, the bag may be rejected. It is obvious that these amendments differ substantially: in the French amendment the protection given the receiving state was the right to inspect the bag; in the United States amendment the protection given the receiving state was the right to reject the bag, since it may be assumed that the mission concerned would consent to inspection only when the bag did not contain improper articles.

The United Arab Republic introduced, in three successive versions,²¹⁷ a proposal to deal with this problem. The first, issued before the debate on Article 25 had begun in the Committee of the Whole, corresponded to the French proposal. A revision of that proposal, issued after debate had begun, corresponded to the United States proposal, in that it contemplated that the mission would be given the choice between inspection of the bag in the presence of one of its members, or rejection of the bag. A third version, issued the same day as the second version, did not provide for inspection under any circumstances, but merely for rejection of the bag. Ghana also submitted a proposal²¹⁸ on this subject after the debate on this article had been initiated in the Committee of the Whole. This proposal corresponded to the third version of the United Arab Republic proposal.

In the discussions in the Committee of the Whole the question of abuse of the diplomatic bag was largely overshadowed by the question of radio transmitters. The sponsors of proposals designed to prevent abuse of the diplomatic bag, in the face of the Conference's apathy, sought strength in the reduction of the number of proposals, but the results were disappointing. France initiated this process by offering to withdraw its proposal in favor of the United States proposal, if the latter were changed to incorporate the stipulation in the French proposal that the pouch may contain only diplomatic documents or official articles, and subject to the right of the French Delegation to reintroduce its proposal, if the United States proposal were not adopted.²¹⁹ In response, the United States representative agreed to the French suggestion.²²⁰ Subsequently, the United States Delegation withdrew its proposal in favor of the proposal of the United Arab Republic, then in its third version.²²¹ During the voting the United Arab Republic withdrew its proposal in favor of the Ghanaian proposal.²²² The Ghanaian proposal was rejected by a vote of 8 (U.S.)-48-14.²²³ The United Arab Republic proposal, reintroduced by the United Kingdom, was

²¹⁶ U.N. Doc. A/CONF. 20/C.1/L. 154 (1961).

²¹⁷ U.N. Docs. A/CONF. 20/C.1/L. 151, L. 151/Rev. 1, L. 151/Rev. 2 (1961).

²¹⁸ U.N. Doc. A/CONF. 20/C.1/L. 294 (1961).

²¹⁹ U.N. Doc. A/CONF. 20/C.1/SR. 25 at 6, 9 (1961).

²²⁰ *Ibid.* at 8.

²²¹ U.N. Doc. A/CONF. 20/C.1/SR. 29 at 14 (1961).

²²² *Ibid.* at 19.

²²³ *Ibid.*

rejected by a vote of 22 (U.S.)-37-6.²²⁴ In view of this outcome, the effort was not renewed in the plenary meeting.

C. Other Issues

Conference consideration of the first and third paragraphs of Article 27 has been discussed. There follows a short summary of the development of the other paragraphs of that article.

Paragraph 2 is as drafted by the International Law Commission, with the addition of a sentence defining official correspondence. This sentence had been a United States amendment to this paragraph;²²⁵ when withdrawn by its sponsor in favor of a similar amendment sponsored by France and Switzerland, it was reintroduced by the representative of Australia.²²⁶ The reintroduced amendment was adopted by a vote of 22 (U.S.)-18-28;²²⁷ the amendment of France and Switzerland failed of adoption by a vote of 24 (U.S.)-24-15.²²⁸

Paragraph 4 reproduces the text of the International Law Commission, with minor modifications by the Drafting Committee.

Paragraph 5, while similar to the Commission's text, was a new paragraph proposed by France and Switzerland²²⁹ and adopted by a vote of 33-22-10.²³⁰ A United States proposal²³¹ to limit the personal inviolability of the diplomatic courier to that enjoyed by the administrative and technical staff of the mission was rejected by a vote of 8 (U.S.)-36-17.²³²

Paragraph 6 is a new paragraph sponsored by Chile and Liberia.²³³ It was adopted by a vote of 53 (U.S.)-3-10.²³⁴

Paragraph 7 is a new paragraph, sponsored by France and Switzerland,²³⁵ and adopted by a vote of 34 (U.S.)-20-8.²³⁶ Following adoption, the text was revised in the Drafting Committee.

When this article was considered in the plenary meeting, its paragraphs were adopted without dissenting vote.²³⁷

IMMUNITY

Article 31 of the Vienna Convention is as follows:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

²²⁴ *Ibid.*

²²⁵ U.N. Doc. A/CONF. 20/C.1/L. 154 (1961).

²²⁶ U.N. Doc. A/CONF. 20/C.1/SR. 29 at 15 (1961).

²²⁷ *Ibid.* at 18.

²²⁸ *Ibid.* at 19.

²²⁹ U.N. Doc. A/CONF. 20/C.1/L. 286 (1961).

²³⁰ U.N. Doc. A/CONF. 20/C.1/SR. 29 at 20 (1961).

²³¹ U.N. Doc. A/CONF. 20/C.1/L. 154 (1961).

²³² U.N. Doc. A/CONF. 20/C.1/SR. 29 at 21 (1961).

²³³ U.N. Doc. A/CONF. 20/C.1/L. 133 (1961).

²³⁴ U.N. Doc. A/CONF. 20/C.1/SR. 29 at 20 (1961).

²³⁵ U.N. Doc. A/CONF. 20/C.1/L. 286 (1961).

²³⁶ U.N. Doc. A/CONF. 20/C.1/SR. 29 at 21 (1961).

²³⁷ U.N. Doc. A/CONF. 20/SR. 6 at 9-10 (1961).

- (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

This article was originally Article 29 of the International Law Commission's draft, which was almost identical:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, save in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of his Government for the purposes of the mission;

(b) An action relating to a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee;

(c) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State, and outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Paragraph 1 of Article 31 states the general principle of diplomatic immunity from criminal and civil jurisdiction, followed by exceptions to which the latter would be subject. Doubts had been expressed that this paragraph accurately stated existing international law. In its comments on the 1957 draft articles the United States had stated:

This article [then Article 24] undertakes to lay down a new rule of international law. While providing complete immunity from criminal jurisdiction, the article would make the exemption from civil jurisdiction subject to certain exemptions not presently recognized under international law. . . . The United States Government is of the opinion that

the article should be revised to restate existing principles of international law on the subject. This, it is submitted, requires complete exemption of persons entitled to diplomatic immunity from criminal and civil processes, in the absence of a waiver by the sending state, except in respect of real property owned by such person in his private capacity. In the latter case, court proceedings are usually in rem rather than in personam.²³⁸

In summarizing the United States comment to the Commission, the special rapporteur responded:

The Rapporteur considers that while exceptions (b) and (c) cannot be said to be sanctioned by international law, they cannot, on the other hand, be said to be in conflict with international law. The Commission accepted (b) on the basis of the following considerations. In cases where the Courts of the receiving State are normally competent to decide disputes concerning the succession to an estate, it will be necessary in many cases for all the interested persons to be parties to the judicial proceedings. If in such a case the diplomatic agent is an interested party, the consequence of his being able to claim immunity from jurisdiction would be that the settlement of the estate would be held in abeyance—hardly a desirable state of affairs. In case (c), the considerations were as follows. A condition of the exercise of a liberal profession or commercial activity must be that the client should be able to obtain a settlement of disputes arising out of the professional or commercial activities conducted in the country. It would be quite improper if a diplomatic agent, ignoring the restraints which his status ought to have imposed on him, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court.

The Rapporteur concludes that the position reflected in the text should be maintained.²³⁹

The consequences to which the rapporteur alluded were, of course, undesirable, and the Commission apparently considered them persuasive, since it subsequently adopted without change the text of subparagraphs (b) and (c). It could be urged that the ability of the receiving state to declare *persona non grata* a diplomatic agent, who refuses to waive his immunity under manifestly unwarranted circumstances, obviated the need for this innovation. It should be noted that none of the other states commenting to the Commission on the 1957 draft articles joined the United States in disputing the desirability of subparagraphs (b) and (c). In its comments on the 1958 articles, the United States, while again expressing its conclusion that this article did not correspond to existing international law, indicated a willingness to accept the Commission's formulation.²⁴⁰

When this article was considered in the Committee of the Whole, two amendments sought to qualify the immunity granted in paragraph 1 with regard to the operation of automobiles. The Netherlands proposed²⁴¹ to add to the list of actions in paragraph 1 to which immunity was inapplicable a subparagraph relating to civil actions arising out of motor vehicle accidents. During the debate in Committee, this amendment was revised²⁴²

²³⁸ I.L.C. Report, cited note 3 above, at 58.

²³⁹ U.N. Doc. A/ON.4/116 at 8 (1958). ²⁴⁰ U.N. Doc. A/4164 at 46 (1959).

²⁴¹ U.N. Doc. A/CONF. 20/C.1/L. 186 (1961).

²⁴² U.N. Doc. A/CONF. 20/C.1/L. 186/Rev. 1 (1961).

to provide for the insertion of a new paragraph, after paragraph 1, to the effect that immunity from civil jurisdiction in the case of motor vehicle accidents was subject to the condition that suit could be brought directly against the insurance company. Switzerland proposed²⁴³ to add to the list of actions exempted from immunity in paragraph 1 a new subparagraph relating to an administrative procedure for the issue or withdrawal of a driving license.

Although the Netherlands proposal, in both its original and revised forms, attracted some support,²⁴⁴ it attracted more criticism,²⁴⁵ including the cogent comment of the Soviet Union and United Kingdom delegations that it conflicted with the basic assumption of Article 29, that immunity should extend to all acts committed in an official capacity, since it was possible that the automobile accident could occur during the performance of official duties. The Swiss amendment attracted less criticism;²⁴⁶ during the debate its chances of adoption appeared good. Both amendments were resoundingly rejected: the Netherlands amendment was rejected, in a roll-call vote, by a vote of 9-37 (U.K., U.S., U.S.S.R.)-25;²⁴⁷ the Swiss amendment was rejected by a vote of 4-38-28.²⁴⁸

Another issue which attracted considerable study in the Committee of the Whole arose from a Colombian proposal²⁴⁹ to delete subparagraph 1(c) of Article 29 of the Commission's draft. This proposal was made in conjunction with a Colombian proposal²⁵⁰ for a new article, to be inserted after Article 40, prohibiting commercial or professional activity by the staff of the diplomatic mission. The doubtful proposition that, if commercial and professional activities were prohibited, they need not be provided for in Article 29(1) had been foreseen and rejected by the International Law Commission, which noted in its commentary to this article:

The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. It was argued that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*. Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had com-

²⁴³ U.N. Doc. A/CONF. 20/C.1/L. 215 (1961); this amendment was also issued, apparently inadvertently, as U.N. Doc. A/CONF. 20/C.1/L. 217 (1961).

²⁴⁴ U.N. Docs. A/CONF. 20/C.1/SR. 27 at 9 (Switzerland), 11 (Yugoslavia); A/CONF. 20/C.1/SR. 28 at 6 (Italy) (1961).

²⁴⁵ U.N. Docs. A/CONF. 20/C.1/SR. 27 at 8 (U.S.S.R.), 15 (Czechoslovakia), 16 (Hungary); A/CONF. 20/C.1/SR. 28 at 3 (U.S.), 4 (U.K.), 5 (Finland), 6 (Rumania), 7 (U.A.R.) (1961).

²⁴⁶ U.N. Docs. A/CONF. 20/C.1/SR. 27 at 8 (U.S.S.R.); A/CONF. 20/C.1/SR. 28 at 5 (Finland) (1961). Two states supported it: U.N. Docs. A/CONF. 20/C.1/SR. 27 at 11 (Yugoslavia); A/CONF. 20/C.1/SR. 28 at 6 (Italy) (1961).

²⁴⁷ U.N. Doc. A/CONF. 20/C.1/SR. 28 at 8 (1961); the roll-call vote was requested by Belgium, which voted in favor of the amendment.

²⁴⁸ *Ibid.*

²⁴⁹ U.N. Doc. A/CONF. 20/C.1/L. 173 (1961).

²⁵⁰ U.N. Doc. A/CONF. 20/C.1/L. 174 (1961).

mercial or professional relations cannot be deprived of their ordinary remedies.²⁵¹

The debate on the Colombian amendment began in the Committee of the Whole with the withdrawal in its favor²⁵² of a Guatemalan amendment²⁵³ prompted by the same general sentiments as the Colombian proposal. At the suggestion of the Chairman, however, discussion of the Colombian amendment was deferred pending consideration of the Colombian proposal for the new article.²⁵⁴ During the debate on the new article, which was widely supported,²⁵⁵ a few delegates expressed uncertainty at the scope and meaning of the phrase "professional and commercial activities." The status, under the proposed new article, of artistic or literary activities,²⁵⁶ lectures at universities,²⁵⁷ and personal loans and stock investments²⁵⁸ was questioned. These doubts did not prevent adoption of the proposed article, designated Article 40 (*bis*), by a vote of 63-0-2.²⁵⁹ Immediately after this vote, the representative of Colombia withdrew his amendment to delete Article 29(1) (c),²⁶⁰ apparently in response to an observation²⁶¹ by the Japanese Delegation that, since Article 36 of the Commission's draft (Article 37 of the Convention) made Article 29 applicable to the families of diplomatic agents and to the administrative and technical staffs of the mission and their families, Article 29(1) (c) should be retained, even though the diplomatic agent was himself barred from the practice of professional or commercial activity.

One other amendment to paragraph 1 should be noted. During the discussion of Article 29 of the Commission's draft, the representative of Australia suggested from the floor that paragraph 1 be amended by the addition of a provision adding to the list of civil actions not covered by the diplomatic agent's immunity "an action relating to the recovery of tax on private income having its source in the receiving state."²⁶² In response to the suggestion of the Chairman, a formal amendment to this effect was submitted.²⁶³ The amendment was little discussed,²⁶⁴ but was adopted in the Committee by a vote of 17-11 (U.S.)-39.²⁶⁵ While the vote was nominally equivalent to the two-thirds majority which would be required

²⁵¹ I.L.C. Report, cited note 3 above, at 20.

²⁵² U.N. Doc. A/CONF. 20/C.1/SR. 27 at 5 (1961).

²⁵³ U.N. Doc. A/CONF. 20/C.1/L. 156 (1961).

²⁵⁴ U.N. Doc. A/CONF. 20/C.1/SR. 27 at 5 (1961).

²⁵⁵ U.N. Doc. A/CONF. 20/C.1/SR. 36 at 3 (Netherlands, Venezuela, Argentina, Chile), 4 (Sweden, Belgium, France, Ecuador), 5 (Guatemala, Liberia, Brazil, Mexico, Peru), 6 (Japan, Italy, Portugal, U. K., Viet Nam, Norway), 7 (Malaya and India, El Salvador) (1961).

²⁵⁶ *Ibid.* at 4 (Spain).

²⁵⁷ *Ibid.* (France).

²⁵⁸ *Ibid.* at 6 (Norway).

²⁵⁹ *Ibid.* at 7. Art. 40 (*bis*) became Art. 42 of the Vienna Convention.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.* at 6.

²⁶² U.N. Doc. A/CONF. 20/C.1/SR. 27 at 9 (1961).

²⁶³ U.N. Doc. A/CONF. 20/C.1/L. 288 (1961).

²⁶⁴ It was commented on only by the Delegation of Finland, which accepted the principle of the Australian amendment but expressed doubts as to the desirability of embodying it in the convention. U.N. Doc. A/CONF. 20/C.1/SR. 28 at 5 (1961).

²⁶⁵ *Ibid.* at 8.

to adopt this proposal in the plenary session, it was apparent from the large number of abstentions that the delegates had not made up their minds about this proposal, and that its fate would be determined in the plenary session.

Article 31(2), relating to the giving of evidence by diplomatic agents, was the subject of several amendments. The Soviet Union proposed²⁶⁶ to add a second sentence to the effect that, if the diplomatic agent agreed to give evidence, he need not attend the court or other authority of the receiving state for that purpose. This amendment corresponded to a version of paragraph 2 originally proposed by Mr. Tunkin²⁶⁷ at the 1957 session of the International Law Commission and subsequently deleted by the Commission's drafting committee at the suggestion of Mr. Edmonds.²⁶⁸ Italy proposed²⁶⁹ to replace the Commission's text of paragraph 2 by a provision that the diplomatic agent need not give evidence about a matter related to his official functions, but that in other cases, while he could not be compelled to appear before judicial authority, a local court desiring a statement should submit to him a written list of questions. While it was not clear from the text whether this amendment contemplated that the diplomatic agent could be compelled to give written testimony in cases not involving his official functions, it appeared from the statement of the Italian representative introducing this amendment that, while the diplomatic agent ought to give evidence, he could not be required.²⁷⁰

The United States proposed²⁷¹ to amend paragraph 2 to provide that the diplomatic agent is obliged to give evidence in the case of the actions listed in paragraph 1, where the agent's immunity has been waived, and in the case of a counterclaim where the diplomatic agent is precluded from invoking his immunity. The Spanish Delegation proposed²⁷² to add to paragraph 2 a provision that the diplomatic agent would give evidence on instructions from his government. It could be urged that this amendment would have intruded into the area of the relationship between the diplomatic agent and the sending state, which is not properly a subject of international law.

At the beginning of the debate in the Committee of the Whole the

²⁶⁶ U.N. Doc. A/CONF. 20/C.1/L. 176 (1961).

²⁶⁷ 1 I.L.C. Yearbook (1957) 104 (A/CN. 4/SEB.A/1957).

²⁶⁸ *Ibid.*

²⁶⁹ U.N. Doc. A/CONF. 20/C.1/L. 195 (1961).

²⁷⁰ U.N. Doc. A/CONF. 20/C.1/SR. 27 at 7 (1961).

²⁷¹ U.N. Doc. A/CONF. 20/C.1/L. 260 (1961). With regard to the first part of the U. S. amendment, the Commission's commentary had taken a different view:

"... [T]he Commission considered whether paragraph 2 of the article should not contain an exception to cover the cases referred to in paragraph 1. The Commission concluded that these cases should not be mentioned. It is debatable whether the question of the obligation to give evidence is relevant in cases where the diplomatic agent is himself party to the suit. At all events—and this was the decisive point in the Commission's opinion—in such cases the diplomatic agent is called upon to testify in his own interest and, if he fails to do so, he must accept the consequences." I.L.C. Report, cited note 3 above, at 20.

²⁷² U.N. Doc. A/CONF. 20/C.1/L. 221 (1961).

United States noted its withdrawal of its amendment.²⁷³ The Soviet amendment drew little support, save from predictable sources,²⁷⁴ and no effective reply was made to the objection that evidence in the form contemplated by the Soviet and Italian amendments would not be receivable in many states.²⁷⁵ Both the Soviet and the Italian amendments were eventually withdrawn; the Soviet amendment was withdrawn toward the end of the debate,²⁷⁶ the Italian, during the voting.²⁷⁷ Though the Spanish amendment to paragraph 2 had not been supported in any statement made during the discussion, it was not withdrawn; at the vote it was rejected by a vote of 5-40 (U.S.)-12.²⁷⁸

Article 29(4) of the Commission's draft (Article 31(4) of the Vienna Convention) was not objected to by any delegation. In fact, some delegations were concerned by the possibility that the diplomat, as an aspect of his immunity, might go unpunished or be able to avoid civil liability for an action committed in the sending state. An amendment submitted by Venezuela²⁷⁹ related to criminal offenses; it would have obligated the sending state to prosecute a diplomatic agent accused of an offense punishable under the laws of both states, at the request of the receiving state. The Netherlands proposed²⁸⁰ to add to paragraph 4 a requirement that the sending state designate a court, apparently within the sending state, to hear cases against its diplomatic agents abroad. Spain proposed²⁸¹ to add to paragraph 4 a provision that an action against a diplomatic agent should be removed by letters rogatory to a court in the sending state. None of the amendments to paragraph 4 fared well. The Venezuelan amendment was criticized as too extreme.²⁸² Though it received some support,²⁸³ it was withdrawn by its sponsor.²⁸⁴ The Netherlands amendment was replaced by a subsequent revised proposal²⁸⁵ which contained no amendment to paragraph 4. The Spanish amendment was not put to the vote.²⁸⁶

Debate on this article in the plenary session was not protracted. The Netherlands proposed²⁸⁷ to enlarge the scope of the Australian amendment adopted in the Committee of the Whole, so that actions relating to all taxes

²⁷³ U.N. Doc. A/CONF. 20/C.1/SR. 27 at 4 (1961).

²⁷⁴ *Ibid.* at 15 (Czechoslovakia), 16 (Hungary). Yugoslavia also supported the Soviet amendment. *Ibid.* at 12.

²⁷⁵ See the statement of the Soviet delegate on this point. *Ibid.* at 14.

²⁷⁶ U.N. Doc. No. A/CONF. 20/C.1/SR. 28 at 5 (1961).

²⁷⁷ *Ibid.* at 8.

²⁷⁸ *Ibid.*

²⁷⁹ U.N. Doc. A/CONF. 20/C.1/L. 229 (1961).

²⁸⁰ U.N. Doc. A/CONF. 20/C.1/L. 186 (1961).

²⁸¹ U.N. Doc. A/CONF. 20/C.1/L. 221 (1961).

²⁸² U.N. Doc. A/CONF. 20/C.1/SR. 27 at 8 (U.S.S.R.) (1961).

²⁸³ *Ibid.* at 13.

²⁸⁴ U.N. Doc. A/CONF. 20/C.1/SR. 28 at 5 (1961).

²⁸⁵ U.N. Doc. A/CONF. 20/C.1/L. 186/Rev. 1 (1961).

²⁸⁶ It is the author's recollection that the Spanish amendment was withdrawn by its sponsor at the twenty-eighth meeting of the Committee of the Whole, prior to the voting. This is confirmed by the failure of the Spanish representative to object when his proposal was not voted on. The provisional record contains no indication, however, that the Spanish amendment was withdrawn.

²⁸⁷ U.N. Doc. A/CONF. 20/L. 17 (1961).

from which the diplomatic agent was not exempt were excluded from the immunity from civil jurisdiction granted by paragraph 1. It will be recalled that the original Australian amendment, which had been designated subparagraph 1(c) by the Drafting Committee, had related only to actions arising from a tax on income earned in the receiving state. Colombia also renewed its proposal that the reference in paragraph 1 to actions arising from professional or commercial activity by a diplomatic agent be deleted.²⁸⁸ This provision had been subparagraph 1(c) in the text of Article 29 formulated by the International Law Commission, but had been designated subparagraph 1(d) by the Drafting Committee. Support for the Colombian proposal to delete subparagraph 1(d) was limited, at least partially because Article 40 (*bis*), which had been adopted by the Committee of the Whole at the proposal of Colombia, had been reformulated by the Drafting Committee to prohibit professional and commercial activities only "in principle."²⁸⁹ This reformulation was subsequently defended by the representative of the United States, who questioned the advisability of a strict prohibition against professional and commercial activities in the absence of any agreed definition of the nature and scope of such activities.²⁹⁰

At the voting on this article in the plenary session, subparagraphs (a) and (b) of paragraph 1 were adopted unanimously.²⁹¹ The Netherlands amendment to extend the scope of subparagraph (c) was rejected by a vote of 6-46 (U.S.)-6,²⁹² and subparagraph (c) itself was rejected by a vote of 24-35-11.²⁹³ On the motion of the Italian representative,²⁹⁴ voting on subparagraph 1(d) was deferred until after Article 40 (*bis*) had been considered.²⁹⁵

Article 40 (*bis*) was quickly disposed of.²⁹⁶ The words "in principle," put to a separate vote on the motion of the representative of Colombia, failed, by a vote of 31 (U.S.)-29-6, to secure the requisite two-thirds majority. Article 40 (*bis*) was then adopted by a vote of 61-2-8, and became Article 42 of the Vienna Convention.

Returning to Article 29, the Conference then adopted subparagraph 1(d) by a vote of 36 (U.S.)-13-21,²⁹⁷ even though Article 40 had been adopted in a form which some delegations had asserted would make the subparagraph unnecessary. Because of the rejection of subparagraph 1(c), this paragraph became subparagraph 1(c) in the final text of the convention. The other paragraphs, and the article as a whole, were adopted unanimously.²⁹⁸

The decision of the Conference to limit the immunity from civil jurisdiction in accordance with the recommendations of the International Law Commission is itself a significant manifestation of the development of the

²⁸⁸ U.N. Doc. A/CONF. 20/SR. 6 at 12 (1961).

²⁸⁹ See statement of representative of Italy, *ibid.*

²⁹⁰ U.N. Doc. A/CONF. 20/SR. 7 at 5 (1961).

²⁹¹ U.N. Doc. A/CONF. 20/SR. 6 at 2 (1961).

²⁹² *Ibid.* at 3.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.* at 5.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.* at 6.

²⁹⁸ *Ibid.*

international law of diplomatic immunities. Perhaps more significant is the impression, which emerges from the conference consideration of Article 29(1), that support for even greater limitations on that immunity was present. Such support may foreshadow the development of international law in this area, and raises the question whether an even more stringent interpretation of the "functional necessity" theory of diplomatic privileges and immunities may be anticipated.

SETTLEMENT OF DISPUTES

Article 45 of the International Law Commission's draft articles provided as follows:

Any dispute between States concerning the interpretation and application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation or arbitration or, failing that, shall, at the request of either of the parties, be submitted to the International Court of Justice.

This article was not adopted by the Conference, which duplicated the decision of the Geneva Conference on the Law of the Sea by adopting instead a separate protocol to the convention regarding the settlement of disputes.²⁹⁹

The improbability that the Conference would be prepared to adopt, by the requisite two-thirds majority, an article placing disputes arising under the Convention within the compulsory jurisdiction of the International Court of Justice had been foreshadowed in the International Law Commission, which considered whether the article should be omitted from the Commission's final draft.³⁰⁰ The Commission's decision to include Article 45 in the final draft, while perhaps motivated by other considerations, was, it is submitted, fully justified by the need to keep alive the issue of the judicial settlement of international disputes during a period of international relations characterized by moderate support for such means of settlement. The Commission could validly anticipate that efforts at the Conference to secure the adoption of Article 45, while unlikely of success, and, indeed, likely to preclude signature of the Convention by a number of states if successful, would serve to emphasize that reliance on the Court for the settlement of international disputes remains a major objective of the policy of many states. In this sense, the eventual failure of the Conference to adopt Article 45 does not divest of value the efforts at the Conference to secure its adoption, nor refute the decision of the Commission to include the article in its final text.

Amendments to Article 45 in the Committee of the Whole were of several basic types. Most drastically, Bulgaria proposed³⁰¹ the deletion of Article 45. Two other amendments, submitted by China,³⁰² and by

²⁹⁹ U.N. Doc. A/CONF.13/L.57; 52 A.J.I.L. 802 (1958).

³⁰⁰ 1 I.L.C. Yearbook (1958) 184-191 (A/CN.4/SER.A/1958); 1 *ibid.* (1957) 151-155, 223 (A/CN.4/SER.A/1957).

³⁰¹ U.N. Doc. A/CONF.20/C.1/L.296 (1961).

³⁰² U.N. Doc. A/CONF.20/C.1/L.302/Corr.1 (1961). In introducing his delegation's amendment, the representative of China appears to have contemplated that the Court's

Argentina and Guatemala,³⁰³ favored the retention of an article contemplating settlement of disputes by the International Court of Justice, but only with the concurrence of the parties to the dispute. Iraq, Italy, Poland, and the United Arab Republic proposed³⁰⁴ that Article 45 be replaced by an optional protocol similar to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes concluded at the 1958 United Nations Conference on the Law of the Sea. Such a protocol would provide for compulsory settlement of disputes arising under the convention, including reference to the International Court of Justice at the request of any of the parties to the dispute, but would be binding, of course, only among states parties to the protocol. Three amendments to Article 45, while contemplating changes in the article, supported the inclusion in the article of a provision for the compulsory jurisdiction of the Court. The Japanese amendment³⁰⁵ sought a more clear formulation of Article 45, avoiding the words "failing that," which appeared somewhat ambiguous in the Commission's text. The United States amendment³⁰⁶ and the Belgian sub-amendment³⁰⁷ to the amendment of Argentina and Guatemala both sought to alter the apparent intent of the Commission's text, that a party might submit a dispute to the Court only after efforts to agree on conciliation or arbitration had proved unsuccessful.

In the debate in the Committee of the Whole, a determined, though perhaps foredoomed, effort was made to secure the adoption of a provision for compulsory settlement of disputes.³⁰⁸ The United States firmly supported this principle, and withdrew its amendment in an effort to facilitate the mobilization of support for Article 45.³⁰⁹ Switzerland, apparently considering that its sponsorship of the Optional Protocol at the first United Nations Conference on the Law of the Sea had been misunderstood, affirmed its adherence to the principle of compulsory settlement, and requested a roll-call vote on Article 45.³¹⁰ Communist opposition³¹¹ to the principle of compulsory settlement was firm on the other hand, and some opposition was found in other areas³¹² as well.

At the conclusion of the debate the Chairman ruled that the four-Power proposal, as the amendment furthest removed from the substance of Article

compulsory jurisdiction under Art. 36(2) of its Statute obviated the need for a specific provision in the convention. U.N. Doc. A/CONF. 20/C.1/SR. 37 at 10-11 (1961).

³⁰³ U.N. Docs. A/CONF. 20/C.1/L. 139 and L. 139/Rev. 1 (1961).

³⁰⁴ U.N. Docs. A/CONF. 20/C.1/L. 316 and L. 316/Add. 1 (1961).

³⁰⁵ U.N. Doc. A/CONF. 20/C.1/L. 307 (1961).

³⁰⁶ U.N. Doc. A/CONF. 20/C.1/L. 299 (1961).

³⁰⁷ U.N. Doc. A/CONF. 20/C.1/L. 325 (1961).

³⁰⁸ U.N. Docs. A/CONF. 20/C.1/SR. 37 at 12 (Japan), 13 (U. S., Switzerland), 14 (Yugoslavia), 15 (Sweden); A/CONF. 20/C.1/SR. 38 at 2 (Israel), 3 (France), 4 (U. K.), 6 (Philippines, Colombia), 7 (Ecuador) (1961).

³⁰⁹ U.N. Doc. A/CONF. 20/C.1/SR. 37 at 13 (1961).

³¹⁰ *Ibid.*

³¹¹ U.N. Docs. A/CONF. 20/C.1/SR. 37 at 11 (Poland), 13 (Bulgaria), 14 (U.S.S.R.); A/CONF. 20/C.1/SR. 38 at 2 (Czechoslovakia), 3, 5 (Rumania), 6 (Albania) (1961).

³¹² U.N. Docs. A/CONF. 20/C.1/SR. 37 at 11 (Argentina), 14 (Guatemala); A/CONF. 20/C.1/SR. 38 at 4 (Tunisia, Viet Nam), 5 (Indonesia) (1961).

45, should be voted on first. The four-Power proposal was adopted by a vote of 49 (U.S.)-17-16;⁸¹³ the other amendments were thus not put to a vote.

When the optional protocol adopted in the Committee of the Whole was considered in plenary session, the Conference had also before it the Commission's text of Article 45, which had been introduced as an amendment by Switzerland.⁸¹⁴ In explaining his proposal,⁸¹⁵ the Swiss representative restated his intention to require a roll-call vote on Article 45. Under normal circumstances, the Swiss proposal would have been put to a vote before the optional protocol. Although several delegations⁸¹⁶ supported the Swiss proposal, a motion by the representative of India⁸¹⁷ that priority in voting be given to the optional protocol was adopted by a vote of 40-28 (U.S.)-7.⁸¹⁸ The optional protocol was then adopted by a vote of 63 (U.S.)-3-9,⁸¹⁹ with the result that Article 45 was again not put to the vote.

CONCLUSION

The Vienna Conference on Diplomatic Intercourse and Immunities closed on April 14, 1961. At the formal signing on April 18, 1961, seventy-five states signed the Final Act, and, as of January 1, 1962, forty-four states had signed the convention. As of January 1, 1962, no ratifications had been received; nevertheless, the receipt of a sufficient number of ratifications (22) to bring the instrument into force was anticipated.

It is impossible to avoid comparisons between the Vienna Conference on Diplomatic Intercourse and Immunities and the first Geneva Conference on the Law of the Sea. The Vienna Conference was successful, in that it was able to reach agreement on the totality of its subject matter; the Geneva Conference was only a partial success, in that an important question, the breadth of the territorial sea, was left unresolved. The Geneva Conference adopted one hundred twenty-four substantive articles in a conference of ten weeks' duration; the Vienna Conference adopted forty-seven substantive articles in a conference of six weeks' duration.

Reasons may be advanced for the greater success of the Vienna Conference. Most obviously, the subject matter of the Vienna Conference was substantially less contentious than that of the Geneva Conference. In the context of diplomatic relations, all states are both sending and receiving states; disputes arose out of questions of balance and emphasis rather than from conflicting national interests. What disputes arose often revealed the division to be between large and smaller states, rather than between East and West. A second factor was the skill of the Secretariat and the Conference officers. The large international conference is ill suited to the drafting of complex instruments; at its present stage of development it may be compared to a domestic legislative body *without* the political party

⁸¹³ *Ibid.* at 8.

⁸¹⁴ U.N. Doc. A/CONF. 20/L. 16 (1961).

⁸¹⁵ U.N. Doc. A/CONF. 20/SR. 11 at 2-3 (1961).

⁸¹⁶ *Ibid.* at 8 (U. S., Philippines), 4 (Norway, Belgium, Iran), 5 (Italy, France, Colombia), 7 (Sweden, Mexico) (1961).

⁸¹⁷ *Ibid.* at 3.

⁸¹⁸ *Ibid.* at 9.

⁸¹⁹ *Ibid.*

structure which is basic to the domestic legislative process. A high degree of co-ordination and guidance is thus required. The functioning of the Secretariat, clearly adequate at Geneva, had matured and improved perceptibly at Vienna. And while the officers of both conferences have generally been of high quality, the Chairman of the Committee of the Whole, Ambassador Lall, proved to be a parliamentarian of outstanding skill, both on the dais and in the corridors.

The big international conference continues to be essentially a hurried and harassed operation, and the physical fatigue and confusion of the representatives are factors in many of its decisions. But the fact that the large drafting conference can produce creditable formulations of international law, as affirmed by the experience of the Vienna Conference, is a source of optimism for all those concerned with international law.

EDITORIAL COMMENT

LESTER H. WOOLSEY

1877-1961

To quote his own words, written a few years ago on the death of a colleague, "A pillar of the American Society of International Law has fallen" in the passing away of Lester Woolsey in Providence, Rhode Island, on June 20, 1961. He was one of those pioneer American lawyers who, at the beginning of this century, recognized the validity and necessity of the rule of international law at home and abroad, and became in 1907 a charter member of the Society, whose objective he so ably supported throughout his life.

Lester Woolsey began his career in the law as a claims examiner in the U. S. Land Office, and as an instructor at the Washington College of Law and at George Washington University Law School. He entered the State Department as an attorney in 1909, became Assistant Solicitor in the Office of the Counselor (Chandler P. Anderson) in 1913, and then in the office of Secretary of State Robert Lansing in 1915-1916. He was Law Adviser to the Department from 1916 to 1917, and Solicitor from 1917 to 1920. The period during which Mr. Woolsey was in the State Department was one in which problems of international law and international relations assumed major importance as the United States began to emerge on the international scene as a first-class Power. Boundaries and fisheries disputes with Great Britain, claims arising from the latter, border questions with Mexico involving the Rio Grande and claims arising from Mexican revolutionary movements, the Panama Canal question, and others, occupied the attention of the legal officers of the State Department. At this time there was also a strong peace movement in the United States, as elsewhere in the world, calling for judicial settlement of international disputes, particularly through international arbitral tribunals. The Hague Conventions of 1907 on the laws of war and neutrality were of high importance, as well as the London Declaration of 1909 on Laws of Naval War, in the thinking of international lawyers.

In 1911, Mr. Woolsey was secretary in behalf of the United States at the International Fur Seals Conference, to which Mr. Lansing was U. S. technical delegate. When the European war broke out in 1914, Mr. Woolsey, as Assistant Solicitor of the Department of State, handled the vital questions involved in protecting the neutral rights of the United States against belligerent challenges and violations. When the United States abandoned its neutrality and entered the war in 1917, the problems which Woolsey, then Solicitor, had to face were those of a co-belligerent vis-a-vis the remaining neutral Powers, as well as the enemy Powers. At the end of the war he attended the Paris Peace Conference as a technical

delegate of the United States. In 1920 he served on a commission to draw up a treaty between the United States and Siam, for which services the King of Siam conferred on him the Order of the White Elephant.

In 1920 Mr. Woolsey left the Department of State to go into the private practice of law in partnership with Robert Lansing, with whom he had been so closely associated in the Department. The partnership was dissolved by the death of Mr. Lansing in 1928, and Mr. Woolsey continued the practice as successor to the partnership. During this period, in addition to handling private claims, he was professor of international law at American University, acted as international law expert for the Chinese Government at the Washington Conference on Limitation of Armaments, and was counsel for the Government of Chile in the Tacna-Arica arbitration. In connection with the last two services, respectively, Mr. Woolsey received the Order of Chia-Ho from the Chinese Government, and was made an officer of the Chilean Order of Al Merito. He was legal adviser to the Pan American Union, and in 1934 was United States member of the Commission of Inquiry, U. S.-Spain, under the 1914 Bryan Treaty for the Advancement of Peace. He was also special counsel for the United States before the Mexican-U. S. General Claims Commission in 1936. Mr. Woolsey was a member of the Advisory Committee of the Harvard Research in International Law, which, from 1929 to 1939, prepared and published a series of draft conventions, comments and bibliographies on selected topics of international law. He was also the author of a *Digest of English Prize Law from the War of 1744 through the Crimean War*, prepared while he was Solicitor of the Department of State.

Mr. Woolsey took an active part in the Society's work almost from its very beginning. He was elected a member of the Executive Council in 1918 and served two terms on it, when he was elected Treasurer of the Society in 1925. For over twenty years Mr. Woolsey conscientiously performed the duties of Treasurer, including the task of looking after the Society's then comparatively small but valued investments. Upon relinquishing the office of Treasurer in 1946, Mr. Woolsey was elected a Vice President of the Society for the years 1946-1949. From 1950 to 1956 he was an Honorary Vice President, and in 1956 was elected President of the Society. Following his term as President, Mr. Woolsey was elected an Honorary Vice President, which position he held at the time of his death. During all these years Mr. Woolsey served on a number of committees. He was particularly concerned with improving the financial position of the Society, and long advocated the setting up of an endowment fund to assure for it permanent financial security. Mr. Woolsey, when President of the Society, also proposed that means be found to make the Society more effective in upholding the principles of international law, particularly with respect to current events. He urged the setting up of a scholarship fund to be given by the Society in honor of James Brown Scott. When illness caused him to leave his Washington home for Providence, he donated to the Society his set of the *Journals* and *Proceedings* with directions that the proceeds of their sale be placed in a fund to

provide a scholarship in honor of James Brown Scott. After his death his daughters very generously gave to the Society Mr. Woolsey's valuable collection of international law books which have been placed in the Society's Library.

Mr. Woolsey's first speech before the Society was in 1917, when, as Solicitor of the Department of State, he delivered an address on the subject of "Some Economic Considerations of International Organization," which he opened with a characteristically humorous remark: "On account of my connection with the Department of State, it is appropriate that I should have assigned to me a colorless topic relating to the economics of international relations, for in discussing this subject, I shall not be expected to throw any light, even if I could, upon the intricacies of the relations of the United States with the belligerent Powers during the last thirty months."¹ His subsequent words, spoken over forty years ago, have a familiar sound. Pointing out that "the differences in the geographical positions of States inevitably have their effect on international law," Mr. Woolsey went on to say that:

It is difficult to formulate rules of international law for nations so differently situated, or when formulated to apply those rules so as to work out justice and equity in the relations of states.²

In his last appearance before the Society, on April 26, 1957, Mr. Woolsey in his presidential address devoted his remarks to "Peace with Justice."³ Analyzing the conditions of peace, he referred to the relations of Canada and the United States as a model, stating:

To attain such a condition of peace, it is necessary that there should be trust and confidence on both sides of the border and machinery for the settlement of disputes which are sure to arise. . . . These attributes are attained only through years of freedom, of honorable and fair dealing without acrimonious and spiteful propaganda and attempts to overreach each other. This is not an overnight solution, a solution of immediacy. Nor, of course, can it be obtained by force or be purchased by grants of financial or material aid.⁴

Stating that peace and justice "are faces of the same coin," he declared that "Peace cannot be attained without justice. . . . Neither can there be justice without peace. Justice does not thrive in the temper of strife." Referring to the International Court of Justice as an instrument for settling disputes, Mr. Woolsey stated that the numerous limitations placed by the great Powers on the Court's jurisdiction "leave the Court with comparatively little to do." However, he pointed out that "Courts . . . are not infallible instruments of justice," and suggested that "The judicial process should be so formulated as to get to the merits of a case regardless of technicalities and special rules of law or procedure."⁵

On the nature of the disputes which should be submitted to the International Court, Mr. Woolsey, recognizing that the better practice and

¹ 1917 Proceedings, American Society of International Law 37.

² *Ibid.* 38.

³ 1957 Proceedings, American Society of International Law 57.

⁴ *Ibid.* 58-59.

⁵ *Ibid.* 60-61.

opinion are that courts of justice should not pass upon political questions, stated that "the United Nations and the regional organizations, like the Organization of American States and others, are the organs or courts for the settlement of *political* controversies between states." He pointed out that "The United Nations Assembly, though a purely political body, is prone to decide or defer legal questions on a political basis."⁶

Other addresses by Mr. Woolsey before the Society concerned problems of American neutrality, neutral persons and property on the high seas in time of war, and the munitions trade, with respect to which he had played an important part in establishing United States policy and practice as Solicitor of the State Department.

Of particular interest at the present time when the question of submission of all justiciable disputes to the compulsory jurisdiction of the International Court of Justice is under widespread discussion, are the remarks of Mr. Woolsey at the meeting of the Society in 1944, when he lead a discussion of the subject, "Borderlines of National and International Jurisdiction." These remarks show the judicial temper which permeated Woolsey's expression of views. He said:

It seems to me very evident that international law, by more or less common agreement, does not cover so-called domestic questions, and I wonder if it is due to the fact that we are overworking international law or whether international law has not as yet developed along broad enough lines to cover these domestic questions.⁷

Referring to treaties submitting to arbitration various definite classes of disputes, he called attention to the treaties of general arbitration, providing for decision *ex aequo et bono* of disputes for which there are no applicable principles of international law. Few countries, he said, have been willing to go this far because of their unwillingness to submit to adjudication certain questions deemed by them to involve national honor, security and independence.

What would an arbitration court do when it was free to decide a case and there were no established principles which it knew of or could apply? . . . Nations like to have some basis for a guess, at least, as to what the outcome of an arbitration is going to be before they undertake it.⁸

Moreover, he said, there is no appeal from an international court decision, and the court is not bound to follow preceding decisions. He continued:

I think generalizations on jurisdiction and abstract formulae are dangerous. I believe in the method by which the common law of England was built up. The decision of a case on one side of the line and the decision of a case on the other side gradually developed principles that have stood the test of time.⁹

He concluded:

. . . if nations were willing to make general treaties of arbitration to submit all questions, it might result into a development of inter-

⁶ *Ibid.* 64-65.

⁷ 1944 Proceedings, American Society of International Law 48.

⁸ *Ibid.* 49.

⁹ *Ibid.* 51.

national law, a development of rules for the settlement of even questions of vital interest, independence, honor, territorial integrity, and matters of that sort. In that way a system of law might be built up case by case and I am not sure but that that is the way to extend law to this fertile field of disputes. . . .¹⁰

Although Mr. Woolsey was not formally elected a member of the Board of Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW until 1925, a position he held until 1944, when he became an honorary editor, he contributed editorials and articles from 1909 to 1957. He reviewed numerous publications for the JOURNAL, the last review in 1958 being an appraisal of a volume on the Allied blockade of Germany, 1914-1916, a subject on which he was an expert. His contributions to the JOURNAL reflected the careful research of authorities, scholarship and judicial approach so characteristic of his work. The subjects he discussed so thoroughly ranged over the field of international claims, such as the Black Tom case, the Panama and Mexican claims, in which he was of counsel for some of the principal claimants, the Mexican oil expropriations, international boundary disputes, such as those between Ecuador and Peru, the Chaco dispute, the Leticia dispute, the Tacna-Arica settlement, United States relations with Latin America, particularly with Panama, and the Panama Canal problem. He contributed numerous editorials and articles on the subject of neutrality and the munitions trade, the first, written in 1910, being entitled "Early Cases on the Doctrine of Continuous Voyages."¹¹ In that article Mr. Woolsey set forth the results of painstaking research on a subject which was to become of vital interest within a few years. In later years he discussed problems raised by the Sino-Japanese hostilities, the second World War and the United Nations.

Lester Woolsey was a thorough, meticulous lawyer, with a keen insight into the international legal problems with which he dealt, both as counsel for a government and as counsel for a private client. He was in the first rank of American international lawyers. He not only possessed the highest qualifications of a lawyer but he also had an artist's appreciation of beauty. He spent many summers in New England where he put on canvas many seaside and rural scenes he visited. He was a man of kindness and integrity, which, together with his keen perception and dry humor, made his friendship a cherished one by those who knew him. As Dr. James Brown Scott wrote of Robert Lansing when he was appointed Counselor of the Department of State in 1914, Mr. Woolsey was "in fact as well as in theory . . . a high-minded and Christian gentleman."¹² His services to the American Society of International Law were so numerous they could not possibly all be recounted. His contributions to the legal profession both as a practicing international lawyer and as exponent of the rule of law are of enduring value. The Society and the profession have indeed lost a pillar.

ELEANOR H. FINCH

¹⁰ *Ibid.*

¹¹ 4 A.J.I.L. 823 (1910).

¹² 8 *ibid.* 338 (1914).

SOME LEGAL IMPLICATIONS OF THE U-2 AND RB-47 INCIDENTS

The purpose of this comment is not to pass legal or political judgment on the actions of the governments involved in the U-2 and the RB-47 incidents of 1960,¹ but to note and analyze, now that the passions aroused by the incidents have subsided, some of the legal implications of the positions taken by these and other governments in connection with these incidents, particularly with respect to sovereignty and jurisdiction in space. Among the questions of international law on which these incidents have a bearing are the following: What is the legal basis of national sovereignty in airspace? How far up does such sovereignty extend? What action may a state lawfully take against a foreign aircraft which intrudes into its national airspace? Is deliberate intrusion of aircraft into foreign airspace for military reconnaissance purposes an act of aggression? Is a state entitled to interfere with flights of foreign aircraft over the high seas in close proximity to its territorial sea ("contiguous zone")? By analogy, is a state entitled to control the passage of foreign space vehicles in a zone immediately above its national airspace?

On May 1, 1960, Francis Gary Powers, a citizen of the United States, was arrested on Soviet territory near Sverdlovsk after he had descended by parachute from a United States aircraft. According to public Soviet statements, this aircraft, a high-altitude plane of the Lockheed U-2 type, had been shot down by a Soviet rocket, apparently without warning, while flying over the Soviet Union at an altitude of approximately 60,000 to 68,000 feet. Powers was subsequently convicted of espionage by the Military Division of the Supreme Court of the Soviet Union and sentenced to ten years of confinement.²

The United States Government did not protest against the shooting down of the U-2 plane flown by Powers or against the imprisonment, trial and conviction of Powers. It eventually admitted that the U-2 flight had been deliberately undertaken for military intelligence purposes pursuant to a policy approved by the President, and that similar flights over Soviet territory had been conducted for approximately four years. Shortly thereafter, President Eisenhower ordered the suspension of further U-2 flights over the U.S.S.R. and President Kennedy subsequently ordered that they not be resumed.³

The absence of protest by the United States against the actions of the

¹ Cf. Wright, "Legal Aspects of the U-2 Incident," 54 A.J.L.L. 836 (1960).

² For English translations of Soviet statements and documents on the U-2 incident and the Powers trial, see Events Incident to the Summit Conference, Hearings before the Committee on Foreign Relations, U. S. Senate, 86th Cong., 2d Sess., May 27-June 2, 1960 (hereinafter cited as Senate Hearings, 1960), pp. 175, 181, 188, 195, 203, 220, 235; and The Trial of the U 2 (Translation World Publishers, Chicago, 1960). The record of the Powers trial has been published in Russian as *Sudebnyi Protsess po Ugolovnomu Delu Amerikanskogo Letchika-Shpiona Frensis G. Pauersa* (1960).

³ Senate Hearings, 1960, cited above, and documents there printed; and transcript of President Kennedy's first news conference, New York Times, Jan. 26, 1961. See, further, 42 Dept. of State Bulletin 816-818, 851-853, 900, 905 (1960); 43 *ibid.* 276-277, 350, 361 (1960).

Soviet authorities toward Powers and his plane is in sharp contrast with the strong remonstrances invariably made by the United States against the shooting down by the Soviets of American military aircraft over the high seas and the imprisonment of crew members of the aircraft so shot down. Such remonstrances were made, for example, in the case of the United States Air Force RB-47 plane shot down by Soviet aircraft on July 1, 1960, in which the United States denied that the aircraft had been flying above Soviet territory.

There are two differences which might account for the contrast—differences in the nature of the missions of the aircraft and in the location of the incidents. The admitted purpose of the U-2 flight was military reconnaissance of Soviet territory. The United States, however, has never admitted that an American aircraft over the high seas could be lawfully attacked and shot down by Soviet forces, and its crew tried in Soviet courts for espionage, merely because it was observing Soviet territory. Furthermore, the Soviet Union itself does not appear to have ever protested on legal grounds against the observation of its territory by foreign aircraft flying over the high seas. In both the U-2 and the RB-47 incidents, its complaints were based on the real or alleged "violation" of its "frontiers" or airspace by American aircraft.⁴ As President Kennedy has said, the significant difference between the U-2 and the RB-47 flights was that "one was an overflight and the other was a flight of a different nature."⁵ The difference, then, that accounts for the contrast in the American attitudes toward the two incidents is the difference in the location of the incidents.

The Soviet Union is not a party to the Chicago Convention of 1944⁶ or to any other general treaty which expressly recognizes national sovereignty in airspace. Nevertheless, the validity of the Soviet Union's claim of sovereignty over the airspace above its territory does not appear to have been ever challenged by any state. Conversely, the Soviet Union has not challenged the sovereignty of other states over the airspace above their respective territories. Soviet spokesmen, in fact, often dwell on the respect accorded by the Soviet Union to the airspace sovereignty of other states.⁷ The Soviet claim of sovereignty and jurisdiction in airspace, asserted diplomatically on numberless occasions, is explicitly made in the Soviet Air Code of 1935⁸ in the following terms:

1. To the Union of S.S.R. belongs the full and exclusive sovereignty over the airspace of the Union of S.S.R. The airspace of the Union of S.S.R. means the airspace above the land and water territory of the

⁴ See below.

⁵ New York Times, Jan. 26, 1961.

⁶ 61 Stat. 1180; T.I.A.S., No. 1591.

⁷ See, e.g., Premier Khrushchev's remarks, May 11, 1960, Senate Hearings, 1960, cited note 2 above, at 208. At a news conference on the same day, President Eisenhower said that as far as he knew there had never been any Soviet reconnaissance flights over the United States. *Ibid.* at 201. On Dec. 14, 1960, the U.S.S.R. apologized to Finland for intrusion of a Soviet aircraft into Finland due to bad weather. New York Times, Dec. 15, 1960.

⁸ *Vozdushnyi Kodeks SSSR* (2d ed., 1936). Translation.

Union of S.S.R. and over the coastal maritime zone established by the laws of the Union of S.S.R.

66. The laws and regulations in force in the Union of S.S.R. extend to foreign civil aircraft, their crews and passengers in flight in the airspace of the Union of S.S.R.

(The failure of the United States to protest against the action of the Soviet authorities toward Powers and the plane he was flying provides additional evidence that national sovereignty in airspace is a rule of customary international law and that it applies to the Soviet Union.⁹)

But how far up does such sovereignty extend? Soviet law, like the legislation of other countries¹⁰ and the Chicago Convention, contains no definition of "airspace" or of the upward limit, if any, of national sovereignty. Many space vehicles launched by the United States Government have passed directly above Soviet territory at heights of more than 100 miles both during and after the International Geophysical Year without objection on the part of the Soviet Government; similarly, space vehicles launched by the Soviet Union have passed over the United States and many other nations, also without protest. Since the launching of Sputnik I in October, 1957, Soviet writers have been virtually unanimous in expressing the view that state sovereignty has or should have an upward limit and should not extend infinitely into space, but have not suggested any specific boundary between airspace which is under national sovereignty and outer space which is not.¹¹ In these circumstances, Powers, as an individual on trial before a Soviet court, might well have pleaded ignorance of the upward extent of Soviet sovereignty in extenuation of his guilt;¹² but the failure of the United States to rely on altitude in justification of the flight and to protest against the Soviet action in the U-2 incident suggests recognition that Soviet sovereignty extends upward to at least the altitude of the U-2 flights. Such recognition is implicit in President Kennedy's language in announcing his order against the resumption of U-2 flights: "Flights of American aircraft penetrating the air space of the Soviet Union have been suspended since May, 1960. I have ordered that they not

⁹ For a contrary view, see Beresford, "Surveillance Aircraft and Satellites: A Problem in International Law," 27 *Journal of Air Law and Commerce* 107, at 112 (1960).

¹⁰ Cf. for example, U. S. Federal Aviation Act of 1958, sec. 1108, 72 Stat. 798, 49 U.S.C. 1508.

¹¹ See, e.g., translations of articles by Zadorozhnyi and Galina in U. S. Senate, Committee on Aeronautical and Space Sciences, *Legal Problems of Space Exploration: A Symposium*, Sen. Doc. No. 26, 87th Cong., 1st Sess., at 1047, 1050 (1961); Kovalev and Cheprov, "Artificial Satellites and International Law," 1958 *Soviet Year Book of International Law* 128 (with English summary); Korovin, "International Status of Cosmic Space," *International Affairs* (Moscow), No. 1 (1959), p. 53; "Conquest of Outer Space and Some Problems of International Relations," *International Affairs* (Moscow), No. 11 (1959), p. 88; Osnitsky, "International Law Problems of the Conquest of Space," 1959 *Soviet Year Book of International Law* 51 (with English summary); Kovalev and Cheprov, "O Razrabotke Pravovykh Problem Kosmicheskogo Prostranstva," *Sovetskoye Gosudarstvo i Pravo*, No. 7 (1960), p. 130.

¹² But at the trial Powers made no such plea.

be resumed."¹³ It is also apparent, explicitly or by implication, in the remarks of representatives of five states other than the U.S.S.R. in the U.N. Security Council debates concerning the two incidents. These states include Ceylon, Ecuador, Poland, Tunisia and, somewhat less clearly, Argentina.¹⁴ The representatives of only three states (China, France and Italy) sought to minimize the importance of sovereignty in airspace by pointing to the launchings of space vehicles which pass over the territories of other states.¹⁵ Thus, if the United States and the U.S.S.R. are included, not less than seven out of the eleven members of the Security Council appear to have recognized that Soviet sovereignty extends upward at least to the altitude of the U-2 flights.

The U-2 incident—and particularly the absence of a United States protest against the shooting down of the plane—further suggests that in some circumstances no previous warning or order to land is required by international law before an intruding foreign aircraft is shot down, even if the intruder does not itself attack or is likely to attack. On most occasions of real or alleged intrusion, including the RB-47 incident, the Soviet Union has asserted that the intruder was ordered to land or to turn away before it was shot down, or that the intruder opened fire first.¹⁶ The ostensible Soviet practice—whether or not actually followed—in previous instances of “intrusion” was described by Soviet Foreign Minister Gromyko as follows: “Soviet fighter planes never opened fire on invading United States aircraft first, and only when such aircraft themselves opened fire were our airmen compelled to return their fire.”¹⁷ Following the U-2 and RB-47 incidents, however, this alleged policy of “restraint” on the part of the Soviet Union—if it ever existed in fact—was apparently given up. During the debate on the RB-47 incident, the Soviet representative stated:

The Soviet Government is known to have given the order to its armed forces to shoot down American military aircraft, and any other aircraft, forthwith in the event of their violation of the airspace of the Soviet Union . . .¹⁸

¹³ New York Times, Jan. 26, 1961. During the Presidential campaign of 1960, Senator Kennedy said that the U-2 flights “were not in accordance with international law.” *Ibid.*, Oct. 8, 1960. The U. S. Senate Committee on Foreign Relations, in its report on the events relating to the Summit Conference, made no attempt to defend the U-2 flights as having been conducted above the airspace subject to the sovereignty of the Soviet Union, but suggested that “the U-2 incident has pointed up the need for international agreement on the question of how high sovereignty extends skyward.” Events Relating to the Summit Conference, Sen. Rep. No. 1761, 86th Cong., 2d Sess., June 28, 1960, at p. 26; to the same effect, testimony of Secretary of State Herter, Senate Hearings, 1960, cited note 2 above, pp. 3-107. Senator Fulbright, chairman of the Senate committee, suggested in a speech that the U-2 flights violated Soviet sovereignty. 106 Cong. Rec. 14734-14737 (June 28, 1960).

¹⁴ U. N. Security Council, 15th Year, Official Records, 858th, 859th, 861st, 863rd and 883rd Meetings (May 24-27 and July 26, 1960), Docs. S/P.V. 858, 859, 861, 863, 883.

¹⁵ *Ibid.*, 858th Meeting (May 24, 1960), Doc. S/P.V.858.

¹⁶ Cf. Lissitzyn, “The Treatment of Aerial Intruders in Recent Practice and International Law,” 47 A.J.I.L. 559 (1953).

¹⁷ U.N. Security Council, 15th Year, Official Records, 857th Meeting (May 23, 1960), Doc. S/P.V.857.

¹⁸ *Ibid.*, 880th Meeting (July 22, 1960), Doc. S/P.V.880.

It thus appears that the Soviet Union does not recognize any duty, at least under the conditions of a "cold war," to give warning or an order to land or turn away to an aerial intruder before shooting him down.

In its complaint to the Security Council, the Soviet Union alleged that the U-2 flights were "aggressive acts" by the United States and offered a draft resolution to that effect.¹⁹ This draft resolution was rejected by a vote of 7 to 2 (Poland and U.S.S.R.), with 2 abstentions (Ceylon and Tunisia).²⁰ Instead, the Security Council, on May 27, 1960, adopted by 9 votes to 0, with 2 abstentions (Poland and U.S.S.R.),²¹ a resolution²² in which, *inter alia*, it expressed conviction "of the necessity to make every effort to restore and strengthen international good will and confidence, based on the established principles of international law," and appealed to all Member Governments "to respect each other's sovereignty, territorial integrity and political independence." In the course of the debate,²³ many representatives pointed out that the Security Council had to take into account the political aspects of the situation and not merely the legal merits of the dispute. In rebutting the Soviet charge of aggression, the United States cited Soviet secrecy, the danger of surprise attack, and the need to protect the non-Communist world against such attack. It also pointed to the numerous acts of espionage committed by Soviet agents in the United States and elsewhere. Nevertheless, it refrained from claiming a legal right to overfly the Soviet Union for reconnaissance purposes, and some representatives attached importance to the announcement of the United States that the U-2 flights over the U.S.S.R. had been discontinued. In these circumstances, the rejection by the Security Council of the Soviet charge against the United States does not warrant the drawing of any general legal conclusions, but it does suggest that deliberate intrusions of single unarmed aircraft for reconnaissance purposes need not be regarded in all cases as aggressive acts.

In the RB-47 incident, unlike the U-2 affair, the dispute between the United States and the Soviet Union was primarily about the facts. The Soviet Union alleged that the American plane, a United States Air Force patrol aircraft similar in type to a bomber, was shot down over Soviet territorial waters off the northern coast of the U.S.S.R. after it had deliberately intruded into Soviet airspace and disobeyed an order to land. The two surviving members of the crew were imprisoned in Soviet jails, apparently with a view to being brought to trial before a Soviet court, until January 1961, when they were released and returned to the United States. The United States denied that the plane had at any time been closer than thirty miles to the Soviet coast, denounced the attack on it by Soviet forces as illegal, and demanded the release of the two survivors. It asserted that the plane had been engaged in electromagnetic observations

¹⁹ U.N. Docs. S/4314 and S/4315; U.N. Security Council, 15th Year, Official Records, 857th Meeting (May 23, 1960), Doc. S/P.V.857.

²⁰ *Ibid.*, 860th Meeting (May 26, 1960), Doc. S/P.V.860.

²¹ *Ibid.*, 863rd Meeting (May 27, 1960), Doc. S/P.V.863.

²² U.N. Doc. S/4328.

²³ U.N. Security Council, 15th Year, Official Records, 857th to 863rd Meetings (May 23-27, 1960), Docs. S/P.V.857-863.

over the Barents Sea, and that a Soviet fighter had tried to force it to enter Soviet airspace before shooting it down over the high seas.²⁴

As in the U-2 affair, the Soviet Union complained to the Security Council of "aggressive acts" by the United States and offered a draft resolution condemning such acts.²⁵ This draft resolution failed of adoption by 2 votes (Poland and U.S.S.R.) to 9. A resolution proposed by the United States, recommending that the Soviet Union and the United States submit their differences arising out of the incident either to a fact-finding commission or to the International Court of Justice,²⁶ obtained 9 favorable votes, but the negative vote of the U.S.S.R., operating as a veto, prevented its adoption.²⁷

From the legal point of view, the most striking feature of the RB-47 incident is that none of the nations involved—the U.S.S.R., the United States, and the members of the U.N. Security Council which discussed the incident—either claimed or admitted the right of a state to shoot down a foreign aircraft over the high seas, even if it flies within close proximity of the state's territory and even if it is a military aircraft which may be engaged in military reconnaissance. In the course of the debates,²⁸ the representatives of several states, including the U.S.S.R., Argentina, Tunisia and Ceylon, suggested that flights close to the territorial sea of another country may be undesirable as possibly leading to incidents, but none asserted that this is a sufficient justification for shooting down the aircraft engaged in such flights. The representative of the United Kingdom expressly upheld the right to conduct such flights for reconnaissance purposes, and said that Soviet aircraft had engaged in such flights without being shot down. Most of the other representatives upheld the freedom of flight over the high seas without express reference to reconnaissance.

The 1960 debate was in many respects similar to another debate which took place in the Security Council in September, 1954, after an American patrol plane had been apparently shot down by the Soviets over the Sea of Japan. On that occasion, too, no participant in the debate asserted or admitted the right to shoot down foreign reconnaissance aircraft over the high seas, no matter how closely it approached to the territorial sea. Vyshinsky, the Soviet representative, stated:

Mr. Lodge said that the Soviet Union representative was apparently defending the right of the Soviet Union to shoot aircraft down over the high seas. If he had not made his speech in haste then I am sure Mr. Lodge would not have said that, for my whole argument on this ques-

²⁴ New York Times, July 13, 1960, Jan. 26, and March 4, 1961; 43 Dept. of State Bulletin 163-165, 209-212, 274-276 (1960); U.N. Security Council, 15th Year, Official Records, 880th to 883rd Meetings (July 22-26, 1960), Docs. S/P.V.880-883.

²⁵ U.N. Docs. S/4384, S/4385 and S/4406. ²⁶ U.N. Doc. S/4409/Rev.1.

²⁷ U.N. Security Council, 15th Year, Official Records, 883rd Meeting (July 26, 1960), Doc. S/P.V.888. Poland also voted against the U. S. draft resolution. The Soviet Union also vetoed a resolution proposed by Italy which would have expressed the hope that the International Committee of the Red Cross would be permitted to fulfill its tasks with respect to the members of the RB-47 crew.

²⁸ U.N. Security Council, 15th Year, Official Records, *loc. cit.* note 24 above.

tion was concentrated on proving that the incident involving the Soviet and United States aircraft occurred over Soviet territory and not over the high seas. It is therefore absurd to suggest that I could be defending the right of any State to shoot aircraft down over the high seas.

It is others who wish to defend this right. We are opposed to it. . . .²⁰

Occasional non-compliance in fact by the Soviet Union or other states with the principle of freedom of flight over the high seas does not weaken the legal force of the principle unless such non-compliance is claimed to be lawful.

Significantly, the existence or non-existence of publicly proclaimed Air Defense Identification Zones (ADIZ), such as have been established over the high seas off the United States and Canada,²⁰ does not appear to have been regarded as affecting the rights of a coastal state with respect to the freedom of flight over the high seas. In the debate on the RB-47 incident, only the Polish representative alluded to the existence of such zones off the United States, but even he refrained from suggesting that within such zones foreign aircraft could be lawfully shot down. The United States presented maps plainly showing that on several occasions in 1959 and 1960 Soviet military aircraft penetrated the Alaskan Coastal ADIZ and flew considerable distances within the zone. According to the uncontradicted statement of the American representative, no attempt was made by the United States forces to shoot down these aircraft. The Soviet Union does not appear to have ever publicly proclaimed any ADIZ's over the high seas.

That the Soviet Union purports to uphold the freedom of flight over the high seas was further made evident in February, 1961, after a Soviet transport plane carrying the Chairman of the Presidium of the Supreme Soviet and other Soviet officials to Morocco had been intercepted by a French fighter over the Mediterranean Sea some eighty miles off the coast of Algeria, within what the French apparently call "the French zone of responsibility" or "zone of identification."²¹ The French fighter fired some warning shots, apparently in the belief that the Soviet plane had deviated from its flight plan and was flying too close to Algeria. The French also alleged that the plane had failed to reply to the fighter's request for identification. The Soviet Government sharply protested against the French action. It asserted that the plane had established radio contact with Algiers and was on course, but added:

But first of all it is permissible to ask: Who gave the French authorities the right to engage in "identification" of other states' aircraft flying

²⁰ U.N. Security Council, 9th Year, Official Records, 679th and 680th Meetings (Sept. 10, 1954), Docs. S/P.V.679, 680. Freedom of flight over the high seas is affirmed in Art. 2 of the 1958 Geneva Convention on the High Seas, 52 A.J.I.L. 842 (1958); 38 Dept. of State Bulletin 1115 (1958).

²⁰ See U. S. Naval War College, *International Law Situation and Documents*, 1956, pp. 577-600; Murchison, *The Contiguous Air Space Zone in International Law* (1957). Cf. Brock, "Hot Pursuit and the Right of Pursuit," 13 JAG Journal 18 at 20 (1960); and Pender, "Jurisdictional Approaches to Maritime Environments: A Space Age Perspective," 15 *ibid.* 155 (1961).

²¹ See New York Times, Feb. 10-13, 1961; Pravda (Moscow), Feb. 11-13, 1961.

in airspace over the high seas? It should be well known to the French Government that the generally accepted norms of international law provide for the freedom of flight in the airspace over the high seas, and no state, if it does not wish to be a violator of international laws, has the right to limit this freedom and to dictate arbitrarily for the aircraft of other states any routes over international waters.³²

The French Government expressed regret over the incident.

The seemingly wide consensus, shared by the United States, the United Kingdom and the Soviet Union, as well as by smaller Powers, that a nation is not entitled to interfere with the movements of foreign aircraft (except, of course, in self-defense against an armed attack) over the high seas, even in a "contiguous zone" adjacent to its territorial sea, has interesting implications for the nascent law of outer space. If, as some have suggested, space beyond the airspace subject to national sovereignty should be regarded as analogous to the high seas, it would seem that subjacent states would not be entitled to interfere with the movements of foreign space vehicles in the space immediately above their national airspace on any theory of "contiguous zones." In this connection, it may be well to note that some Soviet writers, perhaps mindful of the reconnaissance potentialities of space vehicles, reject the analogy between outer space and the high seas.³³

OLIVER J. LISSITZYN

³² Pravda (Moscow), Feb. 12, 1961. Translation.

³³ See, e.g., the articles by Kovalev and Cheprov and by Osnitsky, cited note 11 above. Cf. also Zhukov, "Space Espionage Plans and International Law," International Affairs (Moscow), No. 10 (1960), p. 53.

NOTES AND COMMENTS

THE ACT OF STATE DOCTRINE IN THE LIGHT OF THE *SABBATINO* CASE

The purpose of this note is to consider an appropriate limitation on the use of the "Act of State Doctrine," particularly in the light of Judge Dimock's decision in *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (D.C., S.D.N.Y., 1961).¹ In that case Judge Dimock found that the Cuban nationalization decree in question purported to affect interests in sugar situated within Cuban territory on the decree's effective date, and that the sugar in question was within Cuban territory on that date. Moreover, it appears that the sugar was under the effective control of the Cuban Government after it was nationalized. Thus Judge Dimock was confronted with the act of state doctrine in determining whether he could pass judgment on the validity of that decree.

In passing on the validity of foreign taking² measures, municipal courts³ could, depending on the facts, refer to one or more of three possible standards: (1) the municipal law of the taking state, (2) the public policy of the forum, or (3) the rules of public⁴ international law.⁵ Our own municipal courts have consistently refused to apply standards (1) and (2) to foreign taking measures affecting property within the territorial jurisdiction of the taking state at the time of the taking and, thus, as to these two standards, have applied the act of state doctrine.⁶ This was the position taken by Judge Dimock in the *Sabbatino* case.

A Limitation on the Act of State Doctrine

Judge Dimock did, however, under a proper factual situation, apply the standard of international law and, in so doing, placed a limitation on the act of state doctrine. He stated:

The crucial question remains, however, whether this court can examine the validity of the Cuban act under international law and

¹ 55 A.J.I.L. 741 (1961). The record on appeal in this case was certified to the U. S. Court of Appeals for the Second Circuit on May 26, 1961.

² The term "taking" as used herein means a compulsory transfer to the state of property or rights not theretofore owned by the state through the exercise of state sovereignty. The significant fact is whether or not the "taking" is of such a nature as to justify a challenge to its legality either on the national or international level.

³ The traditional terms of art in public international law which denote the law, the judges and the courts of a particular sovereign state are "municipal law," "municipal judges" and "municipal courts," respectively. Some writers have used the terms "national law," "national judges" and "national courts." The traditional terms will be used herein. Where a sovereign state has a federal system, the term "municipal courts" includes both Federal and State courts.

⁴ The term "international law" as used herein means "public international law," as distinguished from "private international law" or "conflict of laws."

⁵ See Restatement, The Foreign Relations Law of the United States, § 28d (Tent. Draft No. 4, 1960).

⁶ *Ibid.*

refuse recognition to the act if it is in violation of international law. Apparently, no court in this country has passed on the question. See Restatement, Foreign Relations Law of the United States § 28d(2) and comment e. thereto (Tent. Draft No. 4, 1960); Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 843, 845, *supra*. . . . Foreign forums have evidenced some willingness to examine the validity of foreign acts under international law but by far the strongest support for such examination has come from legal commentators and text-writers. I hold that in the circumstances of the present action the law of the forum will not enforce the Cuban decree if it is violative of international law.

He then justified his position by pointing out that the act of state doctrine "has its source in our conflict of laws principles" and is thus a "self-imposed restraint." He suggested that the basic reason for the doctrine, namely, the respect for the sovereignty of each state within its own territory, vanishes "when the act of a foreign state violates not what may be our provincial notions of policy but rather the standards imposed by international law."⁷ He further pointed out that another reason for the doctrine, namely, the desire not to embarrass the Executive in its conduct of foreign relations, was not applicable in this case in the light of the fact that the Department of State had delivered a note to the Cuban Government "declaring the very nationalization law which plaintiff seeks to enforce to be in violation of international law."⁸ He concluded, under the circumstances of this case, that he should enforce international law. Appropriately, he then considered whether the Cuban nationalization decree violated international law, and found that it did on three grounds, namely, (1) the taking was avowedly in retaliation for acts of the United States Government and was totally unconnected with the subsequent use of the property being nationalized, (2) the taking was discriminatory, and (3) the nationalization measure failed to provide adequate compensation.

⁷ It might also be added that the municipal judge in refusing to recognize the law of a foreign state need not declare such law a nullity within that foreign state—such a declaration would be inconsistent with a recognition of the absolute sovereign right each state exercises within its own territory. Rather, the municipal judge need only refuse to recognize any rights arising out of that law, as to the subject matter of any action brought before him, on the grounds that such law, even though valid under the municipal law of the foreign state, is in violation of international law. In fact some commentators have gone so far as to suggest that a state which recognized any rights arising out of such a foreign law would, itself, be committing an international delinquency. This theory has not as yet been borne out by state practice. However, it is a logical conclusion and may develop as a state practice. See Mann, "International Delinquencies Before Municipal Courts," 70 Law Quarterly Review 181 (1954).

⁸ Another reason given by our U. S. Supreme Court in some of its earlier cases for justifying the application of the doctrine was the availability of the diplomatic remedy. See *U.S. v. Dieckman*, 92 U.S. 520 (1876); *Oetjen v. Central Leather Company*, 246 U.S. 297 (1918); and *Ricaud v. American Metal Company*, 246 U.S. 304 (1918). It has become apparent today that the diplomatic remedy is no longer adequate. Its ultimate technique, namely, the use of force, has been prohibited by the United Nations Charter which, at the same time, has failed to provide compulsory legal procedures. In the face of such a dilemma the municipal court may be the only effective remedy open to the claimant.

Thus, for the first time a court in the United States has been confronted squarely with the issue whether to extend the act of state doctrine so as to rule out an examination of the validity of an act of a foreign state under international law and has decided against such an extension. This decision will be most heartening to those international lawyers both in the United States and abroad who have supported the examination by municipal courts of the validity of acts of foreign states under international law.⁹

The Defense of Bona Fide Purchaser

In his decision Judge Dimock implied that, if the plaintiff had been a private litigant who had "acted in good faith reliance" on the Cuban nationalization decree, he might have had a harder case. The situation in which one of the parties to an action is a so-called *bona fide* purchaser for value from the taking state and the other party is the original owner from whom the property in question was taken presents the issue: Who should prevail, such purchaser (of, for example, the refined sugar or cut timber taken from the original owner by the taking state) or the original owner? The doctrine of *bona fides* concerns the problem of the legal effect of good faith, that is, ignorance with respect to the facts of the taking. The great number of modern taking situations (such as nationalization) normally involve extensive property rights and often become a matter of international concern. Accordingly, a purchaser of taken property from the taking state will usually find it difficult to prove that he did not know the facts of the taking. Where such a purchaser does know the facts of the taking, may he, nevertheless, rely in good faith on the taking measure, even though it may be in violation of international law? This is the situation apparently envisaged by Judge Dimock referred to above. In general, ignorance of the law is no excuse. Nevertheless, such purchasers will still plead as a defense their belief that the taking was not in violation of international law and hence would be recognized by municipal courts in other states. But this is exactly the legal problem which is at issue.¹⁰

Thus, the original owner may be able to strengthen his case by publish-

⁹ In addition to those commentators from the United States, Great Britain and Austria cited by Judge Dimock at footnote 7 of his decision, we might add the following: from Germany—Raape, *Internationales Privatrecht* 618-620 (1955); from Belgium—Van Hecke, "Confiscation, Expropriation and the Conflict of Laws," 4 *Int. Law Quarterly* 345 (1951); De Visscher, *Theory and Reality in Public International Law* 242 (1957); from The Netherlands—Adriaanse, *Confiscation in Private International Law* 149 (1956); Kollewijn, "Nationalization Without Compensation and the Transfer of Property," 6 *Nederlands Tijdschrift voor Internationaal Recht* 140 (1959); Verzijl, "The Relevance of Public and of Private International Law Respectively for the Solution of Problems Arising from Nationalization of Enterprises," 19 *Zeitschrift für Öffentliches Recht und Völkerrecht* 531 (1958); from Switzerland—Niederer, *Der Völkerrechtliche Schutz des Privateigentums* 52 (1953); from New Zealand—O'Connell, "A Critique of the Iranian Oil Litigation," 4 *Int. and Comp. Law Quarterly* 267 (1955); and Sweden—Hjerner, *The General Approach to Foreign Confiscations* 186 (1958). This pamphlet reveals, in the author's opinion, one of the most realistic and convincing approaches written on the general problem of confiscations.

¹⁰ Hjerner, *op. cit.* 201.

ing a notice of the taking throughout the international commercial world, which would appropriately describe the property taken and would suggest that in the opinion of the owner the taking was in violation of international law. This was, in fact, done by the Anglo-Iranian Oil Company in the Anglo-Iranian oil dispute.¹¹ In addition, the company indicated that it would initiate legal action against any purchasers of the taken property¹² with the purpose of recovering the same—and it did so.¹³ It is interesting to note that, after those notices were published, the Department of State received many inquiries relative to its position in regard to purchases of oil from Iran by American firms. In response to these inquiries the Department of State stated:

Under present circumstances, this Government believes that the decision whether or not such purchases of oil from Iran should be made must be left to such individuals or firms as may be considering them, and to be determined upon their own judgment. The legal risks involved are matters to be resolved by the individuals or firms concerned.¹⁴

As a result, there were few, if any, purchases of such oil by American firms.¹⁵ Thus, such notices not only point up a possible legal risk¹⁶ (and thus deter purchasers) but may constitute, by their very nature, a legally significant factor in weakening, if not barring altogether, the defense of *bona fides*. Accordingly, where a prospective purchaser from the taking state (or its agents) may properly be held to have notice that a particular taking measure may be in violation of international law, he could not, in the words of Judge Dimock, act "in good faith reliance" on such taking measure. Under the circumstances it would behoove the prospective purchaser to get a legal opinion as to the validity of the taking measure under

¹¹ See The Wall Street Journal (New York ed.), Sept. 14, 1951, p. 3. Such publication may be sufficient, but it is suggested that the United Nations might provide some sort of medium which, upon agreement by all Member States, would be the official publication for the purpose of, among other things, legal notices of this nature. Notice in such an official publication could then be held to bar purchasers from the taking state from raising the defense of *bona fides*.

¹² Such a legal action might be brought to recover (or claim rights in) a product of the taken property. For example, if a manufacturing establishment is taken, the original owner may try to recover some of the products of such establishment which are exported from the taking state.

¹³ See Anglo-Iranian Oil Co., Ltd. v. Jaffrate et al., 1953 Int. Law Rep. 316; Anglo-Iranian Oil Co., Ltd. v. Idemitsu Kosan Kabushiki, *ibid.* 304; Anglo-Iranian Oil Co., Ltd. v. S.U.P.O.R. (Venice), 1955 *ibid.* 19; Anglo-Iranian Oil Co., Ltd. v. S.U.P.O.R. (Rome), *ibid.* 23.

¹⁴ Dept. of State Press Release No. 906, Dec. 6, 1952.

¹⁵ In this connection one commentator stated: "The existence of international law has been affirmed, not only by the conduct of the United Kingdom, but also by the behavior of those individuals, nations and companies that have been deterred from buying Iranian oil because of doubts on the legal ownership of the oil. They were deterred solely by AIOC's threat of legal action, and not by that of the British Government." Ford, *The Anglo-Iranian Oil Dispute of 1951-1952*, p. 228 (1954).

¹⁶ Certainly the legal risk is greater in the Cuban situation, where the violation of international law is more clear-cut, than it was in the Iranian situation.

international law, or await a judicial decision settling the question before he acted.

The Important Role of the Municipal Court

The immediate advantage of review by municipal courts is that the alien injured by a taking in violation of international law would have an effective remedy. The more important advantage over the years would be the judicial confirmation and refinement of the relevant rules of international law. Such confirmation and refinement is of vital importance today to the capital-exporting states. The only effective judicial machinery generally available to this end is the municipal court.

A reformulation of the relevant rules away from the stringent requirements of prompt, effective and adequate compensation is being pressed on many fronts. To the extent that this reformulation defines "prompt" to mean in installments and subsequent to the taking, providing there is adequate legal machinery established at the time of the taking to insure full compensation within a reasonable time, it may be acceptable to most states, including the capital-exporting states. However, to the extent that the reformulation condones partial or no compensation, or mere promises of compensation, without implementing legal machinery to enforce such promises, it will undoubtedly be unacceptable to the capital-exporting states.

Under the circumstances it is most unfortunate that the municipal courts of the United States, the leading capital-exporting state in the world, have failed to play a rôle in this reformulation. Unfortunately, their silence has been interpreted by some to be a manifestation of a lack of judicial concern as to these matters of vital importance to United States private investment abroad. Worse than that, this silence has indirectly buttressed arguments advanced by Eastern European Socialist countries in support of programs of nationalization without compensation.¹⁷ Dr. Jessup has recently expressed strong feelings with regard to this dilemma as follows:

. . . the courts of the United States could make a more significant contribution to the development of the rule of law among nations, which, as we have seen, is standard policy of the United States as well as a desideratum in the minds of all men of good will. If the courts of the leading power of the free world support by their silence or by their jurisprudential verbiage the notion that there is no international law, they certainly lend no support to the Department of State when it seeks to protect American interests abroad. If it were only realized, their present attitude contributes the greatest possible embarrassment to the Executive in its conduct of foreign policy.

At this point we shall again be told that foreign policy is based on power, and international law, like morality, has no place in the deadly

¹⁷ For example, Professor Bystricky of Czechoslovakia recently buttressed his argument for recognizing the international validity of *any* measures of nationalization by a state within its territory (even those without compensation) on the grounds that such a view was in accordance with American judicial practice, citing *Ricaud v. American Metal Company*, above. See Sarraute, "The Proceedings of the Commission of Private International Law at the 6th Congress of the International Association of Democratic Lawyers," 83 *Journal du Droit International (Clunet)* 886-888 (1956).

serious business of the cold war. We can only refer back to what we have already said and observe that the Supreme Court does not make any contribution to national objectives by declining to be an accomplice in the plot to bolster the international rule of law. The court is certainly not insensitive to domestic, economic and social forces; why should it be insensitive to the national interest abroad? . . .¹⁸

More recently, in an address before the American Society of International Law, the then Legal Adviser of the Department of State, in discussing the means of strengthening the force and influence of the rules of international law dealing with the requirements of compensation, stated: "No possible way of strengthening the rule of law in this vital field should be left unexplored. . . ."¹⁹ It cannot be over-emphasized that municipal courts could and should play a rôle in this strengthening of the "rule of law." It is hoped that judges in the United States will heed this plea, as did Judge Dimock in the *Sabbatino* case, when he stated:

Courts of this country have the obligation to respect and enforce international law not only by virtue of this country's status and membership in the community of nations but also because international law is a part of the law of the United States, see *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320; U.S. Const. Art. 1, § 8, cl. 10; 1 Oppenheim, *International Law* 41-2 (8th ed., Lauterpacht, 1955), *supra*. The conclusion is inescapable that the decree in the present action is subject to examination in the light of the principles of international law. The effective method to promote adherence to the standards imposed by international law is to enforce these standards in municipal courts, particularly in view of the poverty and inadequacy of international remedies.

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OBSERVATIONS ON THE PRACTICE OF TERRITORIAL ASYLUM IN THE UNITED STATES

For episodes of melodramatic derring-do, calculated opportunism, and high human courage, there is little in contemporary literature to compare with the practice of political asylum. Consider the first ten months of 1961, which have included the quixotic cruise of the *Santa Maria*, the disastrous anti-Castro expedition to Bahía de Cochinos with the C.I.A. as *deus ex machina*, and the establishment of the "wall" between East and West Berlin in an effort to end once for all the "'mute plebiscite'" of the hundreds of thousands of persons who have fled from the Soviet Zone of Germany to political asylum in West Germany.¹ Given prevailing uncer-

¹⁸ Jessup, *The Use of International Law* 141 (1959). Dr. Jessup is now a Judge of the International Court of Justice.

¹⁹ Becker, "Just Compensation in Expropriation Cases: Decline and Partial Recovery," 1959 Proceedings, American Society of International Law 336; 40 Dept. of State Bulletin 784 (1959).

¹ C. G. Fenwick, "'Piracy' in the Caribbean," 55 A.J.I.L. 426-428 (1961); Henrique Galvão, *Santa Maria: My Crusade for Portugal* (1961); the cruise of the *Santa Maria* has also made the paperbacks, see H. A. Zeiger, *The Seizing of the Santa Maria* (Popular Library, 1961, 35¢); the incident is covered in the New York Times, Jan. 24-Feb. 3, 1961 (city ed. unless otherwise indicated). The anti-Castro expedition is re-

tainty about the legal regulation of asylum which is governed by custom and, to a limited extent, mainly in Latin America, by treaty, together with the difficulty of disentangling politics from law and both from humanitarianism as the *rationale* for grants of political asylum, it is little wonder that the practice is controversial. It is possible to argue that political asylum has no independent status in international law, for the practice can be readily subsumed under such headings as "jurisdiction of states" or "diplomatic and consular privileges and immunities"; however, as the Latin Americans have long pointed out in their publications, international conferences, and international agreements, there is a discernible practice of political asylum which impinges upon other areas of international law, but which is characterized by distinctive problems requiring special treatment by states which indulge in it.

Of the several kinds of political asylum, *i.e.*, territorial asylum, diplomatic and consular asylum, asylum in public ships and aircraft, asylum to prisoners of war and to war criminals, the most common form is territorial asylum. The grant and maintenance of territorial asylum is not simply a matter to be filed under the rubrics of admission, residence, and expulsion of aliens. At the very least, the status of "political refugee" dramatizes the ordinary conditions under which an alien enters, remains in, or departs from a country; that it also creates special responsibilities for the asylum state has been demonstrated in the recent experience of the United States with territorial asylum.

A. RESPONSIBILITY OF THE ASYLUM STATE FOR PROTECTION OF POLITICAL REFUGEES

The terms "political refugee," "political offender," or "political fugitive" are rather flexible in usage. United States statutes are not specific as to the meaning of "political offender" or "political offense." The legislation on extradition does not define either term; nor does the Immigration and Nationality Act of 1952, in exempting a person convicted of "a purely political offense" from the class of aliens ineligible for admission into the United States.² Similarly, American extradition treaties except the offense of a "political character" from the category of extraditable crimes,³ but they contribute some dimension to the definition by denying extradition in cases in which "the person sought would have to appear, in the requesting State, before an extraordinary tribunal or court,"⁴ or by

ported in the New York Times, April 16-21, 1961. More than 150,000 persons sought asylum in West Germany between Jan. 1 and Aug. 13, 1961. Press and Information Office of the German Federal Government, 9 The Bulletin, Nos. 2-31 (Jan. 10-Aug. 15, 1961); No. 28 (July 25, 1961), p. 3; New York Times, Aug. 14, 1961, p. 1, col. 8, p. 6, col. 1.

² 18 U.S.C., sec. 3185; 8 U.S.C., sec. 1182 (a) (9) (10).

³ *E.g.*, Art. 3, U. S.-Mexico Extradition Treaty, Feb. 22, 1899, 31 Stat. 1818; Art. 6, U. S.-Union of South Africa Extradition Treaty, Dec. 18, 1947, T.I.A.S., No. 2243.

⁴ Art. V, sec. 4, U. S.-Brazil Extradition Treaty, Jan. 13, 1961, Sen. Exec. H, 87th Cong., 1st Sess., 44 Dept. of State Bulletin 164, 166 (1961). This is the most recent extradition treaty concluded by the United States.

specifying extradition for offenses of an ostensibly political character, such as anarchism, and those in which the common crime element is predominant.⁵ The political refugee is the person who flees his country because of persecution for political, religious, or ethnic reasons; dissatisfaction with existing conditions in a country in which political opposition is not tolerated; participation in an unsuccessful attempt to oust a regime from power; or participation in an unsuccessful defense of a regime in power against a *coup d'état*—indeed, political asylum is a concomitant of the political process in some countries. The term includes also the people abroad, diplomatic and other government personnel, alien crewmen, students, teachers, businessmen, not to speak of athletes and ballet dancers, who seek asylum rather than return to their homelands. Where emigration and high treason are equated, as in Article 1 of the 1958 Soviet Law on Criminal Liability for State Crimes,⁶ the scope of the term must be acknowledged as being very comprehensive. In the last analysis, however, whatever the motivation for seeking asylum, the grant of political asylum is still the right of the asylum state, as extradition treaties often stipulate in terms, and courts and the political branch of government make clear in practice.⁷

Once admitted into the United States, the political refugee is assured of the constitutional guarantees of due process of law and equal protection of the laws. He has access to the courts in order to protect his interests against private persons as well as government agents of the asylum state and even of his former state of allegiance.⁸ Whether he also enjoys the

⁵ *Ibid.*, Art. V, sec. 6(b), sec. 6(a); Art. 4, U. S.-Belgium Extradition Treaty, Oct. 26, 1901, 32 Stat. 1894. Cf. Cassels, J.: "The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered." *Regina v. Governor of Brixton Prison, Ex parte Koleczynski*, [1955] 2 Weekly L. R. 116, 121.

⁶ Text published in *Pravda and Izvestia*, Dec. 26, 1958, trans. 11 Current Digest of the Soviet Press 3 (No. 5, March 11, 1959) (cited henceforth as Current Digest).

⁷ *E.g.* Art. V, sec. 6(c), U. S.-Brazil Extradition Treaty, note 4 above; Art. 6, U. S.-Bolivia Extradition Treaty, April 21, 1900, 32 Stat. 1857; *Re Ezeta et al.*, 62 F. 984 (1894); *Artukovic v. Boyle*, 140 F. Supp. 245 (1956), *affd.* as *Karadzole v. Artukovic*, 247 F. 2d 198 (1957). Eight years of litigation concerning the request of Yugoslavia for the extradition of Artukovic for war crimes was terminated by dismissal of the request, *U. S. ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383 (1959), see note by Cardozo, 55 A.J.I.L. 127 (1951); *Ramos v. Diaz*, 179 F. Supp. 459 (1959).

⁸ 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 729-731 (2d rev. ed., 1945); 2 *ibid.* 871 ff.; 3 Hackworth, *Digest of International Law* 562-565 (1942); *Harisiades v. Shaughnessy*, 342 U.S. 580, 585-586 (1952), rehearing denied, 343 U.S. 936 (1952); *Arcaya v. Paéz*, 145 F. Supp. 464 (1956). See R. R. Wilson, *United States Commercial Treaties and International Law* 209 ff. (1960). Admission of Hungarian refugees under parole, pursuant to Public Law 85-559, 72 Stat. 419, has been construed as providing these people "greater rights than an ordinary parole" in regard to deportation proceedings, *Licea-Gomez v. Pilliod*, 193 F. Supp. 577 (1960), explaining *Application of Paktorovics*, 156 F. Supp. 813 (1957), reversed 260 F. 2d 610 (1958). A would-be political refugee is entitled to a hearing as to his eligibility for asylum under 8 U.S.C., sec. 1253 (h) "not [as] a matter of favor but of right," *U. S. ex rel. Szlajmer v. Esperdy*, 188 F. Supp. 491, 499-500 (1960). On the rights of aliens in general, see, *e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), *Galvan v. Press*, 347 U.S. 522 (1954).

privileges normally accruing to nationals of his former state, *e.g.*, under treaties of establishment between that state and the asylum state or with regard to suits against the United States Government which are conditioned by reciprocity, is another matter, for the political refugee would seem to be in an anomalous position in regard to allegiance, having the status of a quasi-stateless person, unless for reasons of policy, his former state chooses to continue to regard him as a national.⁹

The repatriation campaigns conducted by the Soviet Union and other Communist-bloc states with particular vigor between 1955 and 1958 demonstrated something of the scope of the asylum state's responsibility toward the political refugee. Repatriation was designed to serve the objectives of the domestic and foreign policies of the Communist states: the former by discouraging continuous "massive redefection" from these states, and the latter by undermining the morale of political refugees abroad, preventing or vitiating their efforts to organize effective anti-Soviet-bloc movements abroad, using the refugees for the political purposes of the Soviet bloc abroad, and by nullifying the propaganda value to the Western states of the continuous defection of Soviet-bloc nationals.¹⁰ It was a "subtle" attempt to achieve what East Germany has undertaken to do by force since mid-August, 1961. The Soviet-bloc states adopted two approaches to repatriation. The "soft" approach included the offer of amnesty to refugee nationals, the establishment, supposedly by ex-refugees, of the Committee for Return to the Motherland, which functioned in East Berlin as a center for the dissemination of propaganda by press and radio, and even an appeal to religion, as in March, 1957, when the Synod of the Russian Orthodox Church invited all believers "now away from their country" to return to Soviet Russia.¹¹ In addition, there were visits to refugees by the personnel of Soviet-bloc embassies and consulates in asylum states, the private trans-

⁹ *E.g.*, 15 Stat. 243; 36 Stat. 1135, 1136; 43 Stat. 1112, 1113; 62 Stat. 975, 976. See George Ginsburgs, "The Soviet Union and the Problem of Refugees and Displaced Persons 1917-1956," 51 A.J.I.L. 325-361 (1957); Paul Weis, "The Convention Relating to the Status of Stateless Persons," 10 Int. and Comp. L. Q. 255-264 (1961).

¹⁰ See F. R. Barnett, "America's Strategic Weakness—Redefection," 15 The Russian Review 29, 30 (1956). See the explanation offered for redefection by Hugo Hanke, sometime Premier of the Polish Government in Exile, reported in Pravda and Izvestia, Sept. 13, 1955, trans. 7 Current Digest 13 (No. 37, Oct. 26, 1955). Some 2,600,000 persons have fled the Soviet Zone of Germany for asylum in West Germany in the period between 1949 and July, 1961. Press and Information Office of the German Federal Government, 9 The Bulletin 3 (No. 28, July 25, 1961).

¹¹ The Soviet decree of Sept. 17, 1955, in Art. 7 offered amnesty to Soviet nationals who had collaborated with Germany during the second World War and also to those nationals who had been "drawn into anti-Soviet activities in the postwar period, if they have exonerated themselves by subsequent patriotic activity for the benefit of the Motherland or have given themselves up and confessed." Izvestia, Sept. 18, 1955, trans. 7 Current Digest 3 (No. 35, Oct. 12, 1955). International Rescue Committee, Special Memorandum on Soviet and Satellite Repatriation Campaign 7-11 (c. 1956); Senate Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act, Hearings on the Scope of Soviet Activity in the United States, 84th Cong., 2d Sess., Pt. 24, at 1258 (1956) (cited henceforth as Hearings on Soviet Activity); New York Times, March 23, 1957, p. 3, col. 8.

mission of letters purportedly from family and friends at home, and offers of improved working and living conditions in the home state.¹² The techniques of the "hard" approach included blackmail, *e.g.*, the threat to reveal to the Immigration and Naturalization Service information leading to the deportation of the refugees, some of whom were easily vulnerable to this threat because they had only been able to enter the United States by "willfully misrepresenting a material fact" of name, national origin, or previous political or criminal record; systematic terrorization; and, upon occasion, resort to violence.¹³ It also became evident in the course of investigation of the repatriation campaigns that capitulation by the political refugee to the blandishments of the "soft" or "hard" approaches could subject him to pressure from another source. His fellow refugees, suspicious of the motivation for his decision to redefect and regarding him as a coward, an informer, or a secret agent of the Soviet bloc, might attempt coercive measures against him.¹⁴

Repeated complaints about the harassment of refugees in this country by agents of the Soviet-bloc states brought the repatriation campaigns to the attention of the Senate Judiciary Committee's Internal Security Subcommittee, whose investigations, together with publicity from other sources, drew public attention to this side of the refugee problem. The experience of the United States with the repatriation campaigns made it apparent that, apart from the ordinary protection afforded under law to citizen and alien alike, the political refugee needed additional protection against his state of origin. This additional responsibility has been assumed in some measure by executive agencies of the Federal Government. The Immigration and Naturalization Service will request special protection for refugees by Federal or local authorities if the need is brought to its attention, and will inquire whether a refugee is departing from the country voluntarily. But the problem here is whether the refugee, hampered by language barriers, lack of knowledge of governmental institutions in this country, and by fear of reprisals, will seek protection through government agencies. The non-governmental organizations, such as the International Rescue Committee, which sponsor refugees in this country and which usually continue in an advisory capacity to them until they have been integrated into the community, have helped to protect their clientele by bringing

¹² Hearings on Soviet Activity, Pt. 24, at 1257-1260 (1956); *ibid.*, 85th Cong., 1st Sess., Pt. 70, at 4326-4327 (1957).

¹³ *Ibid.*, 84th Cong., 2d Sess., Pt. 25, at 1337, 1344 (1956); Pt. 24, at 1256, 1261-1265 (1956); Pt. 17, at 904-907 (1956). See 8 U.S.C., sec. 1182 (a)(19). Senate Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act, Report, May 24, 1956, 84th Cong., 2d Sess., p. 3 (cited henceforth as Report). On the problem of misrepresentation under 8 U.S.C., sec. 1182 (a)(19), see *Landon v. Clarke*, 239 F. 2d 631 (1956) and *Calvillo v. Robinson*, 271 F. 2d 249 (1959).

¹⁴ *E.g.*, testimony in the case of Alexei Chwostow, who sought to return to Soviet Russia with his minor child, born in the United States, indicated that fear was the principal motive for his redefection—fear for the safety of relatives in Russia and for his own safety if he stayed in the United States in the face of threats of reprisals from Soviet officials as well as Russian refugees here. Hearings on Soviet Activity, Pt. 33, at 1792-1795 (1956).

evidence of pressure on refugees to the attention of appropriate public authorities. The matter of access of diplomatic and consular officials to refugee nationals is another aspect of the problem of whether the political refugee who has voluntarily dissociated himself from his state of origin continues to be a national of that state if it so chooses. Although the historical attachment of the United States to the right of expatriation provides one answer, the Department of State provided another by expelling a member of the staff of the Soviet Embassy at Washington and declaring *personae non gratae* certain members of the Soviet Delegation to the United Nations for exerting pressure upon refugees.¹⁵

The recent influx of Cuban political refugees, which by July, 1961, had reached some 65,700 persons,¹⁶ has reinforced these problems and added others. In fact, in respect of the Cuban refugees, the rôle of the United States as an asylum state is more complex than it has been with respect to refugees from other countries for two reasons: as the "country of first asylum" the United States has had to face the necessity of providing immediate economic assistance to these people, and because of its geographical proximity to Cuba, the United States has also had to face the problem of its own involvement in the inevitable attempts by the refugees to oust the incumbent Cuban regime from power.

During the past year the Federal Government has joined State and local authorities, especially in Florida where the bulk of the refugees is to be found, and the non-governmental organizations which work with them, in providing programs of emergency relief and economic and social rehabilitation for the refugees as well as in encouraging them to settle elsewhere in the United States.¹⁷ While no Cuban repatriation campaign seems to have been in progress, it has been necessary to provide protection to refugees against harassment by Cuban officials, *e.g.*, in May, 1960, a Federal Grand Jury in Miami indicted an American national and a Cuban consular employee for acting as foreign agents without registering with the Attorney General and for spying upon opponents of the Castro regime in Miami.¹⁸ In several instances the Department of State has requested the departure of Cuban consular personnel from the country on grounds of their engaging in "highly improper activities" here.¹⁹

¹⁵ Report 3, 12-19. Department of Justice, Board of Immigration Appeals, Int. Dec. No. 953 (Sept. 19, 1958), Interim Decisions of the Board of Immigration Appeals 4-5; 34 Dept. of State Bulletin 765 (1956); 36 *ibid.* 719 (1957).

¹⁶ House of Representatives Committee on the Judiciary, Hearing before Subcommittee No. 1 on Migration and Refugee Assistance, 87th Cong., 1st Sess., at 41 (1961). About 1750 Cubans come into the United States each week, *ibid.* 10.

¹⁷ Statement by Secretary of Health, Education, and Welfare Ribicoff, *ibid.* 10, 13, 7-9, 13-14. The presence of so many refugees in Miami has, in spite of ameliorative efforts, continued to cause economic and social strain. New York Times, Oct. 21, 1961, p. 5, col. 1.

¹⁸ 43 Dept. of State Bulletin 79, 86 (1960).

¹⁹ *Ibid.* 7, 475 (1960). See Senate Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act, Hearings on the Fair Play for Cuba Committee, 87th Cong., 1st Sess. (1961).

B. RESPONSIBILITY OF THE ASYLUM STATE FOR CONTROL OF POLITICAL REFUGEES

The very fact of granting political asylum to refugees is indicative of a degree of sympathy on the part of the asylum state with the predicament, if not with the cause, of these people. The degree of sympathy increases in proportion to the geographical proximity of the asylum state to the state from which the refugees are fleeing and to the extent to which the asylum state's relations with the former state of the refugees are adversely affected by the latter state's policies. The situation has been graphically illustrated by the progressive deterioration of relations between the United States and Cuba, which culminated in the severance of diplomatic relations on January 3, 1961, and in American support to the anti-Castro expedition to Bahía de Cochinos in April.²⁰ In this context the United States has faced and is facing some difficult problems relative to control of the activities of Cuban political refugees in the country. The temptation to use the United States as a base of operations for the training of expeditionary forces, the supplying of rebel forces in Cuba, the mounting of an expedition against Cuba, or the harassment of the Castro regime by propaganda, whether by dropping pamphlets from airplanes or by radio broadcasting, is not inhibited by the refugee's awareness of his responsibility to respect the laws of the asylum state.²¹

An obvious control over the activities of individual political refugees is provided in the immigration laws. A would-be refugee may be denied admission into the country, or he may be admitted into or allowed to remain in the country conditionally.²² Of the 65,700 Cubans in the United States on July 31, 1961 (excluding permanent residents), 37,200 persons have been classified as non-immigrants in a "technically deportable status," that is, after the expiration of their non-immigrant visas and upon a plea of reluctance to return to Cuba for political reasons, deportation proceedings have either not been instituted or else have not been concluded against them, and they have been "authorized voluntary departure without time limit."²³ Another 4500 Cubans are classified as "parolees," persons who come to the United States with the intention of seeking political asylum and who may arrive with or without appropriate documentation; these people are allowed to enter the country on a temporary basis, but are

²⁰ 44 Dept. of State Bulletin 108 (1961).

²¹ *Of. Carlisle v. United States*, 83 U.S. 147 (1872). New York Times, Dec. 18, 1960, p. 29, col. 4; March 23, 1961, p. 1, col. 4.

²² *E.g.*, New York Times, Aug. 31, 1960, p. 8, col. 2. Former Cuban President Carlos Prío Socarrás was granted asylum in 1956 after he agreed to refrain from "any activity which may be in any way prejudicial to the public interest of this country or in violation of its laws." *Ibid.* May 10, 1956, p. 1, col. 1; June 9, 1956, p. 10, col. 2.

²³ House of Representatives Committee on the Judiciary, Hearing before Subcommittee No. 1 on Migration and Refugee Assistance, 87th Cong., 1st Sess., at 41-43 (1961). Some 24,000 persons in non-immigrant status are classified as "potential refugees," in that they will probably ask asylum upon the expiration of their non-immigrant visas. *Ibid.*

not considered to have been "admitted" under the immigration laws.²⁴ Following the severance of diplomatic relations with Cuba on January 3, 1961, the Department of State announced the imposition of restrictions upon travel to Cuba by American nationals and by aliens admitted into the United States as permanent residents.²⁵

The neutrality laws of the United States make it a criminal offense to raise a hostile military or naval expedition in this country or to equip and despatch ships for the purpose of attacking a state with which the United States maintains friendly or, at least, neutral relations.²⁶ This legislation has been invoked against Cuban refugees and their American sympathizers upon a number of occasions since 1952, when Cuba's current political difficulties were initiated by Colonel Batista's *golpe de estado* against President Carlos Prío Socarrás. In December, 1953, for example, Señor Prío Socarrás and several Cuban and American nationals were arraigned on charges of conspiring to ship arms and ammunition to Cuba in violation of the neutrality laws, a charge to which Prío Socarrás subsequently pleaded *nolo contendere* and was fined \$9,000.²⁷ More recently, former Senator Rolando Masferrer was indicted for violating the neutrality laws by attempting to lead a military expedition against Cuba in October, 1960.²⁸ Federal arms controls, revised in 1953, have been strengthened during the past three years.²⁹ Following Cuban charges in 1959 that American airports were being used as bases for attacks on Cuba, flight controls were made more stringent.³⁰ Three successful attempts between May and August, 1961, to "hijack" American commercial aircraft and to force them to fly with crew and passengers to Havana, resulted in the

²⁴ *Ibid.* 41, 43; 8 U.S.C., sec. 1182 (d) (5). Both "technically deportable" non-immigrants and parolees are subject to "screening" processes which include checking their bona fides with government agencies, such as the F.B.I. and C.I.A., as well as with representatives of the Cuban community in Miami. Hearing before Subcommittee No. 1 on Migration and Refugee Assistance, 87th Cong., 1st Sess., at 44, 45-49 (1961). See *New York Times*, Oct. 22, 1961, p. 1, col. 6; Oct. 24, 1961, p. 1, col. 6.

²⁵ 26 Fed. Reg. 482, 492 (Jan. 19, 1961); 45 Dept. of State Bulletin 108 (1961).

²⁶ 18 U.S.C., secs. 960, 962; 22 U.S.C., sec. 461; 8 U.S.C., sec. 1251 (a) (17). See *U. S. v. Arjona*, 120 U. S. 479, 484 (1887); 2 Hackworth, Digest of International Law 336-342.

²⁷ *New York Times*, Dec. 15, 1953, p. 26, col. 3; Sept. 7, 1954, p. 12, col. 3.

²⁸ *Ibid.*, April 11, 1961, p. 1, col. 8; May 2, 1961, p. 2, col. 5. The indictment against him was dismissed on Nov. 9. *Ibid.*, Nov. 11, 1961, p. 26, col. 1 (late city ed.). At the time of the anti-Castro invasion in April, 1961, there were reports of open recruiting of Cuban nationals in Miami and New York and their training in the United States and Central America for a period of nine months previous to the expedition. *Ibid.*, April 19, 1961, p. 14, col. 6; April 20, 1961, p. 10, col. 4; April 7, 1961, p. 1, col. 4 (late city ed.).

²⁹ Arms controls are provided under 22 U.S.C., sec. 401, amended by Exec. Order 10863 (Feb. 18, 1960), 25 Fed. Reg. (Pt. I) 1507 (Feb. 20, 1960); 22 U.S.C., sec. 1934; 22 C.F.R., Pts. 121-126. See *Rubin v. U.S.*, 289 F. 2d 195 (1961).

³⁰ SR-437, Nov. 4, 1959, 14 C.F.R., Pt. 620. Amendments to Pt. 620, Security Control of Air Traffic, adopted between 1955 and 1959, are consolidated in 25 Fed. Reg. 339 (Jan. 15, 1960); revised, Oct. 10, 1961, 26 Fed. Reg. 9709 (Oct. 14, 1961). See 43 Dept. of State Bulletin 79 (1960).

adoption of administrative and legislative measures designed to prevent the recurrence of such escapades.³¹ The Federal Aviation Agency adopted a special regulation prohibiting unauthorized persons from interfering with the operation or flight plans of a commercial plane and from carrying firearms on board; the Department of Justice issued orders for border patrolmen to accompany certain commercial flights.³² Congress, in turn, added the crime of "aircraft piracy" to the roster of Federal criminal offenses, defining the term as "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce," and making this offense punishable by imprisonment of not less than twenty years or by death.³³

One of the hazards which a country of first asylum must face is the coalescence of political refugees into quasi-political movements or into would-be governments-in-exile. In the United States the anti-Fidelistas comprise a half-dozen or more groups whose common cause is the ouster of the Castro regime. To them are opposed such pro-Castro groups as the 26th of July Movement and the Fair Play for Cuba Committee. The common cause of the anti-Fidelistas has not sufficed to override divisive factors which prevent their uniting as a single movement, although efforts have been made in this direction and a resolution even introduced in the House of Representatives calling for the recognition of a Cuban government-in-exile.³⁴ The extent to which these political refugees can freely express their ideas or organize into formal groups without embarrassing or interfering with the foreign relations of the United States poses a nice question of control. The principle seems to be that, so long as individual refugees or their organizations do not violate specific laws, their activities will not be interfered with by the authorities.³⁵ Where violations of law occur, such as the fracas in September, 1960, between apparently rival Cuban groups, during Castro's visit to the United Nations, which resulted

³¹ New York Times, May 2, 1961, p. 1, col. 6 (late city ed.); July 26, 1961, p. 1, col. 5; Aug. 10, 1961, p. 1, cols. 4, 5, p. 6, col. 8. A fourth attempt at "hijacking" on Aug. 3 was unsuccessful. *Ibid.*, Aug. 4, 1961, p. 1, col. 2. See 45 Dept. of State Bulletin 334-336, 407-408 (1961).

³² SR-448, July 28, 1961, 26 Fed. Reg. 7009 (Aug. 4, 1961); Order No. 247-61, *ibid.* (Pt. I) 7614 (Aug. 16, 1961).

³³ Public Law 87-197, 75 Stat. 466, 49 U.S.C., sec. 1472 (i)-(n). See H.R. Rep. No. 958, 87th Cong., 1st Sess.; S. Rep. No. 694, 87th Cong., 1st Sess.; House of Representatives Committee on Interstate and Foreign Commerce, Hearings before a Subcommittee on Crimes on Board Aircraft, 87th Cong., 1st Sess. (1961). Cf. Cuban treatment of the same type of offense, e.g., New York Times, Dec. 11, 1960, p. 34, col. 3. The Federal Communications Commission was reported in April, 1961, as exerting control over illicit radio broadcasts to Cuba from the south Florida area. *Ibid.*, April 12, 1961, p. 15, col. 1.

³⁴ *Ibid.*, April 29, 1961, p. 3, col. 1; July 26, 1961, p. 3, col. 5; Aug. 11, 1961, p. 2, col. 4. On July 10, 1961, Representative Victor L. Anfuso (D., N.Y.), introduced H.R. Con.Res. 345, "expressing the sense of the Congress that the United States should recognize a Cuban government-in-exile." 107 Cong. Rec. 11379; A5093-5094 (July 10, 1961). Cf. New York Times, Jan. 14, 1961, p. 15, col. 4; March 23, 1961, p. 32 M, col. 1.

³⁵ This point was made by American Ambassador Bonsal to President Dorticos of Cuba in October, 1959. 41 Dept. of State Bulletin 715, 716 (1959).

in the death of an innocent bystander, who happened to be a Venezuelan national, prompt measures are taken for the prosecution of the responsible parties.³⁶

The grant of territorial asylum to political refugees in itself should not require justification in an era in which the existence of such international acts as the Convention on the Status of Refugees or the European Convention on Human Rights demonstrates an increasing awareness of the international responsibility of states for the protection of individuals. But whether or not the grant of territorial asylum is regarded as emanating from behind the bastion of the concept of state sovereignty, in practical terms, as the recent experience of the United States would indicate, that bastion is no barrier to various difficulties arising from that grant. Apart from the necessity of providing for the welfare of the refugees, a task which in the state of first asylum may become burdensome economically, socially, and politically, in localities, such as Miami, which bear the brunt of mass arrivals, the asylum state must face the necessity of assuring the refugees not only the ordinary protection due aliens but also special protection, where external or internal pressures are placed upon them because of their particular condition, as well as a possible duty of forbearance in view of the fact that the refugees, as quasi-stateless persons, have no protection in event of abridgment of their rights or interests by the asylum state. It is one thing, however, to accept the responsibility of looking after the welfare of political refugees, and another to assert controls over their activities when these are directed against a state with which the asylum state is in strained relations, as in the case of the United States and Cuba. This dilemma has been graphically illustrated by the rôle of certain Federal Government agencies in the April anti-Castro expedition, together with the evident confusion in the decision-making process entailed by an involvement which cut across two Administrations. It also appears in a tendency toward permissive enforcement of the corpus of neutrality legislation. An examination of the ramifications of the anti-Castro expedition is outside the scope of this note; however, that affair points up the problem which, for the asylum state, is the difficult task of charting a course between sympathy for the cause of the political refugees, when that sympathy moves in the direction of overt support to their irredentist activities, and awareness of its national and international responsibility for the maintenance of law and order.

ALONA E. EVANS
Wellesley College

³⁶ New York Times, Sept. 22, 1960, p. 1, col. 6; Oct. 15, 1960, p. 24, col. 1; March 24, 1961, p. 3, col. 5; April 8, 1961, p. 2, col. 6 (late city ed.); June 30, 1961, p. 8, col. 5 (late city ed.). In March, 1961, a clash between anti-Fidelista supporters and members of the Fair Play for Cuba Committee was reported in Los Angeles. *Ibid.*, March 7, 1961, p. 29, col. 8.

PUBLICATION AND DECLASSIFICATION OF RECORDS

The President of the United States has directed the prompter clearance and publication of *Foreign Relations* and a continuing review of Government files with a view to automatic declassification of papers, with specific exceptions, 12 years after issuance. Executive Order 10964, September 20, 1961 (26 Fed. Reg. 8932), which prescribes the downgrading procedure within departments, does not control access to declassified files for research. This order modifies Executive Order 10501, entitled "Safeguarding Official Information in the Interests of the Defense of the United States" (18 Fed. Reg. 7049), which was amended with respect to historical files by Executive Order 10816, May 7, 1959 (24 Fed. Reg. 3777). In addition to the housekeeping economies effected by downgrading files, the new order should result in a freer access to them, at least for specific purposes.

The directive concerning *Foreign Relations* was issued on September 7, 1961, in the form of a letter from the President to the agencies concerned.¹ It defines goals of clearance and publication of that series which have been advocated by the Department of State's Advisory Committee on the Publication of "Foreign Relations of the United States" and this Society's Committee on Department of State Publications. The letter follows:

THE PRESIDENT TO THE SECRETARY OF STATE, THE SECRETARY OF DEFENSE,
THE SECRETARY OF THE TREASURY AND THE ADMINISTRATOR OF THE
GENERAL SERVICES ADMINISTRATION

September 6, 1961

Dear Mr. Secretary:

The effectiveness of democracy as a form of government depends on an informed and intelligent citizenry. Nowhere is the making of choices more important than in foreign affairs; nowhere does government have a more imperative duty to make available as swiftly as possible all the facts required for intelligent decision.

As many of these facts as possible should be made public on a current basis. But, because of the inherent need for security in the current conduct of foreign affairs, it is obviously not possible to make full immediate disclosure of diplomatic papers. However, delay in such disclosure must be kept to a minimum.

It has long been a pride of our government that we have made the historical record of our diplomacy available more promptly than any other nation in the world. The Department of State has the responsibility within the Executive Branch for putting out this permanent record in the series "Foreign Relations of the United States." The discharge of this responsibility requires the active collaboration of all departments and agencies of our Government in the submission and clearance of papers necessary for the completeness of this record.

¹ House of Representatives Committee on Government Operations, Subcommittee on Availability of Information from Federal Departments and Agencies, in its Eleventh Report, pp. 126-136 (H. Rep. 1257, 87th Cong., 1st Sess.), prints its correspondence with the Department of State on this matter.

In recent years the publication of the "Foreign Relations" series has fallen farther and farther behind currency. The lag has now reached approximately twenty years. I regard this as unfortunate and undesirable. It is the policy of this Administration to unfold the historical record as fast and as fully as is consistent with national security and with friendly relations with foreign nations.

Accordingly I herewith request all departments, agencies and libraries of the Government to collaborate actively and fully with the Department of State in its efforts to prepare and publish the record of our diplomacy. In my view, any official should have a clear and precise case involving the national interest before seeking to withhold from publication documents or papers fifteen or more years old.

Sincerely yours,

/s/ JOHN F. KENNEDY

Executive Order 10964 basically revises Executive Order 10501, which, at its issuance on November 5, 1953, changed the reason for classification from "security" to "protection of the defense interest" and in its terms and in amendments limited the agencies which may originate classified material (Sec. 2). The new executive order proceeds from the now recognized fact that secrecy is a transitory condition for a document, and so provides for designated "Persons to be responsible for continuing review of such classified information or material" which in general shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified 12 years after date of issuance. Excepted from the automatic declassification procedure is information or material (1) originated by foreign governments or international organizations (over which the Government has no jurisdiction), provided for by the Atomic Energy Act (68 Stat. 942) and other statutes, or requiring intelligence or cryptographic handling; (2) extremely sensitive items on an individual basis; (3) items classified for an indefinite period, not to be automatically declassified. Authorities shall indicate an earlier date on which items may be downgraded or declassified, a specified event which has that effect, including removal of attachments or enclosures.

Executive Order 10964 affects most heavily the practices of the Department of Defense. It affects the Department of State, in whose records members of the American Society of International Law are chiefly interested, particularly in the injunction of automatic declassification 12 years after date of issuance. That is eight years less than the present spread between the date of the material and the date of publication of *Foreign Relations*, and three years less than the target date set by the President for that series. All files covering the years 1789-1929 are open in the National Archives; "limited access" is given for research to files through 1941 by the Historical Office "in conjunction with the appropriate policy officer"; access to files from 1942 to the present is granted to specific persons "as liberally as possible" on the recommendation of the Committee on the Use of Departmental Records, in accordance with Regula-

tions and Procedures 185.4, all notes, records or manuscripts being subject to clearance. The Executive Order advances this latter practice in principle from 1944 to 1949. The Historical Office at present is compiling the *Foreign Relations* for 1945, which makes it four years behind the prescribed automatic declassification of the Executive Order. The temporary postponement, August 9, 1957, of the special series on relations with China, which affected 14 volumes covering the years 1943-1949, is canceled by the Executive Order, unless some reason can be found to bring some or all of their contents within its exceptions to automatic declassification. The President's letter of September 6, in its impact on the Department of Defense, ought to hasten the publication of the records of the Churchill-Roosevelt conferences at Washington, Casablanca and Quebec, 1941-1944. It looks almost as if the United States Government is approaching the conclusion that responsible publication of the records of foreign relations is a contribution to their effective conduct.

DENYS P. MYERS

PARKER SCHOOL SUMMER PROGRAM IN FOREIGN LAW

The Parker School of Foreign and Comparative Law will hold its sixth Summer Program in Foreign Law on the Columbia University campus during the period from June 4 through June 29, 1962. As in the past, enrollment will be limited to approximately twenty selected lawyers. During the past five years one hundred and two persons have attended the program. They have come from all parts of the United States and from eight foreign countries. Fifty-eight of the participants were associated with corporations and forty-four with law firms.

The program is designed to give the participants a method of approach to the legal problems faced by Americans doing business abroad, and to familiarize them with the more important of these problems. The program will be essentially the same as in former years. Matters discussed will include (a) problems of language; (b) problems of dealing with foreign governmental authorities and of analyzing the legal climate of a foreign country; (c) organization of the Bench and Bar in civil law countries; (d) contracts, the relation of commercial law to civil law, and codification in civil law systems; (e) the legal status of American business enterprise in civil law systems, the rôle of treaties and executive agreements in foreign internal law, protection extended by the United States Government to persons and property abroad, effectiveness of choice-of-law provisions; (f) bases of taxation; (g) bases of jurisdiction of civil law courts over aliens and non-residents, execution of foreign judgments, arbitration, and effectiveness of choice-of-forum provisions; (h) United States and European antitrust laws, and monetary, import, tax and labor controls; (i) economic integration and unification of law in civil law countries, the impact of the Common Market and of the Coal and Steel Community upon American business enterprise.

The Faculty in 1961 consisted of five persons. The leading rôle was played by Henry P. de Vries, who is a professor of law at the Columbia

Law School and a foreign law consultant. He was assisted by Professor Georges van Hecke of the Louvain University Law School, Belgium; Professor Pierre Lalive of the University of Geneva Law School; Edgar E. Barton, Esq., a partner in the New York City law firm of White & Case; and by Robert Anthoine, who is professor of taxation at the Columbia Law School and a tax consultant. It is anticipated that most of these men will be on the Faculty in 1962.

Further information about the program can be obtained from the Director of the Parker School of Foreign and Comparative Law, Columbia University, Law School Building, New York 27, New York.

WILLIS L. M. REESE
Director

INSTITUTE OF AIR AND SPACE LAW

The Institute of Air and Space Law of McGill University has announced that its twelfth session will commence in September, 1962. The length of the course is two years. In the first year the student attends lectures and writes a term paper within the field of the Institute's work. The second year need not be intra-mural and is devoted to the writing of a thesis on a selected subject. The course leads to the degree of Master of Laws (LL.M.) and is designed to teach graduate students the principles of air law and the latest theories of a rule of law for outer space.

Applicants for admission must hold a law degree of high standing from an approved law school in any part of the world, or must have been admitted to the practice of law. Students should have a good working knowledge of the English language. A knowledge of French is also desirable.

Further information may be obtained by writing to the Director of the Institute, 3644 Pearl Street, Montreal 2, Quebec, Canada.

E. H. F.

THE FLETCHER SCHOOL OF LAW AND DIPLOMACY

The Fletcher School of Law and Diplomacy of Tufts University, which is a graduate school of international affairs administered with the co-operation of Harvard University, has announced its program of study for 1962-1963. This program is a comprehensive one of advanced study in the fields of international law, organization, diplomacy, world politics, international economics, trade and finance. It is designed to provide graduate training for careers in the State Department and diplomatic service of the United States, in the United Nations and other international agencies, in international business, finance and journalism, and in teaching and research in international affairs. The course of study leads to the degrees of Master of Arts, Master of Arts in Law and Diplomacy and Doctor of Philosophy.

Candidates for admission must have an A.B. degree or its equivalent granted prior to September 15, 1962, and should have a broad undergraduate preparation in the liberal arts, preferably with substantial train-

ing in economics, government and history, and a reading knowledge of one modern foreign language. Admission is limited to a maximum of sixty students, approximately fifty men and ten women. In order to receive full consideration, applications and supporting data should be submitted by February 15, 1962.

FELLOWSHIPS

Several scholarships and fellowships are offered to men and women possessing outstanding personal and academic qualifications. These grants vary in amount from tuition scholarships to fellowships bearing stipends up to \$3000. There are available a number of fellowships for graduate study in international economics and foreign relations, which are part of the program of the Clayton Center of International Economic Affairs, established in honor of William L. Clayton, first Under Secretary of State for Economic Affairs. Candidates must have an A.B. degree, proficiency in one modern foreign language, a broad background in the liberal arts, with substantial undergraduate training in economics or business administration.

The North Atlantic Region of the Soroptimist Federation of the Americas, an international organization of business and professional women, has made available for 1962-1963 a special national fellowship of \$2500, open to women students only, for the purpose of encouraging them to prepare for careers in public service in international affairs. Candidates must have completed the A.B. degree or its equivalent, or expect to receive the degree before September 1, 1962. They should be thoroughly prepared in the social sciences and in at least one modern foreign language. Weight will be given to any previous graduate study or practical experience in government or business.

Requests for further information, admission, scholarship and fellowship forms should be addressed to The Registrar, The Fletcher School of Law and Diplomacy, Tufts University, Medford 55, Massachusetts. Scholarship and fellowship applications must be received by February 15, 1962.

ELEANOR H. FINCH

ANNUAL MEETING OF THE SOCIETY

The 56th Annual Meeting of the Society will be held at the Statler Hilton Hotel in Washington, D. C., from April 26 to 28, 1962. The tentative program has been announced. The meeting will begin on Thursday afternoon, April 26, with two simultaneous sessions, one devoted to the subject of Disarmament, and the other to Conflict of Laws. On Thursday evening, President Arthur H. Dean will address the Society, and it is anticipated that there will be another distinguished speaker that evening.

On Friday morning, April 27, the Society will hold its business meeting for the election of officers for the coming year as well as the transaction of other necessary business.

On Friday afternoon, April 27, one session will be devoted to the "International Aviation Policy of the United States." The other session will

consider the subject of "Enhancing the Effectiveness of the International Law Commission and the Legal Committee of the General Assembly."

The Society, in a departure from its customary order of procedure, will hold its annual dinner on Friday evening, April 27, which will be immediately preceded by a reception.

On Saturday morning, April 28, a session will be devoted to "International Monetary Policy." It is anticipated that another session will take the form of a student moot on a question of international law, in which law school students will argue a case before a bench of three senior members of the Society.

The names of the participants in the program will be announced later, and a printed program will go out to the members some time in advance of the meeting.

Professor Richard R. Baxter, of the Harvard Law School, is Chairman of the Committee on Annual Meeting. Other members of the Committee include: Messrs. Richard N. Gardner, Monroe Leigh, Stephen M. Schwebel and John R. Stevenson.

The program promises to be a most interesting one, and out-of-town members who are planning to attend the meeting are urged to make hotel reservations as soon as possible. As announced in the October, 1961, JOURNAL, the Statler Hilton Hotel has set aside a block of rooms for members attending the meeting.

ELEANOR H. FINCH

FORD FOUNDATION GRANT

As announced in the Society's letter No. 8 to members, the Society has received from the Ford Foundation a grant of \$500,000 to support the Society's expanding program of studies and research on foreign investment and economic development, space activities, federalism, and disarmament; activities to strengthen and improve the teaching of international law; and regional and local meetings. The grant will be paid in annual installments over a period of five years, and will be expended for staff, research, travel, research and secretarial assistance, and advisory group meetings and conferences.

The studies and research will be made with the assistance of expert advisory and consulting groups. In the field of foreign investment, international and local legal problems will be considered in the political and economic setting of selected countries or geographic areas in Asia, Africa and Latin America. Studies and discussions on the legal aspects of space activities will include consideration of the scientific, technological, political and economic factors involved in international regulation, control and joint management of certain kinds of space activities. The advantages and disadvantages of a federal or confederal structure of government for international dealings and for internal development will be studied with particular attention to the problems of new nations. With respect to disarmament, attention will be concentrated on the international machinery

necessary to enforce disarmament or arms-control measures and to settle international disputes in conditions of disarmament or arms reductions.

In the field of teaching of international law, the Society's activities will include surveys of present courses, methods and materials, seminars on selected problems of teaching, and a clearing house of information and materials.

The new program of studies and research made possible by the grant will enable the Society to make a larger contribution to the solution of the pressing international problems of today by providing the opportunity for individual research, for group discussions and meetings, and for the publication of their results.

RESEARCH FELLOWSHIPS IN LEGAL ASPECTS OF SPACE ACTIVITY

Under the study programs financed by the Ford Foundation grant, noted above, the American Society of International Law is offering a small number of research fellowships for studies of the legal aspects of space activities. Preference will be given to proposals for studying legal and organizational problems in relation to scientific and technological developments.

Applicants granted research fellowships will have the benefit of consultations with the Society's Advisory Group on the Legal Aspects of Space Activities, composed of legal scholars, government officials, and practicing lawyers active in this field. It is expected that most scholars will pursue their studies at their own universities or other institutions. In certain cases it may be possible to arrange temporary office space in Washington, D. C., for persons whose work would benefit from access to government officials and public documents available in Washington.

Eligibility is not restricted to present members of academic faculties, but preference will be given to individuals whose background indicates an ability to make a significant new contribution to knowledge and thought.

The stipends, ranging in amount from \$2,500 to \$10,000, will vary with the age and experience of the applicant and the nature and duration of the study he undertakes. Funds may be requested for maintenance in lieu of other earnings and research expenses for full-time or part-time research. It is expected that the fellowships will in most cases supplement funds provided by the applicant's own institution. Partial support from other sources will also be welcomed if available on terms that do not restrict the scholar's freedom to pursue his own research or affect the Society's option to publish the manuscript with full credit to the author.

Completed applications received by March 15, 1962, will be reviewed by the Advisory Group. Fellowship awards will be announced about April 15, 1962. Application forms and further information may be obtained from: Study Program—Space Activities, American Society of International Law, 2223 Massachusetts Avenue, N.W., Washington 8, D. C.

E. H. F.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

BY ERNEST L. KERLEY *

INTERNATIONAL CLAIMS

Cuban exchange controls—deprivation of rights of ownership—discrimination

On March 1, 1961, the Department of State issued a memorandum explaining in a general way the views of the Department concerning Cuban exchange controls which affect accounts of American nationals in Cuban financial institutions:

For some months, the Cuban Government and authorities have limited purchases of dollar exchange to the detriment of many American exporters. The United States Government has from time to time urged the Cuban Government to remove the restrictions and will continue to seek a solution of the problem. The Department is not, however, able to predict when and in what manner the matter will be settled.

As a general rule, a limitation on the purchase of dollar exchange does not constitute a legal ground for an international claim against the Cuban Government, as it is generally accepted in international law and practice that a state has the right to regulate foreign exchange. The right to regulate does not, however, include the right to discriminate against nationals of a particular country or to deprive an owner of an account of all rights of ownership. The Department of State would not, however, be in a position to take up a claim on the ground of discrimination or deprivation of rights without proof, preferably, documentary evidence which it could submit or bring to the attention of the Cuban Government.

If an American national receives discriminatory treatment or is deprived of rights of ownership and brings the matter to the Department's attention, the Department will give the matter careful consideration with a view to presenting a claim to the Cuban Government or taking such other action as appears appropriate.

Debts owed to American nationals by private parties and concerns in Cuba—exhaustion of local remedies—denial of justice

On March 1, 1961, the Department of State issued a memorandum explaining in a general way the views of the Department concerning amounts owed American nationals by private persons and business concerns in Cuba:

* The material for this section has been prepared by a committee consisting of Miss Sylvia Nilsen, Mr. Thomas Huang, Mr. Gordon Christenson, Mr. Richard Bilder, Mr. Herbert Reis and Mr. Stanley Cohen, under the chairmanship of Mr. Kerley.

For some months, American nationals have had difficulty in obtaining payment of amounts owed by private parties in Cuba. While the Department is sympathetic and desires to render all possible assistance, it would not be justified in making representations to the Cuban Government because of the private nature of debts. Creditors must resort in the first instance to available procedures in Cuba for collection.

A legal basis for an international claim against the Cuban Government or for representations by this Government to the Cuban Government would not arise unless an American national attempted to collect a debt by exhausting the legal remedies provided by Cuban law and sustained a denial of justice, as that term is understood in international law, such as denial or unwarranted obstruction of access to Cuban courts, gross deficiency or delay in judicial processes, manifestly unjust judgment or an atmosphere of hostility or prejudice which would make it futile to attempt to exhaust legal remedies. The Department of State would not, however, be in a position to take up a claim or make representations to the Cuban Government on any of the foregoing bases without proof, preferably, documentary evidence which it could submit or bring to the attention of the Cuban Government. Unsupported general statements about such matters would not as a rule have sufficient evidentiary value to warrant action.

If an American national attempts to collect a debt from a private party and sustains a denial of justice and brings the matter to the Department's attention, the Department will give it careful consideration with a view to presenting a claim to the Cuban Government or taking such other action as appears appropriate.

Nationalization, intervention or other taking of property of American nationals by the Cuban Government or authorities—exhaustion of local remedies—denial of justice—filing of claims

On March 1, 1961, the Department of State issued a memorandum explaining in a general way the views of the Department concerning claims based upon nationalization, intervention or other taking of property of American nationals by the Cuban Government or authorities:

Since 1959, the Cuban Government and authorities have nationalized, intervened and otherwise taken millions of dollars' worth of property of American nationals. The United States Government has vigorously protested such takings and urged the Cuban Government either to return the property or pay prompt, adequate and effective compensation. Thus far, the Cuban Government has not returned properties or been willing to make an agreement for compensation.

The Department is unable to predict when and in what manner it will be possible to settle this problem. In the past the Department has settled similar problems (1) by submitting individual claims through the diplomatic channel to the foreign government concerned and obtaining restitution or compensation; (2) by obtaining a lump sum in settlement of all claims, with the amount paid distributed by an agency of the United States Government; or (3) by an agreement submitting all claims to an international arbitral tribunal for adjudication.

Since the United States Government has not obtained agreement with Cuba for restitution, payment of a lump sum or for international arbitration, the only possibility at present would be for the United

States Government formally to espouse through the diplomatic channel individual claims of American nationals. While the Department can give no assurance that claims it espouses would be paid by the Cuban Government, it is ready to receive and consider for presentation any claim which is properly prepared and documented and is valid from an international legal standpoint.

The Department does not use forms for claims against foreign governments but has memoranda explaining how such claims should be prepared and documented. Its memorandum of March 1, 1961, on the preparation of claims for loss of or damage to property is attached.¹ In addition to the evidence which is mentioned in that memorandum, evidence should also be submitted showing that the American national exhausted such legal remedies as were available in Cuba and in the process sustained a denial of justice, as that term is understood in international law, or that the laws of Cuba do not provide a remedy or, if provided, that it would be futile to attempt to exhaust such remedy. The requirement for exhaustion of legal remedies is based upon the generally accepted rule of international law that international responsibility may not be invoked as regards reparation for losses or damages sustained by a foreigner until after exhaustion of the remedies available under local law. This, of course, does not mean that "legal remedies" must be exhausted if there are none to exhaust or if the procurement of justice would be impossible.

Each American national must decide whether to prepare a claim now, either with a view to its presentation through the diplomatic channel when ready, or in order that it will be ready in the event that a claims settlement with Cuba is effected at a later time. Each American national must also decide whether to "exhaust legal remedies" in Cuba, either with a view to obtaining restitution or adequate compensation or documentary evidence which could be used to show that justice could not be obtained by judicial proceedings. Generally, unsupported assertions to the effect that it would be useless to exhaust or attempt to exhaust legal remedies would, of course, have less evidentiary value than a court decree or other documentary evidence demonstrating the futility of exhausting or attempting to exhaust legal remedies.

An American national who does not wish to prepare a claim now may, if desired, submit a description of the claim to the Department for its records. The description should include, at least, the facts mentioned in paragraph "First" of the attached memorandum.²

¹ Not printed here. It is furnished by the Department of State on request.

² That paragraph reads: "Claim should be prepared in form of sworn statement, *in triplicate*. It should contain in narrative form a clear chronological statement of the essential facts relating to:

- "a. Citizenship of claimant or claimants.
- b. Full description of the property in question and its exact location when loss occurred.
- c. Time and manner of acquisition of claimant's ownership of the property or other interest therein.
- d. The action taken against the property which is considered as giving rise to a claim against a foreign government.
- e. Identification of persons, officials, agency, or forces taking such action and dates the action was taken.
- f. The nature and amount of damage resulting from action complained of."

CONSULS

Taxation—real property—treaty provisions—Finland

The New York State Board of Equalization and Assessment requested an opinion of the Department on the taxable status of real property located in Pelham, which is owned by the Government of Finland and occupied by its Consul General. In a letter to the Counsel of the State Board, dated August 29, 1961, the Department noted that no evidence had been presented that the property had been used for any purpose other than as an official residence of the Consul General of Finland. The Department was therefore of the view that the property should be exempt from taxation inasmuch as property owned by a foreign government and used exclusively as a residence of its consular officers for carrying on consular functions is property used for governmental purposes within the meaning of Article XXI of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Finland, Treaty Series, No. 868.

Right to communicate with prisoners—treaty provisions—United Kingdom

The British Government advanced the position that the requirement in Paragraph 1 of Article 16 of the Consular Convention between the United States and the United Kingdom, T.I.A.S., No. 2494, according to which the local authorities are to notify a consular officer whenever one of his nationals is, *inter alia*, "detained in custody," is intended to cover the situation of persons transferred from one consular jurisdiction to another to serve their terms of imprisonment, or who, while serving a sentence, are transferred from an institution in one consular district to an institution in another district.

In a letter to the British Embassy, dated August 28, 1961, the Department rejected the interpretation of the British Government. The Department was of the view that the requirement in Paragraph 1 of Article 16 cited by the British Government applies only to persons arrested and confined awaiting trial, or otherwise detained in connection with a contemplated trial or hearing. It considered that the categories of persons described by the British Government more properly fell within the provisions of Paragraph 2 of Article 16 and that the obligations set forth under Paragraph 1 do not apply to persons covered by Paragraph 2, since those persons will have had a hearing on the merits and will have been convicted and sentenced to serve a term of imprisonment.

TREATIES

Territorial scope of application—Trust Territory of the Pacific Islands

The Assistant Director General of the International Labor Office inquired whether the United States Government desired to communicate formal Declarations under Article 35 of the Constitution of the International Labor Organization accepting the obligations of the Officers' Com-

petency Certificates Convention, 1934 (No. 53) in respect of the Trust Territory of the Pacific Islands.

In a note, dated June 6, 1961, Ambassador Graham A. Martin informed the Director General of the International Labor Office as follows:

I have the honor to inform you that the United States Government considers Convention No. 53 applicable to the Trust Territory of the Pacific Islands by virtue of the understanding contained in the United States instrument of ratification of that Convention registered in 1938. That understanding reads in part:

“... the provisions of this Convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this Government reserves its decision.”

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When the Trust Territory of the Pacific Islands came under the jurisdiction of the United States in 1947, the treaties and agreements applicable generally to territories under the jurisdiction of the United States were considered by this Government to become applicable to the Trust Territory without necessity of a declaration to that effect in any given case.

INTERNATIONAL ORGANIZATIONS

International Law Commission—nomination of Herbert W. Briggs

The Department of State issued the following statement to the press on June 29, 1961:

The Secretary of State has nominated Professor Herbert W. Briggs of Cornell University as a candidate for election to the International Law Commission of the United Nations. Professor Briggs is a past President of the American Society of International Law, Editor-in-Chief of the *American Journal of International Law*, and one of this country's most distinguished authorities in the field of international law. The Department is certain that Professor Briggs will make an outstanding contribution to the work of the International Law Commission, and views his nomination as evidence of the increased importance which the Department attaches to the work of the Commission.

The International Law Commission is a group of scholars working together under United Nations auspices to promote the progressive development of international law. Its twenty-one members are elected for five-year terms by the General Assembly of the United Nations from a list of candidates nominated by member States. The members of the Commission serve in an individual capacity rather than as representatives of the States of which they are nationals. The next election of members of the International Law Commission will take place during the Sixteenth Session of the General Assembly which is to begin in September of this year.³

Professor Briggs was born in Wilmington, Delaware, on May 14, 1900. He received his undergraduate degree from the University of West Virginia and his doctorate from Johns Hopkins University.

³ Professor Briggs was elected a member of the Commission by the U.N. General Assembly on Nov. 28, 1961.

Professor Briggs has taught at Johns Hopkins University, Oberlin College, the United States Naval War College, the Academy of International Law at the Hague, the Universities of Istanbul and Ankara, the University of Copenhagen and at Cornell University, where he holds the Goldwin Smith professorship in international law. He was elected to the presidency of the American Society of International Law for 1959-1960 and has been Editor-in-Chief of the Society's *American Journal of International Law* since 1955.

Among Professor Briggs' widely known works are *The Doctrine of Continuous Voyage*, 1926; *The Law of Nations*, 1938; and *The Progressive Development of International Law*, 1947. (Press Release No. 457, June 29, 1961; 45 *Dept. of State Bulletin* 131 (1961)).

JUDICIAL DECISIONS

BY COVEY OLIVER

Of the Board of Editors

European Convention on Human Rights—Powers of Commission on Human Rights—Articles 28, 29, 31 and 44 of Convention—submission of Commission Report to Applicant—Rule 76 of Rules of Procedure of Commission—admissibility of written observations of the Applicant

LAWLESS CASE (PRELIMINARY OBJECTIONS AND QUESTIONS OF PROCEDURE).

European Court of Human Rights.¹ Judgment of November 14, 1960.²

Gerard Richard Lawless, an Irish laborer, admittedly a member of the outlawed Irish Republican Army, had been arrested in September, 1956, and charged with unlawful possession of firearms under the Firearms Act, 1935, and under Offences against the State Act, 1939. He was tried and acquitted of the charge. He was arrested again in May, 1957, under the 1939 Act, on suspicion of engaging in unlawful activities. A sketch map for an attack on certain frontier posts between the Irish Republic and Northern Ireland was found on him bearing the inscription "Infiltrate, annihilate and destroy." In a search of his house, the police found a manuscript document on guerrilla warfare containing, among others, the following statements:

"The resistance movement is the armed vanguard of the Irish people fighting for the freedom of Ireland. The strength of the movement consists in the popular patriotic character of the movement. The basic mission of local resistance units are the destruction of enemy installations and establishments, that is TA halls, special huts, BA recruiting offices, border huts, depots, etc.

"Attacks against enemy aerodromes and the destruction of aircraft hangars, depots of bombs and fuel, the killing of key flying personnel and mechanics, the killing or capture of high-ranking enemy officers and high officials of the enemy's colonial Government and traitors to our country in their pay, that is British officers, police agents, touts, judges, high members of the Quisling party, etc."

Lawless was charged with (1) possession of incriminating documents and (2) membership in an unlawful organization, the IRA, in violation of the 1939 Act. He was tried and convicted on the first charge, but acquitted on the second. He served a sentence of one month, and was released from prison on about the 16th of June, 1957. He was arrested again on July 11, 1957, by a security officer as he was about to embark on a ship for

¹ Composed of President R. Cassin, Judges G. Maridakis, E. Rodenbourg, R. McGonigal, *ex officio*, G. Balladore Pallieri, E. Arnalds, and K. F. Arik; P. Modinos, Registrar.

² Statement of facts and excerpted English text prepared by Eleanor H. Finch.

England, and was detained for 24 hours in a Dublin police station, under Section 30 of the 1939 Act, as being a suspected member of an unlawful organization.

On July 12, the Chief Superintendent of Police acting under the 1939 Act, ordered Lawless to be detained for a further 24 hours. Before the expiration of this period Lawless was transferred to a military prison and was detained in accordance with an order issued on July 12, 1957, by the Minister of Justice under a 1940 Act amending the 1939 Act, giving Ministers of State special powers of detention without trial whenever the government issues a proclamation declaring that such powers are necessary to secure the preservation of public peace and order and that this part of the Act should come into force immediately. The pertinent provisions of the Act read:

Section 4

(1) Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section.

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(3) Every person arrested under the next preceding subsection of this section shall be detained in a prison or other place prescribed in that behalf by regulations made under this Part of this Act until this Part of this Act ceases to be in force or until he is released under the subsequent provisions of this Part of this Act, whichever first happens.

The 1940 Act further provided that a person detained under Section 4 should, as soon as possible after his arrival at the place of detention or prison, be furnished with a copy of the warrant issued and of the provisions of the Act providing for appeal by detained or arrested persons to a Commission made up of a commissioned officer of the Defense Forces, a barrister or solicitor, and a judge. The 1940 Act provided that, upon a finding by the Detention Commission that no reasonable grounds exist for the detention of a person, he shall be released.

Due to the renewed activities of the IRA in 1954, 1956, and the early part of 1957, the Irish Government had issued a Proclamation on July 5, 1957, bringing into force on July 8, 1957, the special powers of arrest and detention referred to. On July 20, 1957, the Irish Government informed the Secretary General of the Council of Europe that, in compliance with Article 15 (3) of the Human Rights Convention, the Council was being informed of the going into force of the 1940 Act conferring special powers of arrest and detention, which was considered necessary to "prevent the commission of offenses against public peace and order and to prevent the maintaining of military or armed forces other than those authorized by the Constitution."

On July 17, 1957, Lawless was transferred to a military detention camp and kept there without charge or trial. On August 16, 1957, he was informed that he would be released if he gave an undertaking in writing to respect the Constitution and laws of Ireland and not to be a member of or assist any unlawful organization under the Offenses against the State Act, 1939. Lawless refused to give such undertaking, and subsequently applied to have the continuation of his detention considered by the Detention Commission. On September 17 he appeared before the Com-

mission and was represented by counsel and solicitors. The Commission, sitting for the first time, adopted certain rules of procedure and adjourned until September 20. On September 18, 1957, counsel for Lawless applied to the Irish High Court for a Conditional Order of habeas corpus *ad subjiciendum*, requiring the Commandant of the detention camp to produce Lawless before the Court for the purpose of deciding upon the validity of his detention. The High Court heard both parties and dismissed the application for habeas corpus. Lawless appealed to the Supreme Court, invoking the Constitution and laws of Ireland and the European Convention on Human Rights.³ The appeal was dismissed by the Supreme Court on November 6, 1957.

In dismissing the appeal the Supreme Court held that the 1940 Act was not repugnant to the Constitution; that the Parliament had not introduced legislation to make the Convention on Human Rights part of the municipal law of Ireland, and the Court could not therefore give effect to the Convention if it should appear to grant rights other than, or supplementary to, those provided under Irish municipal law. The Court also held that the appellant's detention without release was properly constituted under the second warrant, that appellant had not established a *prima facie* case regarding the allegation he had not been told the reason for his arrest under the Minister's warrant, that an invalidity in the arrest, even if established, would not have rendered his subsequent detention unlawful. The Court declared it had no power to question the opinion of a Minister who issued a warrant for detention under section 4 of the Act, and that, with respect to the Detention Commission:

Even if it was shown that the Commission's rulings on various procedural matters were wrong, that would not make the appellant's detention unlawful nor would it provide a basis for an application for *habeas corpus*. Section 8 of the 1940 Act showed that the Commission was not a court and an application before it was not a form of proceedings but no more than an enquiry of an administrative character.

On November 8, 1957, Lawless submitted an Application to the European Commission of Human Rights, alleging that his arrest and detention under the 1940 Act without charge or trial violated the Convention, and claiming immediate release from detention, payment of damages for the detention, and payment of all costs and expenses of the proceedings brought in the Irish courts and before the Commission to secure his release. Early in December the Detention Commission resumed its consideration of the case. Lawless appeared before it on December 10, 1957, and gave a verbal undertaking that he would not engage in any activities declared illegal under the 1939 and 1940 Acts. The following day he was released by order of the Minister of Justice, and his attorney, by letter of December 16, 1957, notified the European Commission of Human Rights of this fact. At the same time the letter stated that Lawless intended to continue the proceedings before the Commission with regard to his claim for compensation and damages for the detention and for reimbursement of all costs and expenses in connection with the proceedings to obtain his release.

[The Judgment on the preliminary objections follows.]

PROCEDURE:

On 13th April 1960 the Secretary of the European Commission of Human Rights (hereinafter called "the Commission") transmitted to the

³ Reprinted in 45 A.J.I.L. Supp. 24 (1951).

Registrar of the Court a Request from the Commission, dated 12th April 1960, submitting to the Court the case brought before the Commission under Article 25 of the Convention, by an Application dated 8th November 1957 and filed by Gerard Richard Lawless, a national of the Republic of Ireland, against the Government of the said Republic.

The Request, which refers to the declaration made on 18th February 1953 by the Irish Government under Article 46 of the European Convention on Human Rights and to the powers vested in the Commission by Articles 44 and 48 of that Convention, was transmitted to the Irish Government on 14th April 1960 in accordance with Rule 32 of the Rules of Court. In conformity with Rule 21, paragraph 2 of the Rules of Court, the Registrar furthermore invited the said Government to inform him, within thirty days, whether it wished to appear as a Party to the case. As prescribed in the concluding sub-paragraph of Rule 32, paragraph 1 of the Rules of Court, the Registrar also informed the Committee of Ministers, on 14th April 1960, of the filing of the Request.

By a telegram of 12th May 1960, confirmed by a letter of the same date, the Irish Government informed the Registrar that it desired to appear as a Party in the proceedings relating to the Lawless case and that it had appointed as its Agent Mr. T. Woods, Irish Permanent Representative to the Council of Europe.

Following upon this communication, Lord McNair, President of the Court, proceeded on 18th May 1960, in London, in the presence of the Deputy Registrar to choose by lot the names of six judges to constitute the above-mentioned Chamber—Mr. Richard McGonigal, an elected Judge of Irish nationality, being the *ex officio* member required by Article 43 of the Convention. The Composition of the Chamber was notified by the Registrar to the judges and to the Agent of the Irish Government on 23rd May 1960, and to the President of the Commission on 24th May.

After having, at Strasbourg on 1st June 1960, ascertained the views of the Agent of the Party and the delegates of the Commission upon the procedure to be followed, as required by Rule 35, paragraph 1, of the Rules of Court, the President of the Chamber, by an Order of the same date, appointed 30th June 1960 as the final date for the filing of the Commission's Memorial and 20th August 1960 as the final date for the filing of the Counter-Memorial by the Irish Government. At the request of the Party, this latter time-limit was extended to 30th August 1960, by an order of the President of the Chamber dated 16th August 1960. The Memorial and Counter-Memorial—both raising principally preliminary objections and questions of procedure—were filed on the appointed dates. In accordance with Rule 35, paragraph 3 of the Rules of Court, the Memorial of the Commission was transmitted to the judges and to the Agent of the Irish Government on 30th June 1960 and the Counter-Memorial was communicated to the judges and to the delegates of the Commission on 30th August 1960. So far as concerns the preliminary objections, the case has thus been ready for hearing since 30th August 1960.

Public hearings were held on 3rd and 4th October 1960. . . .

On 3rd and 4th October 1960 the Court confined its debate to the preliminary objections and questions of procedure.

AS TO THE FACTS:

The purpose of the Commission's Request—to which is appended the Report drawn up by the Commission in accordance with the provisions of Article 31 of the Convention—is to submit the case of G. R. Lawless to the Court so that it may decide whether or not the facts of the case disclose that the Respondent Government has failed in its obligations under the Convention.

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After being declared admissible on 30th August 1958, the Request was dealt with by the Commission according to the procedure laid down in Articles 28 and 29 of the Convention. It proved impossible to secure a friendly settlement, and the Commission therefore drew up the Report called for by Article 31 of the Convention. This Report was adopted by the Commission on 19th December 1959, the majority holding that there had been no breach of the Convention on the part of the Irish Government and that no action should be taken on the Applicant's suit for damages.

After transmitting this Report to the Committee of Ministers of the Council of Europe on 1st February 1960, in accordance with Article 31, paragraph 2, of the Convention, the Commission decided, at its meeting of 1st April 1960, to avail itself of the possibility offered by Articles 44 and 46 of the Convention, and refer the Lawless case to the Court for final decision.

In support of this step, the Commission recalled in its Memorial that an opinion stated by it under Article 31 of the Convention as to whether or not the facts found disclosed a breach of the Convention would not be conclusive. The Commission pointed out that under Article 32, paragraph 1, of the Convention, if a question were not referred to the Court, it rested with the Committee of Ministers to decide, by a majority of two-thirds, whether or not there had been a violation of the Convention.

In view of the fundamental importance of the legal problems raised in this case—and particularly of the questions arising in relation to Article 15 of the Convention—the Commission deemed it advisable to refer the case to the Court, though without qualifying in any way its own opinion on the subject as expressed in the Report.

At the meeting held on 1st June 1960, in accordance with Rule 35, paragraph 1, of the Rules of Court, and in its Memorial of 27th June 1960, the Commission stated that in conformity with Rule 76 of its Rules of Procedure, it had, on 13th April 1960—that is, after referring the case to the Court—transmitted the Report to the Applicant, inviting him to submit his observations to the Commission. In submitting the Report to the Applicant the Commission pointed out that that document must be kept secret and that the Applicant was not entitled to publish it.

Rule 76 of the Rules of Procedure of the Commission runs as follows:

"When a case brought before the Commission in pursuance of Article 25 of the Convention is subsequently referred to the Court, the Secretary of the Commission shall immediately notify the Applicant. Unless the Commission shall otherwise decide, the Secretary shall also in due course communicate to him the Commission's Report, informing him that he may, within a time-limit fixed by the President, submit to the Commission his written observations on the said Report. The Commission shall decide what action, if any, shall be taken in respect of these observations."

In its Memorial, the Commission declared its readiness "to submit to the Court the Applicant's comments upon the Report as a document relevant in the present proceedings." However, instead of communicating these comments on its own initiative, the Commission thought appropriate, at this preliminary stage of the procedure, to request the Court for leave to file the memorandum containing the Applicant's comments as a document submitted by the Commission.

In the pleadings, the following submissions were made in regard to the procedure alone:

By the Commission, in its Memorial:

"May it please the Court:

- (1) To give leave for the Commission to submit to the Court the Applicant's comments on the Commission's Report as one of the Commission's documents in the case; and
- (2) in general, to give directions as to the right of the Commission to communicate to the Court the comments of the Applicant in regard to matters arising in the present proceedings".

By the Irish Government, in their Counter-Memorial:

"May it please the Court:

- (1) To decline jurisdiction in the present case unless the Commission satisfies the Court that between 19th December 1959 and 1st February 1960, the question of reference of the case to the Court was not discussed in any way by the Commission;
- (2) To refuse to entertain the case while the delay on the part of the Commission in transmitting its Report to the Committee of Ministers and to the Government has not been satisfactorily explained;
- (3) To declare that any publication by the Commission of its Report other than that expressly authorised by the Convention, is a breach of the obligations imposed on the Commission by the Convention;
- (4) To rule that the comments of the Applicant on the Report of the Commission and the further comments of the Applicant on matters arising in the present proceedings be not received by the Court,

- (a) because no argument in favour of their admission has been submitted by the Commission, and
 - (b) because the admission of such comments would be an oblique method of amending the Convention, and
 - (c) because such comments have come into existence only through a breach by the Commission of its obligations of secrecy, and
 - (d) because in the circumstances of the present proceedings such comments are not material;
- (5) To declare that a correct interpretation of the Convention does not permit of action of the nature contemplated by Rule 76 of the Rules of the Commission'';
- [paragraphs 6 and 7 omitted from English text.]

At the hearing of 3rd October 1960, the Commission made the following submissions:

“A. As to the objection to the Court’s jurisdiction:

May it please the Court to reject the preliminary objections to the Court’s jurisdiction formulated in paragraph 4 of the Respondent Government’s Counter-Memorial.

B. As to the objection concerning the publication of the Report:

May it please the Court to decide that the provisions of Rule 76 of the Commission’s Rules of Procedure and the Commission’s communication of its Report on the present case to the Applicant fall within the competence conferred upon the Commission by the Convention, and to reject the preliminary objection formulated in paragraph 5 of the Respondent Government’s Counter-Memorial.

C. As to the objection in regard to the role of the Applicant in the proceedings before the Court:

May it please the Court:

- (a) to give leave to the Commission to transmit to the Court the written comments of the Applicant upon the Commission’s Report;
- (b) to give such directions as the Court may consider appropriate *as to the right* of the Commission to communicate to the Court *the comments of the Applicant* in regard to matters arising in the present proceedings;
- (c) to reject the submissions formulated in paragraph 6 * of the Respondent Government’s Counter-Memorial.’’

At the hearing of 3rd October 1960, the Agent of the Irish Government, in view of the explanations furnished by the Delegate of the Commission during his oral pleading, withdrew the preliminary objections appearing as Nos. 1 and 2 in his Government’s Counter-Memorial.

* Not included in English text. See above.

The following submissions, relating to the preliminary objections and questions of procedure raised during the present proceedings, were presented by the Agent of the Irish Government at the hearing of 4th October 1960:

“May it please the Court:

- (1) to declare that any publication by the Commission of its Report, other than that expressly authorised by the Convention, is a breach of the obligations imposed on the Commission by the Convention.
- (2) To rule that the comments of the Applicant on the Report of the Commission be not received by the Court.
- (3) To rule that no further comments of the Applicant on matters arising in the present proceedings may be received by the Court.
- (4) To declare that a correct interpretation of the Convention does not permit of action of the nature contemplated by Rule 76 of the Rules of the Commission.”

AS TO THE LAW:

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Whereas, in the light of the final submissions of the Commission and of the Irish Government at the hearings of 3rd and 4th October, 1960, the Court is called upon to decide the following three points only:

- (i) Is Rule 76 of the Rules of Procedure of the Commission in general contrary to the terms of the Convention?
 - (ii) Could the Commission after bringing the case before the Court, communicate its Report to G. R. Lawless, the Applicant, in the manner described by the Commission's delegate, without infringing the terms of the Convention?
 - (iii) Should the Court, either at the instance of the Commission acting on its own authority, or through the Commission after authorisation by the Court, receive the written observations of G. R. Lawless, the Applicant, on the Commission's Report or on points arising during the proceedings?
- (i) *As regards the alleged incompatibility “in genere” of Rule 76 of the Rules of Procedure of the Commission with the Convention*

Whereas among the preliminary points raised by the Irish Government with regard to the proceedings before the Court, that set out in paragraph 4 of their conclusions calls for a general decision by the Court on the compatibility of Rule 76 of the Commission with the terms of the Convention;

Whereas in Article 19, the Convention sets up both the Commission and the Court “to ensure the observance of the engagements undertaken by the

High Contracting Parties in the Convention" and assigns to each of these bodies specific functions in the safeguarding of human rights; whereas those of the Commission differ according to the stage reached in the proceedings; whereas, in the initial stage—governed mainly by Section III of the Convention—the Commission's chief function is to carry out an independent inquiry, to seek a friendly settlement and, if need be, to bring the case before the Court: whereas, once this has been done, the Commission's main function is to assist the Court, and it is associated with the proceedings; whereas, however, even at this stage its action is determined not by a decision of the Court, but directly by the terms of the Convention;

Whereas it follows from the whole body of rules governing the powers of the Court, that it cannot interpret the Convention in an abstract manner, but only in relation to such specific cases as are referred to it; whereas, according to Article 45 of the Convention, the jurisdiction of the Court "shall extend to all cases concerning the interpretation and application of the Convention"; and whereas the exact meaning of this clause is defined in other articles of the Convention, namely: (a) Article 47, according to which "the Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32"; (b) Article 53, which states that only High Contracting Parties which are "parties to the case" are bound by the decision of the Court;

Whereas it follows from the foregoing that the Court is not competent to take decisions such as that to delete a rule from the Commission's Rules of Procedure—a step which would affect all Parties to the Convention—since this would amount to having power to make rulings on matters of procedure or to render advisory opinions; that accordingly the Court has no power to consider a point raised in a general manner by the Commission and the Irish Government;

Whereas, notwithstanding, it is the duty of the Court, in the exercise of its functions, to ensure that the Convention is respected and, if need be, to point to any irregularities and to refuse to apply in such a case any provisions or regulations which are contrary to the Convention; whereas it follows that the Court must consider the specific point which follows;

(ii) *As regards the communication of the Commission's Report to G. R. Lawless*

Whereas, it was established, in the course of the proceedings, that the Commission transmitted the Report drawn up in accordance with Article 31 of the Convention to G. R. Lawless, the Applicant, on 13th April 1960 that is to say one day *after* bringing the case before the Court;

Whereas the Irish Government claimed that the Commission committed a breach of the Convention in communicating its Report to G. R. Lawless, arguing that Article 31 of the Convention expressly forbade Contracting States to publish the Commission's Report; that this applied also to the

Committee of Ministers unless the State concerned did not take the measures required by the decision of the Committee of Ministers; that if the case were brought to the Court, the Report had to remain with the Court and be kept secret unless the Court expressly authorised its publication; that just as the Contracting Parties undertook, by virtue of the Convention, to keep the Report secret, so the Commission, which derived its competence solely from the Convention to which those States were voluntary Parties, was correspondingly not at liberty to publish the Report when it wished, or to communicate it to whomsoever it thought fit, otherwise the Contracting Parties would be in a position subordinate to that of the Commission with regard to the secrecy of the Report; that it was not by a fortuitous omission that the authors of the Convention did not include a clause expressly forbidding the Commission to publish the Report; that under the terms of the Convention, the individual had no part in the proceedings either before the Committee of Ministers or before the Court; and that once the Commission had adopted its Report, the individual dropped out of the proceedings altogether;

Whereas the Commission, in justification of its action in communicating the Report to the Applicant, maintained that the Contracting States, subject to the express provisions of the Convention, had conferred on it the necessary powers to fulfil effectively the functions entrusted to it by Article 19 of the Convention; whereas, moreover, the latter contained no provision forbidding the Commission to publish its Report or communicate it to whomsoever it wished when it considered that the fulfilment of its functions so required; whereas, furthermore, in the present case, the Commission had communicated the Report to G. R. Lawless after the case had been referred to the Court in order to be in a position to present the case impartially and, in so doing, had borne in mind that it was the Applicant who had first brought the case before the Commission;

Whereas in the opinion of the Court the procedure, in a case brought before it under the terms of the Convention, differs from that applicable either before the Commission or before the Committee of Ministers;

Whereas the procedures referred to in Section III of the Convention are secret and the proceedings before the Commission which involve the Applicant, are conducted *in camera* in accordance with Article 33; whereas moreover, when the Commission transmits its Report to the Committee of Ministers and to the States concerned, they are prevented, by Article 31 (2), from publishing it;

Whereas, as soon as the case has been referred to the Court, in accordance with Article 48 of the Convention, the proceedings assume a judicial character; whereas, furthermore, in any democratic society, within the meaning of the Preamble and the other clauses of the Convention, proceedings before the judiciary should be conducted in the presence of the Parties and in public; whereas this fundamental principle with regard to domestic civil and criminal law, is upheld in Article 6 of the Convention and whereas Section IV of the Convention, governing the organisation and competence of the Court, contains no such provision as Article 33 which

stipulates that the Commission shall meet *in camera*; whereas Rule 18 of the Rules of Court in fact states that hearings shall be public "unless the Court shall in exceptional circumstances decide otherwise"; whereas likewise, Rule 51 states that the Court's judgments "shall be read at a public hearing" and whereas it follows, therefore, that proceedings before the Court are public;

Whereas it is true that the debates and the judgment alone are public and that other documents in the case can only be published, in accordance with Rule 52 of the Rules of Court, if the Court expressly authorises such publication; whereas, however, this provision cannot alter the fact that the proceedings take place in the presence of the Parties ("le caractère contradictoire de la procédure"), nor does it prevent the communication of the documents in the case to the persons or bodies directly concerned, with the proviso, made either by the Commission or by one of the Parties, that they should not be published; whereas, therefore, there is a distinction between the publication of documents for which the authorisation of the Court is required and the communication of the said documents to the Applicant, which requires no such authorisation;

Whereas, in the present case, G. R. Lawless, the Applicant, although he is not entitled to bring the case before the Court, to appear before the Court or even to make submissions through a representative appointed by him, is nevertheless directly concerned in the proceedings before the Court; whereas it must be borne in mind that the Applicant instituted the proceedings before the Commission and that, if the Court found that his complaints were justified, he would be directly affected by any decision, in accordance with Article 50 of the Convention, on the substance of the case; whereas Article 38 of the Rules of Court authorises it to hear any person whose deposition seems to it useful in the fulfilment of its task, as is admitted, moreover, both by the Irish Government and by the Commission;

Whereas in communicating its Report to Lawless, the Commission did not fail to draw attention to its confidential character in expressly forbidding its publication;

Whereas it follows from the foregoing that the Court is of the opinion that the Commission is enabled under the Convention to communicate to the Applicant, with the proviso that it must not be published, the whole or part of its Report or a summary thereof, whenever such communication seems appropriate; whereas, therefore, in the present case, the Commission, in communicating its Report to G. R. Lawless, the Applicant, did not exceed its powers;

(iii) *As regards the presentation to the Court by the Commission, of the Applicant's observations on the Report and other points arising during the proceedings*

Whereas the Commission asked the Court for authorisation to submit, as a document in the case, the Applicant's observations on the Report following its communication to him under the conditions referred to above; whereas the Commission requests a general ruling on its right to com-

municate to the Court the Applicant's observations on points arising in the course of the proceedings;

Whereas, while realising that the Applicant is not a party to the proceedings before the Court, the Commission has stated that it wishes to submit to the Court the Applicant's views on the main points of the proceedings with which he is concerned; whereas the Commission has invoked various precedents drawn from advisory opinion procedure at the Permanent Court of International Justice and, subsequently at the International Court of Justice, where observations by individuals submitted through the international organisations who applied for the advisory opinions have been taken into consideration, although the Statutes of both these bodies provide that States alone may be represented in Court; whereas the Commission also invokes the terms of the Convention as a whole and, in particular, the English version of Article 44, to show that the authors of the Convention did not intend to disassociate entirely the individual who had applied to the Commission from the proceedings before the Court, but simply to prevent him from bringing a case to Court himself;

Whereas the Irish Government maintained that if the Court agreed to receive the Applicant's observations from the Commission, this would constitute a breach of the Convention since, according to the French version of Article 44, the High Contracting Parties and the Commission alone were entitled to appear before the Court ("*se présenter devant la Cour*"); and that, moreover, if the Commission were authorised to submit the Applicant's observations as a Commission document, the impartiality and objectivity required of the Commission under the terms of the Convention would be impaired; and furthermore, that to allow the Applicant to submit his observations to the Court would be to give an individual the opportunity of using the proceedings as a means of propaganda against his own Government;

Whereas the Court is not called upon to examine in detail the precedents invoked by the Commission with regard to the part to be played by the individual before an international judicial body; whereas, though recognising their force, the Court must bear in mind the fact that none of the examples cited is that of an individual appealing against the action of his own Government, while in the present case, proceedings were instituted by Lawless against the State of which he is a national; whereas, accordingly, the solution to this question must be sought in the special nature of the procedure laid down in the Convention; whereas, according to Article 44 of the Convention, Contracting States and the Commission are alone empowered to bring a case before the Court or to appear in Court; whereas, nevertheless, the Court must bear in mind its duty to safeguard the interests of the individual, who may not be a party to any court proceedings, and whereas the whole of the proceedings in the Court, as laid down by the Convention and the Rules of Court, are upon issues which concern the Applicant; whereas, accordingly, it is in the interests of the proper administration of justice that the Court should have knowledge of and, if need be, take into consideration, the Applicant's point of view; whereas

to this end the Court has at its disposal: in the first place, and in any event, the Commission's Report, which of necessity sets out the Applicant's allegations with regard to the facts and his legal arguments, even if it does not endorse them; secondly, the written and oral observations of the delegates and Counsel of the Commission, which, as the defender of the public interest, is entitled of its own accord, even if it does not share them, to make known the Applicant's views to the Court as a means of throwing light on the points at issue; and thirdly, the Court may also hear the Applicant in accordance with Rule 38 of the Rules of Court, and, as part of the enquiry, may invite the Commission, *ex officio*, or authorise the Commission at its request, to submit the Applicant's observations on the Report or on any specific point arising in the course of the debates;

Whereas, in the present case, formal note must be taken of the Commission's request for authorisation to submit the Applicant's observations on the Report, but whereas the Court having been unable as yet to examine the merits of the case, is not in a position to reach a decision on this request and reserves its right to do so when it deems fit;

For these reasons,

THE COURT,

Takes note of the withdrawal by the Irish Government of the preliminary objections set out in paragraphs 1 and 2 of their final submissions in their Counter-Memorial and of the objections raised in paragraph 7 * of the same Counter-Memorial;

By 6 votes to 1,

rejects the objections relating to procedure raised by the said Government in paragraphs 1, 3 and 4 of their final submissions,

declares that at this stage there is no reason to authorise the Commission to transmit to it the Applicant's written observations on the Commission's Report;

Decides unanimously to proceed to the examination of the merits of the case.

Done in French and in English, the French text being authentic, at the Council of Europe, Strasbourg, this fourteenth day of November 1960.

(Signed) R. CASSIN

President

(Signed) P. MODINOS

Registrar

Judge G. MARIDAKIS, availing himself of his right under the terms of Rule 50 (2) of the Rules of Court, annexes his dissenting opinion to the present judgment.

(Initialled) R. C.

(Initialled) P. M.

DISSENTING OPINION OF MR. G. MARIDAKIS

According to Article 28 of the Convention, the Commission shall, with a view to ascertaining the facts, undertake together with the representa-

* Not included in English text. See above.

tives of the Parties an *examination of the petition* and, if need be, an *investigation*. . . .

Under Article 31, if a solution is not reached, the Commission shall draw up a *report on the facts* and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations. . . . The opinions of all the members of the Commission on this *point* may be stated in the Report.

According to paragraph 2 of the said Article 31, the Report shall be transmitted to the Committee of Ministers. It shall also be *transmitted to the States concerned* who shall not be at liberty to *publish it*. For the purposes of the Convention the word "transmitted" shall be understood to mean hand over an exact copy of the Report to the Committee of Ministers and the States concerned.

From these provisions it can be deduced:

- (1) that the duty of the Commission is to ascertain the facts;
- (2) that, to this end, it shall undertake with the representatives of the Parties an *examination of the petition* and if need be, an *investigation*;
- (3) that it shall *draw up a report on the facts* and state its *opinion* . . . ;
- (4) that it shall transmit the Report to the Committee of Ministers;
- (5) that it shall *also* transmit the Report to the States concerned, *who shall not be at liberty to publish it*.

It is apparent from these provisions read together that the jurisdiction of the Commission as the body responsible for ascertaining the facts and drawing up a Report ceases as soon as the Report has been transmitted to the Committee of Ministers.

From this date begins the period of three months during which, under Article 32 of the Convention, the Commission may refer the question to the Court.

The provision contained in Rule 76 of the Rules of Procedure of the Commission, that when a case is referred to the Court, the Secretary of the Commission shall also in due course (?) communicate to the Applicant the Commission's Report, *is contrary to the Convention*. If, after the Report has been transmitted to the Committee of Ministers, the Commission no longer has the powers conferred on it by Articles 28 and 31 (1) *a fortiori* it has no further powers after the case has been referred to the Court in accordance with Article 48 of the Convention. From this moment *the Court has sole jurisdiction in the case*. If the Court considers that certain points of the Report need to be clarified and that the Applicant is the only person capable of doing so, the Court may, as *sole judge* call the Applicant and hear him, in accordance with Rule 38 of the Rules of the Court.

Under Rule 76, referred to above, of the Rules of Procedure of the Commission the Applicant may submit to the Commission his written observations on the said Report and the Commission shall decide what action, if any, shall be taken in respect of those observations.

Now, under Article 28 of the Convention, the Commission undertakes an *examination of the petition* and, if need be, an investigation.

Consequently, if the Commission acts in accordance with the procedure described above, since it may not amend its Report once it has been transmitted to the Committee of Ministers and since furthermore, the case as a whole has been placed in the hands of the Court, what kind of action could the Commission take in respect of the Applicant's observations on the said Report? It is not entitled to present them simply as they come from the Applicant, since Article 19 of the Convention places the Commission above the Parties. If it were to *adopt* these observations and submit them as its own, the Applicant would be appearing before the Court *under cover of the Commission*. But Article 44 of the Convention states that "only the High Contracting Parties and the Commission shall have the right to bring a case before the Court."

The wording of this Article brings out its *deeper* significance. It means that the Court has not been set up to settle *disputes* between the Applicant and the State which he is accusing of having violated, in his regard, its obligations under the Convention. It means that the Court is a high supervisory authority set up to guarantee the European order established by the Convention (cf. Statute of the Council of Europe, Article 1 (b)).

Such being the conception contained in the Convention of the duties devolving upon the Court, it is natural that the Applicant should not be entitled to appear before it. If he had this right, it is clear that the proceedings might degenerate into a simple legal action between the Applicant and the State involved, whereas, in the spirit of the Convention, the Court was set up not to judge disputes but "to ensure the observance of the engagements undertaken in the present Convention" (Article 19).

This is the only way of interpreting Article 31 (2) and justifying the provision that the Commission's Report may be transmitted only to the States concerned. The Applicant is the person who claims to have been injured by the State concerned, but his allegation only provides an opportunity—it could not be otherwise—of considering whether or not that State respects its obligations under the Convention. This is the explanation, too, of Article 31 (2), whereby States are not at liberty to publish the Report transmitted to them, and also of the provision in Article 32 (3) that the Committee of Ministers is not entitled to publish the Report.

But, if neither the States to whom the Report has been transmitted, nor the Committee of Ministers are at liberty to publish the Report *a fortiori* the Commission has no right to do so. And, in substance, to communicate the Report to the Applicant in the manner described in Rule 76 of the Rules of Procedure of the Commission is to publish it.

The provision in the Convention prohibiting publication of the Report has been inserted for a good purpose. When a State is accused of a breach of its obligations assumed under the Convention, its prestige suffers prejudice. The authors of the Convention thought that steps should be taken to safeguard the prestige of such a State during the proceedings. They therefore prohibited publication of the Report which contains the opinions

of the members (Article 31) and merely prepares the ground for the final judgment to be rendered, in accordance with the Convention, by the Court or, in some cases by the Committee of Ministers.

Unity is an important principle in all legal proceedings and by virtue of this principle the weight to be given to the Applicant's observations on the Commission's Report must be determined by the Court alone.

The provision contained in Rule 76 of the Rules of Procedure of the Commission, whereby the Commission decides what action, if any, shall be taken in respect of the Applicant's observations, is contrary to the above principle, since it confers on the Commission a discretionary power incompatible with the powers of the Court which has sole jurisdiction at the present stage.

For the above reasons, therefore, Rule 76 of the Rules of Procedure of the Commission is contrary to the terms of the Convention.

However, although the Commission has no authority to communicate the Report to the Applicant, it does not follow that the latter may not take cognizance of it (in the course of contentious proceedings).

Since the Applicant has accused one of the Contracting Parties of a breach of the undertakings given in the Convention, it is a principle of equity (and of law in general) that he should not be denied any means of taking cognizance of the Report. The only way to acquaint him with the contents of the Report would be for the Registrar to invite him to read it in his presence. Should he wish to make any observations on it, the Court alone has power to decide in what form they are to be presented.

This view does not derive from an abstract interpretation of the Convention, nor does it amount to the Court declaring null and void Rule 76 of the Rules of Procedure of the Commission. Both the Commission and the Irish Government in their submissions, refer to Rule 76 of the Commission's Rules of Procedure, but in order to weigh up their respective arguments it must first be determined whether Rule 76 complies with the terms of the Convention or not. It is clear that this cannot be decided without interpreting the text of the Convention.

True, the Court is not empowered to declare null and void Rule 76 of the Commission's Rules of Procedure, but there is no doubt that the Court has the right, and is in duty bound, to refuse to apply any of these rules which it regards as contrary to the terms of the Convention, in accordance with the principle of domestic law, whereby it is a judge's duty to refrain from applying any legal provision which contravenes the Constitution or any regulation which is contrary to law.

In interpreting the Convention with this end in view, it is clear that the Court is not rendering an advisory opinion which could have any force outside the context of the present case, but is simply interpreting the Convention to support the arguments on which its judgment of the case itself and its decisions in respect of the preliminary objections and other incidental points are based, in accordance with the definition of its jurisdiction in Article 45.

(Signed)

G. MARIDAKIS

European Convention on Human Rights—arrest and detention without trial—Articles 5, 6, 7, and 17 of Convention—measures in derogation from obligations as provided in Article 15—threats to security of the state

LAWLESS CASE (MERITS).

European Court of Human Rights.¹ Judgment of July 1, 1961.²

AS TO PROCEDURE

1. The present case was referred to the Court on 13th April 1960 by the European Commission of Human Rights (hereinafter called "the Commission") [by a request] dated 12th April 1960. Attached to the request was the Report drawn up by the Commission in accordance with Article 31 of the Convention. The case relates to the Application submitted to the Commission under Article 25 of the Convention by G. R. Lawless, a national of the Republic of Ireland, against the Government of that State.

2. Preliminary objections and questions of procedure were raised in the present case by both the Commission and the Irish Government, Party to the case. The Court ruled on these questions in its Judgment of 14th November 1960.³

The procedure followed up to that date is set forth in the Judgment.

3. Following that Judgment, the President of the Chamber, by an Order of 14th November 1960, set 16th December 1960 as the latest date by which the delegates of the Commission were to submit their memorial and 5th February 1961 as the latest date for submission of the Irish Government's counter-memorial.

Pursuant to that Order, the Commission on 16th December 1960 submitted a "Statement with respect to the Counter-Memorial (merits of the case)," which was communicated to the Irish Government, Party to the case, on 19th December 1960. On 3rd February 1961, *i.e.*, before the expiry of the allotted period, the Irish Government submitted a document entitled "Observations by the Government of Ireland on the Statement of the European Commission of Human Rights filed on 16th December 1960." That document was communicated to the delegates of the Commission on 7th February 1961, whereupon the case was ready for examination of the merits.

Before the opening of the oral proceedings, the Principal Delegate of the Commission notified the Court, by letter to the Registrar dated 14th March 1961, of the views of the delegates of the Commission on some of the questions raised by the Irish Government in their document of 3rd February 1961. The letter of 14th March 1961, a copy of which was sent to the Irish Government, was likewise added to the file on the [case].

4. Public hearings were held at Strasbourg on 7th, 8th 10th and 11th April 1961. . . .

¹ Composed of R. Cassin, President; Judges G. Maridakis, E. Rodenbourg, R. McGonigal, *ex officio*, G. Balladore Pallieri, E. Arnalds, K. F. Arik; P. Modinos, Registrar.

² Excerpted English text.

³ Above, p. 173.

5. Before entering upon the merits of the case, Sir Humphrey WALDOCK, Principal Delegate of the Commission, brought up certain questions of procedure and made the following submission:

"May it please the Court to rule that the Delegates of the Commission are entitled:

- (a) to consider as part of the proceedings in the case those written observations of the Applicant on the Commission's Report contained in paragraphs 31 to 49 of the Commission's statement of 16th December 1960, as indicated on page 15 of the Court's judgment of 14th November 1960;
- (b) to make known to the Court the Applicant's point of view on any specific points arising in the course of the debates, as indicated on page 15 of the Court's judgment of 14th November 1960;
- (c) to consider the person nominated by the Applicant to be a person available to give such assistance to the delegates as they may think fit to request in order to make known to the Court the Applicant's point of view on any specific points arising in the course of the debates."

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6. On this point of procedure the Court gave the following judgment on 7th April 1961:

"The Court,

Having regard to the conclusions presented by the delegates of the European Commission of Human Rights at the hearing on 7th April 1961;

Taking note of the fact that the Agent of the Irish Government does not intend to submit conclusions on the matter in question;

Whereas in its judgment of 14th November 1960 the Court declared that there was no reason at this stage to authorise the Commission to transmit to it the written observations of the Applicant on the Commission's Report;

Whereas in the said Judgment, of which the French text only is authentic, the Court has recognised the Commission's right to take into account ("de faire état") the Applicant's views on its own authority, as a proper way of enlightening the Court;

Whereas this latitude enjoyed by the Commission extends to any other views the Commission may have obtained from the Applicant in the course of the proceedings before the Court;

Whereas, on the other hand, the Commission is entirely free to decide by what means it wishes to establish contact with the Applicant and give him an opportunity to make known his views to the Commission; whereas in particular it is free to ask the Applicant to nominate a person to be available to the Commission's delegates; whereas it does not follow that the person in question has any *locus standi in judicio*;

For these reasons,

Decides unanimously:

With regard to the conclusions under (a), that at the present stage the written observations of the Applicant, as reproduced in paragraphs 31 to 49 of the Commission's statement of 16th December 1960, are not to be considered as part of the proceedings in the case;

With regard to (b) that the Commission has all latitude, in the course of debates and in so far as it believes they may be useful to en-

lighten the Court, to take into account the views of the Applicant concerning either the Report or any other specific point which may have arisen since the lodging of the Report;

With regard to (c), that it was for the Commission, when it considered it desirable to do so, to invite the Applicant to place some person at its disposal, subject to the reservations indicated above."

7. The Court then heard statements, replies and submissions on matters of fact and of law relating to the merits of the case, for the Commission: from Sir Humphrey WALDOCK, Principal Delegate; for the Irish Government: from Mr. A. O'KEEFFE, Attorney-General, acting as Agent.

AS TO THE FACTS

1. The purpose of the Commission's request—to which is appended the Report drawn up by the Commission in accordance with the provisions of Article 31 of the Convention—is to submit the case of G. R. Lawless to the Court so that it may decide whether or not the facts of the case disclose that the Irish Government has failed in its obligations under the Convention.

As appears from the Commission's request and from its Memorial, G. R. Lawless alleges in his Application that, in his case, the Convention has been violated by the authorities of the Republic of Ireland, inasmuch as, in pursuance of an Order made by the Minister of Justice under section 4 of Act No. 2 of 1940 amending the Offences against the State Act, 1939, he was detained without trial, between 13th July and 11th December 1957, in a military detention camp situated in the territory of the Republic of Ireland.

[See statement of facts above, p. 171.]

VII

29. At the written and oral proceedings before the Court, the European Commission of Human Rights and the Irish Government made the following submissions:

The Commission, in its Memorial of 27th June 1960:

"May it please the Court to take into consideration the findings of the Commission in its Report on the case of Gerard Richard Lawless and

(1) *to decide*

- (a) whether or not the detention of the Applicant without trial from 13th July to 11th December 1957 under section 4 of the Offences against the State (Amendment) Act, 1940, was in conflict with the obligations of the Respondent Government under Articles 5 and 6 of the Convention;
- (b) whether or not such detention was in conflict with the obligations of the Respondent Government under Article 7 of the Convention;

(2) if such detention was in conflict with the obligations of the Respondent Government under Articles 5 and 6 of the Convention, *to decide:*

- (a) whether or not the Government's letter to the Secretary-General of 20th July 1957 was a sufficient communication for the purposes of Article 15, paragraph (3) of the Convention;
 - (b) whether or not, from 13th July to 11th December 1957, there existed a public emergency threatening the life of the nation, within the meaning of Article 15, paragraph (1) of the Convention;
 - (c) if such an emergency did exist during that period, whether or not the measure of detaining persons without trial under section 4 of the 1940 Act, as it was applied by the Government, was a measure strictly required by the exigencies of the situation;
- (3) *to decide* whether or not the Applicant is, in any event, precluded by Article 17 of the Convention from invoking the provisions of Articles 5, 6 and 7;
- (4) in the light of its decisions on the questions in paragraphs 1-3 of these submissions, *to adjudge and declare*:
- (a) whether or not the facts disclose any breach by the Respondent Government of its obligations under the Convention;
 - (b) if so, what compensation, if any, is due to the Applicant in respect of the breach."

30. The Agent of the Irish Government, at the public hearing on 10th April 1961:

"May it please the Court to decide and declare that the answers to the questions contained in paragraph 58 of the Commission's Memorial of 27th June 1960 are as follows:

1. (a) That the detention of the Applicant was not in conflict with the obligations of the Government under Articles 5 and 6 of the Convention.
- (b) That such detention was not in conflict with the obligations of the Government under Article 7 of the Convention.
2. (a) That the Government's letter of 20th July 1957 was a sufficient communication for the purposes of paragraph (3) of Article 15 of the Convention or, alternatively, that in the present case, the Government are not by any of the provisions of the said paragraph (3) deprived from relying on paragraph (1) of Article 15.
- (b) That from 13th July 1957 to 11th December 1957 there did exist a public emergency threatening the life of the nation, within the meaning of Article 15, paragraph (1), of the Convention.
- (c) That the measure of detaining persons without trial, as it was applied by the Government, was a measure strictly required by the exigencies of the situation.
3. That the Applicant is in any event precluded by Article 17 of the Convention from invoking the provisions of Articles 5, 6 and 7 of the Convention.
4. (a) That the facts do not disclose any breach by the Government of their obligations under the Convention.
- (b) That, by reason of the foregoing, no question of compensation arises."

THE LAW

1. *Whereas* it has been established that G. R. Lawless was arrested by the Irish authorities on 11th July 1957 under Sections 21 and 30 of the Offences against the State Act (1939) No. 13; that on 13th July 1957, before the expiry for the order for arrest made under Act No. 13 of 1939, G. R. Lawless was handed a copy of a Detention Order made on 12th July 1957 by the Minister of Justice under Section 4 of the Offences against the State (Amendment) Act 1940; and that he was subsequently detained, first in the military prison in the Curragh and then in the Curragh Internment Camp, until his release on 11th December 1957 without having being brought before a judge during that period;

2. *Whereas* the Court is not called upon to decide on the arrest of G. R. Lawless on 11th July 1957, but only, in the light of the submissions put forward both by the Commission and by the Irish Government, whether or not the detention of G. R. Lawless from 13th July to 11th December 1957 under Section 4 of the Offences against the State (Amendment) Act, 1940, complied with the stipulations of the Convention.

3. *Whereas*, in this connection the Irish Government has put in against the Application of G. R. Lawless a plea in bar as to the merits derived from Article 17 of the Convention; whereas this plea in bar should be examined first;

As to the plea in bar derived from Article 17 of the Convention.

4. *Whereas* Article 17 of the Convention provides as follows:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”;

5. *Whereas* the Irish Government submitted to the Commission and re-affirmed before the Court (i) that G. R. Lawless, at the time of his arrest in July 1957, was engaged in IRA activities; (ii) that the Commission, in paragraph 138 of its Report, had already observed that his conduct was “such as to draw upon the Applicant the gravest suspicion that, whether or not he was any longer a member, he was still concerned with the activities of the IRA at the time of his arrest in July 1957”; (iii) that the IRA was banned on account of its activity aimed at the destruction of the rights and freedoms set forth in the Convention; that, in July 1957, G. R. Lawless was thus concerned in activities falling within the terms of Article 17 of the Convention; that he therefore no longer had a right to rely on Article 5, 6, 7 or any other Article of the Convention; that no State, group or person engaged in activities falling within the terms of Article 17 of the Convention may rely on any of the provisions of the Convention; that this construction was supported by the Commission’s decision on the admissibility of the Application submitted to it in 1957 by the

German Communist Party; that, however, where Article 17 is applied, a Government is not released from its obligation towards other Contracting Parties to ensure that its conduct continues to comply with the provisions of the Convention;

6. *Whereas* the Commission, in the Report and in the course of the written pleadings and oral hearings before the Court, expressed the view that Article 17 is not applicable in the present case; whereas the submissions of the Commission on this point may be summarised as follows: that the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interest the principles enunciated by the Convention; but that to achieve that purpose it is not necessary to take away every one of the rights and freedoms guaranteed in the Convention from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms; that Article 17 covers essentially those rights which, if invoked, would facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of "any of the rights and freedoms set forth in the Convention"; that the decision on the admissibility of the Application submitted by the German Communist Party (Application No. 250/57) was perfectly consistent with this construction of Article 17; that there could be no question, in connection with that Application, of the rights set forth in Articles 9, 10 and 11 of the Convention, since those rights, if extended to the Communist Party, would have enabled it to engage in the very activities referred to in Article 17;

Whereas, in the present case, the Commission was of the opinion that, even if G. R. Lawless was personally engaged in IRA activities at the time of his arrest, Article 17 did not preclude him from claiming the protection of Articles 5 and 6 of the Convention nor absolve the Irish Government from observing the provisions of those Articles, which protect every person against arbitrary arrest and detention without trial;

7. *Whereas* in the opinion of the Court the purpose of Article 17, insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; whereas, therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; whereas this provision, which is negative in scope, cannot be construed *a contrario* as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention; whereas, in the present instance G. R. Lawless has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognised therein but has complained of having been deprived of the guarantees granted in Articles 5 and 6 of the Convention; whereas, accordingly, the Court cannot, on this ground, accept the submissions of the Irish Government.

As to whether the detention of G. R. Lawless without trial from 13th July to 11th December 1957 under Section 4 of the Offences against the State

(Amendment) Act 1940, conflicted with the Irish Government's obligations under Articles 5 and 6 of the Convention.

8. Whereas Article 5 of the Convention reads as follows:

“(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases of persons of unsound mind; alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

9. Whereas the Commission, in its Report, expressed the opinion that the detention of G. R. Lawless did not fall within any of the categories of cases listed in Article 5, paragraph 1 of the Convention and hence was not a measure deprivative of liberty which was authorised by the said clause; whereas it is stated in that opinion that under Article 5, paragraph 1, deprivation of liberty is authorised in six separate categories of cases of which only those referred to in sub-paragraphs (b) *in fine* (“in order to secure the fulfilment of any obligation prescribed by law”) and (c) of the said paragraph come into consideration in the present instance, the Irish Government having invoked each of these sub-paragraphs before the Com-

mission as justifying the detention of G. R. Lawless; that, with regard to Article 5, paragraph 1 (b) *in fine*, the detention of Lawless by order of a Minister of State on suspicion of being engaged in activities prejudicial to the preservation of public peace and order or to the security of the State cannot be deemed to be a measure taken "in order to secure the fulfilment of any obligation prescribed by law," since that clause does not contemplate arrest or detention for the prevention of offences against public peace and public order or against the security of the State but for securing the execution of specific obligations imposed by law;

That, moreover, according to the Commission, the detention of G. R. Lawless is not covered by Article 5, paragraph 1 (c), since he was not brought before the competent judicial authority during the period under review; that paragraph 1 (c) authorises the arrest or detention of a person on suspicion of being engaged in criminal activities only when it is effected for the purpose of bringing him before the competent judicial authority; that the Commission has particularly pointed out in this connexion that both the English and French versions of the said clause make it clear that the words "effected for the purpose of bringing him before the competent judicial authority" apply not only to the case of a person arrested or detained on "reasonable suspicion of having committed an offence" but also to the case of a person arrested or detained "when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"; that, furthermore, the presence of a comma in the French version after the words "*s'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente*" means that this passage qualifies all the categories of arrest and detention mentioned after the comma; that, in addition, paragraph 1 (c) of Article 5 has to be read in conjunction with paragraph 3 of the same Article whereby everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of the said Article shall be brought promptly before a judge; that it is hereby confirmed that Article 5, paragraph 1 (c), allows the arrest or detention of a person effected solely for the purpose of bringing him before a judge;

Whereas the Commission has expressed no opinion on whether or not the detention of G. R. Lawless was consistent with the provisions of Article 6 of the Convention;

10. *Whereas* the Irish Government have contended before the Court—that the detention from 13th July to 11th December 1957 of G. R. Lawless—whose general conduct together with a number of specific circumstances drew upon him, in the opinion of the Commission itself (paragraph 138 of its Report), "the gravest suspicion that he was concerned with the activities of the IRA" at the time of his arrest in July 1957—was not a violation of Article 5 or 6 of the Convention; whereas the Irish Government have contended that the Convention does not require that a person arrested or detained on preventive grounds shall be brought before a judicial authority; and that, consequently, the detention of G. R. Lawless did not conflict with the stipulations of the Convention; whereas on this point the Irish Government, not relying before the Court, as they had done before the Commission, on paragraph 1 (b) of Article 5, have made submissions

which include the following: that Article 5, paragraph 1 (c) refers to two entirely separate categories of cases of deprivation of liberty—those where a person is arrested or detained “on reasonable suspicion of having committed an offence” and those where a person is arrested or detained “when it is reasonably considered necessary to prevent his committing an offence, etc.”; that it is clear from the wording of the said clause that the obligation to bring the arrested or detained person before the competent judicial authority applies only to the former category of case; that this is the meaning of the clause, particularly in the English version;

—that the preliminary work on Article 5 supports this construction of the said clause; that account must be taken of the fact that the said Article is derived from a proposal submitted to the Committee of Experts by the United Kingdom delegation in March 1950 and that the French version is consequently only a translation of the original English text; that, as regards paragraph 1 (c) of the Article, the words “or when it is reasonably considered necessary” appeared in the first draft as “or which is reasonably considered to be necessary” and, in the English version, clearly refer to the words “arrest or detention” and not to the phrase “effected for the purpose of bringing him before the competent legal authority”; that this clause subsequently underwent only drafting alterations;

—that Article 5, paragraph 3, does not conflict with this construction of paragraph 1 (c) of the same Article; that paragraph 3 applies only to the first category of cases mentioned in paragraph 1 (c) and not to cases of the arrest or detention of a person “when it is reasonably considered necessary to prevent his committing an offence”; that this interpretation is supported by the fact that in the Common Law countries a person cannot be put on trial for having intended to commit an offence;

—that Article 5, paragraph 3, is also derived from a proposal submitted in March 1950 by the United Kingdom delegation to the “Committee of Experts” convened to prepare the first draft of a Convention; that the British proposal was embodied in the draft produced by the Committee of Experts; that this draft was then examined by a “Conference of Senior Officials” who deleted from paragraph 3 the words “or to prevent his committing a crime”; that paragraph 3, after amendment by the Senior Officials, accordingly read as follows:

“Anyone arrested or detained on the charge of having committed a crime, in accordance with the provisions of paragraph 1(c), shall be brought promptly before a judge or other officer authorised by law.”;

—that it follows from the foregoing that the Senior Officials intended to exclude from Article 5, paragraph 3, the case of a person arrested to prevent his committing a crime; that this intention on the part of the Senior Officials is further confirmed by the following passage in their Report to the Committee of Ministers [Doc. CM/WP IV (50) 19, p. 14]:

“The Conference considered it useful to point out that where authorised arrest or detention is effected on reasonable suspicion of preventing the commission of a crime, it should not lead to the introduction of a regime of a Police State. It may, however, be necessary in certain circumstances to arrest an individual in order to prevent

his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a penal offence. In order to avoid any possible abuses of the right thus conferred on public authorities, Article 13, para. 2, will have to be applied strictly.”;

that it is clear from the report of the Senior Officials that they—being aware of the danger of abuse in applying a clause which, as in the case of Article 5, paragraph 1 (c), allows the arrest or detention of a person when it is reasonably considered necessary to prevent his committing an offence—wished to obviate that danger not by means of a judicial decision but through the strict enforcement of the rule in Article 13, paragraph 2, of the draft, which later became Article 18 of the Convention; and that Article 5 subsequently underwent only drafting alterations which, however, did not make the meaning of the text absolutely clear or render it proof against misinterpretation;

Whereas the Irish Government have contended that Article 6 of the Convention is irrelevant to the present case, since there was no criminal charge against Lawless;

11. *Whereas* the Commission in its Report and its Principal Delegate at the oral hearing rebutted the construction placed by the Irish Government on Article 5 and based in part on the preparatory work; whereas the Commission contends in the first place that, in accordance with a well-established rule concerning the interpretation of international treaties, it is not permissible to resort to preparatory work when the meaning of the clauses to be construed is clear and unequivocal; and that even reference to the preparatory work can reveal no ground for questioning the Commission's interpretation of Article 5; whereas, in support of its interpretation, it has put forward submissions which may be summarised as follows: that it is true that, in the Council of Europe, Article 5 is derived from a proposal made to the Committee of Experts by the United Kingdom delegation in March 1950, but that that proposal was based on a text introduced in the United Nations by a group of States which included not only the United Kingdom but also France; that the United Nations text was prepared in a number of languages, including English and French; that the British delegation, when introducing their proposal in the Committee of Experts of the Council of Europe, put in both the French and the English versions of the text in question; that the English version cannot therefore be regarded as the dominant text; that on the contrary, all the evidence goes to show that the changes made in the English version, particularly in that of Article 5, paragraph 1 (c), during the preparatory work at the Council of Europe were intended to bring it into line with the French text, which, apart from a few drafting alterations of no importance to the present case, was essentially the same as that finally adopted for Article 5 of the Convention; that this is true even of the comma after the words “*autorité judiciaire compétente*,” which strictly bears out the construction placed by the Commission on Article 5, paragraph 1 (c); that the preparatory work on Article 5, paragraph 3, leaves no room for doubt about the intention of the authors of the Convention to require that everyone arrested or de-

tained in one or other of the circumstances mentioned in paragraph 1 (c) of the same Article should be brought promptly before a judge; that this text, too, had its origin in the United Nations draft Covenant in both languages; that the words "on the charge of having committed a crime" were in fact deleted on 7th August 1950 by the Committee of Ministers themselves, but only in order to bring the English text into line with the French, which had already been given the following wording by the Conference of Senior Officials: "Toute personne arrêtée ou détenue, dans les conditions prévues au paragraphe 1 (c) etc. . . ."; and that the submissions of the Irish Government therefore receive no support from the preparatory work;

12. *Whereas* in the first place, the Court must point out that the rules set forth in Article 5, paragraph 1 (b), and Article 6 respectively are irrelevant to the present proceedings, the former because G. R. Lawless was not detained "for non-compliance with the . . . order of a court" and the latter because there was no criminal charge against him; whereas, on this point, the Court is required to consider whether or not the detention of G. R. Lawless from 13th July to 11th December 1957 under the 1940 Amendment Act conflicted with the provisions of Article 5, paragraphs 1 (c) and 3;

13. *Whereas*, in this connection, the question referred to the judgment of the Court is whether or not the provisions of Article 5, paragraphs 1 (c) and 3, prescribe that a person arrested or detained "when it is reasonably considered necessary to prevent his committing an offence" shall be brought before a judge, in other words whether, in Article 5, paragraph 1 (c), the expression "effected for the purpose of bringing him before the competent judicial authority" qualifies only the words "on reasonable suspicion of having committed an offence" or also the words "when it is reasonably considered necessary to prevent his committing an offence";

14. *Whereas* the wording of Article 5, paragraph 1 (c), is sufficiently clear to give an answer to this question; whereas it is evident that the expression "effected for the purpose of bringing him before the competent legal authority" qualifies every category of cases of arrest or detention referred to in that sub-paragraph; whereas it follows that the said clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from committing an offence, or a person whom it is reasonably considered necessary to restrain from absconding after having committed an offence;

Whereas, further, paragraph 1 (c) of Article 5 can be construed only if read in conjunction with paragraph 3 of the same Article, with which it forms a whole; whereas paragraph 3 stipulates categorically that "everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge . . ." and "shall be entitled to trial within a reasonable time"; whereas it plainly entails the obligation to bring everyone arrested or detained in any of the

circumstances contemplated by the provisions of paragraph 1 (c) before a judge for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits; whereas such is the plain and natural meaning of the wording of both paragraph 1 (c) and paragraph 3 of Article 5;

Whereas the meaning thus arrived at by grammatical analysis is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest; whereas it must be pointed out in this connexion that, if the construction placed by the Court on the aforementioned provisions were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention; whereas such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention; whereas, therefore, the Court cannot deny Article 5, paragraphs 1 (c) and 3, the plain and natural meaning which follows both from the precise words used and from the impression created by their context; whereas, therefore, there is no reason to concur with the Irish Government in their analysis of paragraph 3 seeking to show that that clause is applicable only to the first category of cases referred to in Article 5, paragraph 1 (c), to the exclusion of cases of arrest or detention of a person "when it is reasonably considered necessary to prevent his committing an offence";

Whereas, having ascertained that the text of Article 5, paragraphs 1 (c) and 3, is sufficiently clear in itself and means, on the one hand, that every person whom "it is reasonably considered necessary to prevent . . . committing an offence" may be arrested or detained only "for the purpose of bringing him before the competent legal authority" and, on the other hand, that once a person is arrested or detained he shall be brought before a judge and "shall be entitled to trial within a reasonable time," and that, having also found that the meaning of this text is in keeping with the purpose of the Convention, the Court cannot, having regard to a generally recognised principle regarding the interpretation of international treaties, resort to the preparatory work;

15. *Whereas* it has been shown that the detention of G. R. Lawless from 13th July to 11th December 1957 was not "effected for the purpose of bringing him before the competent legal authority" and that during his detention he was not in fact brought before a judge for trial "within a reasonable time"; whereas it follows that his detention under Section 4 of the Irish 1940 Act was contrary to the provisions of Article 5, paras. 1 (c) and 3 of the Convention; whereas it will therefore be necessary to examine whether, in the particular circumstances of the case, the detention was justified on other legal grounds;

As to whether the detention of G. R. Lawless from 13th July to 11th December 1957 under Section 4 of the Offences against the State (Amend-

ment) Act, 1940, conflicted with the Irish Government's obligations under Article 7 of the Convention.

16. *Whereas* the Commission referred before the Court to the renewed allegation of G. R. Lawless that his detention constituted a violation of Article 7 of the Convention; *whereas* the said Article reads as follows:

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Whereas the submissions made by G. R. Lawless before the Commission were substantially as follows: that the 1940 Act was brought into force on 8th July 1957 and that he was arrested on 11th July 1957; that it was evident from the proceedings before the Detention Commission—which had to examine cases of detention effected under the 1940 Act—that the Minister of State, in signing the warrant of detention, had taken into consideration matters alleged to have occurred before 8th July 1957; that, if the substance rather than the form of the 1940 Act were considered, detention under that Act would constitute a penalty for having committed an offence; that the offences to which the 1940 Act relates were not punishable before 8th July 1957, when the Act came into force; that, furthermore, if he had been convicted of the alleged offences by an ordinary court, he would in all probability have been sentenced to less severe penalties which would have been subject to review on appeal in due course of law;

17. *Whereas* the Commission, in its Report, expressed the opinion that Article 7 was not applicable in the present case; that in particular, G. R. Lawless was not detained as a result of a conviction on a criminal charge and that his detention was not a “heavier penalty” within the meaning of Article 7; that, moreover, there was no question of Section 4 of the 1940 Act being applied retroactively, since a person was liable to be detained under that clause only if a Minister of State was of the opinion that that person was, after the power of detention conferred by Section 4 had come into force, engaged in activities prejudicial to the preservation of public peace and order or the security of the State;

18. *Whereas* the Irish Government share the Commission's opinion on this point;

19. *Whereas* the proceedings show that the Irish Government detained G. R. Lawless under the Offences against the State (Amendment) Act, 1940, for the sole purpose of restraining him from engaging in activities prejudicial to the preservation of public peace and order or the security of the State; *whereas* his detention, being a preventive measure, cannot be deemed to be due to his having been held guilty of a criminal offence within the meaning of Article 7 of the Convention; *whereas* it follows that Article

7 has no bearing on the case of G. R. Lawless; whereas, therefore, the Irish Government, in detaining G. R. Lawless under the 1940 Act, did not violate their obligations under Article 7 of the Convention;

As to whether, despite Articles 5 and 6 of the Convention, the detention of G. R. Lawless was justified by the right of derogation allowed to the High Contracting Parties in certain exceptional circumstances under Article 15 of the Convention.

20. *Whereas* the Court is called upon to decide whether the detention of G. R. Lawless from 13th July to 11th December 1957 under the Offences against the State (Amendment) Act, 1940, was justified, despite Articles 5 and 6 of the Convention, by the right of derogation allowed to the High Contracting Parties in certain exceptional circumstances under Article 15 of the Convention;

21. *Whereas* Article 15 reads as follows:

“(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”;

22. *Whereas* it follows from these provisions that, without being released from all its undertakings assumed in the Convention, the Government of any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention other than those named in Article 15, paragraph 2, provided that such measures are strictly limited to what is required by the exigencies of the situation and also that they do not conflict with other obligations under international law; whereas it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case.

(a) *As to the existence of a public emergency threatening the life of the nation*

23. *Whereas* the Irish Government, by a Proclamation dated 5th July 1957 and published in the Official Gazette on 8th July 1957, brought into

force the extraordinary powers conferred upon it by Part II of the Offences against the State (Amendment) Act, 1940, "to secure the preservation of public peace and order";

24. *Whereas*, by letter dated 20th July 1957 addressed to the Secretary-General of the Council of Europe, the Irish Government expressly stated that "the detention of persons under the Act is considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution";

25. *Whereas*, in reply to the Application introduced by G. R. Lawless before the Commission, the Irish Government adduced a series of facts from which they inferred the existence, during the period mentioned, of "a public emergency threatening the life of the nation" within the meaning of Article 15;

26. *Whereas*, before the Commission, G. R. Lawless submitted in support of his application that the aforesaid facts, even if proved to exist would not have constituted a "public emergency threatening the life of the nation" within the meaning of Article 15; whereas, moreover, he disputed some of the facts adduced by the Irish Government;

27. *Whereas* the Commission, following the investigation carried out by it in accordance with Article 28 of the Convention, expressed a majority opinion in its Report that in "July 1957 there existed in Ireland a public emergency threatening the life of the nation within the meaning of Article 15, paragraph 1, of the Convention";

28. *Whereas*, in the general context of Article 15 of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed; whereas, having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the Irish Government to make their Proclamation of 5th July 1957 come within this conception; whereas the Court, after an examination, find this to be the case; whereas the existence at the time of a "public emergency threatening the life of the nation," was reasonably deduced by the Irish Government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957;

29. *Whereas*, despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, but whereas the

homicidal ambush on the night of 3rd to 4th July 1957 in the territory of Northern Ireland near the border had brought to light, just before 12th July—a date, which, for historical reasons is particularly critical for the preservation of public peace and order—the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland.

30. *Whereas*, in conclusion, the Irish Government were justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation and were hence entitled, applying the provisions of Article 15, paragraph 1, of the Convention for the purposes for which those provisions were made, to take measures derogating from their obligations under the Convention;

(b) *As to whether the measures taken in derogation from obligations under the Convention were “strictly required by the exigencies of the situation”*

31. *Whereas* Article 15, paragraph 1, provides that a High Contracting Party may derogate from its obligations under the Convention only “to the extent strictly required by the exigencies of the situation”; whereas it is therefore necessary, in the present case, to examine whether the bringing into force of Part II of the 1940 Act was a measure strictly required by the emergency existing in 1957;

32. *Whereas* G. R. Lawless contended before the Commission that even if the situation in 1957 was such as to justify derogation from obligations under the Convention, the bringing into operation and the enforcement of Part II of the Offences against the State (Amendment) Act 1940 were disproportionate to the strict requirements of the situation;

33. *Whereas* the Irish Government, before both the Commission and the Court, contended that the measures taken under Part II of the 1940 Act were, in the circumstances, strictly required by the exigencies of the situation in accordance with Article 15, paragraph 1, of the Convention;

34. *Whereas* while the majority of the Commission concurred with the Irish Government’s submissions on this point, some members of the Commission drew from the facts established different legal conclusions.

35. *Whereas* it was submitted that in view of the means available to the Irish Government in 1957 for controlling the activities of the IRA and its splinter groups the Irish Government could have taken measures which would have rendered superfluous so grave a measure as detention without trial; whereas, in this connection, mention was made of the application of the ordinary criminal law, the institution of special criminal courts of the type provided for by the Offences against the State Act, 1939, or of military courts; whereas it would have been possible to consider other measures such as the sealing of the border between the Republic of Ireland and Northern Ireland;

36. *Whereas*, however, considering, in the judgment of the Court, that in 1957 the application of the ordinary law had proved unable to check the

growing danger which threatened the Republic of Ireland; whereas the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order; whereas, in particular, the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population; whereas the fact that these groups operated mainly in Northern Ireland, their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border was an additional impediment to the gathering of sufficient evidence; whereas the sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the emergency;

Whereas it follows from the foregoing that none of the above-mentioned means would have made it possible to deal with the situation existing in Ireland in 1957; whereas, therefore, the administrative detention—as instituted under the Act (Amendment) of 1940—of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances;

37. *Whereas*, moreover, the Offences against the State (Amendment) Act of 1940, was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention; whereas the application of the Act was thus, subject to constant supervision by Parliament, which not only received precise details of its enforcement at regular intervals but could also at any time, by a Resolution, annul the Government's Proclamation which had brought the Act into force; whereas the Offences against the State (Amendment) Act 1940, provided for the establishment of a "Detention Commission" made up of three members, which the Government did in fact set up, the members being an officer of the Defence Forces and two judges; whereas any person detained under this Act could refer his case to that Commission whose opinion, if favourable to the release of the person concerned, was binding upon the Government; whereas, moreover, the ordinary courts could themselves compel the Detention Commission to carry out its functions;

Whereas, in conclusion, immediately after the Proclamation which brought the power of detention into force, the Government publicly announced that it would release any person detained who gave an undertaking to respect the Constitution and the Law and not to engage in any illegal activity, and that the wording of this undertaking was later altered to one which merely required that the person detained would undertake to observe the law and refrain from activities contrary to the 1940 Act; whereas the persons arrested were informed immediately after their arrest that they would be released following the undertaking in question; whereas in a democratic country such as Ireland the existence of this guarantee of release given publicly by the Government constituted a legal obligation on the Government to release all persons who gave the undertaking;

Whereas, therefore, it follows from the foregoing that the detention

without trial provided for by the 1940 Act, subject to the above-mentioned safeguards, appears to be a measure strictly required by the exigencies of the situation within the meaning of Article 15 of the Convention;

38. *Whereas*, in the particular case of G. R. Lawless, there is nothing to show that the powers of detention conferred upon the Irish Government by the Offences against the State (Amendment) Act 1940, were employed against him, either within the meaning of Article 18 of the Convention, for a purpose other than that for which they were granted, or within the meaning of Article 15 of the Convention, by virtue of a measure going beyond what was strictly required by the situation at that time; whereas on the contrary, the Commission, after finding in its Decision of 30th August 1958 on the admissibility of the Application that the Applicant had in fact submitted his Application to it after having exhausted the domestic remedies, observed in its Report that the general conduct of G. R. Lawless, "his association with persons known to be active members of the IRA, his conviction for carrying incriminating documents and other circumstances were such as to draw upon the Applicant the gravest suspicion that, whether or not he was any longer a member, he still was concerned with the activities of the IRA at the time of his arrest in July 1957; whereas the file also shows that, at the beginning of G. R. Lawless's detention under Act No. 2 of 1940, the Irish Government informed him that he would be released if he gave a written undertaking "to respect the Constitution of Ireland and the Laws" and not to "be a member of or assist any organisation that is an unlawful organisation under the Offences against the State Act, 1939"; whereas in December 1957 the Government renewed its offer in a different form, which was accepted by G. R. Lawless, who gave a verbal undertaking before the Detention Commission not to "take part in any activities that are illegal under the Offences against the State Acts 1939 and 1940" and was accordingly immediately released.

(c) *As to whether the measures derogating from obligations under the Convention were "inconsistent with . . . other obligations under international law"*

39. *Whereas* Article 15, paragraph 1, of the Convention authorises a High Contracting Party to take measures derogating from the Convention only provided that they "are not inconsistent with . . . other obligations under international law";

40. *Whereas*, although neither the Commission nor the Irish Government have referred to this provision in the proceedings, the function of the Court, which is to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention (Article 19 of the Convention), requires it to determine *proprio motu* whether this condition has been fulfilled in the present case;

41. *Whereas* no facts have come to the knowledge of the Court which give it cause to hold that the measures taken by the Irish Government derogating from the Convention may have conflicted with the said Government's other obligations under international law;

As to whether the letter of 20th July 1957 from the Irish Government to the Secretary-General of the Council of Europe was a sufficient notification for the purpose of Article 15, paragraph 3 of the Convention.

42. *Whereas* Article 15, paragraph 3, of the Convention provides that a Contracting Party availing itself of the right of derogation under paragraph 1 of the same Article shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor and shall also inform him when such measures have ceased to operate;

43. *Whereas*, in the present case, the Irish Government, on 20th July, 1957, sent the Secretary-General of the Council of Europe a letter informing him—as is stated therein: “in compliance with Article 15 (3) of the Convention”—that Part II of the Offences against the State (Amendment) Act, 1940, had been brought into force on 8th July 1957; whereas copies of the Irish Government’s Proclamations on the subject and of the 1940 Act itself were attached to the said letter; whereas the Irish Government explained in the said letter that the measure in question was “considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution”;

44. *Whereas* G. R. Lawless contested before the Commission the Irish Government’s right to rely on the letter of 20th July 1957 as a valid notice of derogation under Article 15, paragraph 3, of the Convention; whereas, in substance, he contended before the Commission: that the letter had not the character of a notice of derogation, as the Government had not sent it for the purpose of registering a formal notice of derogation; that even if the letter were to be regarded as constituting such a notice, it did not comply with the strict requirements of Article 15, paragraph 3, in that it neither adduced, as a ground for detention without trial, the existence of a time of war or other public emergency threatening the life of the nation nor properly defined the nature of the measure taken by the Government; whereas the Principal Delegate of the Commission, in the proceedings before the Court, made known a third contention of G. R. Lawless to the effect that the derogation, even if it had been duly notified to the Secretary-General on 20th July 1957, could not be enforced against persons within the jurisdiction of the Republic of Ireland in respect of the period before 23rd October 1957, when it was first made public in Ireland;

45. *Whereas* the Commission expressed the opinion that the Irish Government had not delayed in bringing the enforcement of the special measures to the attention of the Secretary-General with explicit reference to Article 15, paragraph 3, of the Convention; whereas the terms of the letter of 20th July 1957, to which were attached copies of the 1940 Act and of the Proclamation bringing it into force, were sufficient to indicate to the Secretary-General the nature of the measures taken and that consequently, while noting that the letter of 20th July did not contain a

detailed account of the reasons which had led the Irish Government to take the measures of derogation, it could not say that in the present case there had not been a sufficient compliance with the provisions of Article 15, paragraph 3; whereas, with regard to G. R. Lawless' third contention, the Delegates of the Commission added, in the proceedings before the Court, that Article 15, paragraph 3, of the Convention required only that the Secretary-General of the Council of Europe be informed of the measures of derogation taken, without obliging the State concerned to promulgate the notice of derogation within the framework of its municipal laws;

46. *Whereas* the Irish Government, in their final submissions, asked the Court to state, in accordance with the Commission's opinion, that the letter of 20th July 1957 constituted a sufficient notification for the purposes of Article 15, paragraph 3, of the Convention or, alternatively, to declare that there is nothing in the said paragraph 3 which, in the present case, detracts from the Irish Government's right to rely on paragraph 1 of the said Article 15;

47. *Whereas* the Court is called upon in the first instance, to examine whether, in pursuance of paragraph 3 of Article 15 of the Convention, the Secretary-General of the Council of Europe was duly informed both of the measures taken and of the reasons therefor; whereas the Court notes that a copy of the Offences against the State (Amendment) Act, 1940, and a copy of the Proclamation of 5th July, published on 8th July 1957, bringing into force Part II of the aforesaid Act were attached to the letter of 20th July; that it was explained in the letter of 20th July that the measures had been taken in order "to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution"; that the Irish Government thereby gave the Secretary-General sufficient information of the measures taken and the reasons therefor; that, in the second place, the Irish Government brought this information to the Secretary-General's attention only twelve days after the entry into force of the measures derogating from their obligations under the Convention; and that the notification was therefore made without delay; whereas, in conclusion, the Convention does not contain any special provision to the effect that the Contracting State concerned must promulgate in its territory the notice of derogation addressed to the Secretary-General of the Council of Europe.

Whereas the Court accordingly finds that, in the present case, the Irish Government fulfilled their obligations as Party to the Convention under Article 15, paragraph 3, of the Convention;

48. For these reasons,

THE COURT

Unanimously

- (i) *Dismisses* the plea in bar derived by the Irish Government from Article 17 of the Convention;

- (ii) *States* that Articles 5 and 6 of the Convention provided no legal foundation for the detention without trial of G. R. Lawless from 13th July to 11th December 1957, by virtue of Article 4 of the Offences against the State (Amendment) Act, 1940;
- (iii) *States* that there was no breach of Article 7 of the Convention;
- (iv) *States* that the detention of G. R. Lawless from 13th July to 11th December 1957 was founded on the right of derogation duly exercised by the Irish Government in pursuance of Article 15 of the Convention in July 1957;
- (v) *States* that the communication addressed by the Irish Government to the Secretary-General of the Council of Europe on 20th July 1957 constituted sufficient notification within the meaning of Article 15, paragraph 3, of the Convention.

Decides, accordingly, that in the present case the facts found do not disclose a breach by the Irish Government of their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms;

Decides, therefore, that the question of entitlement by G. R. Lawless to compensation in respect of such a breach does not arise.

Done in French and in English, the French text being authentic, at the Council of Europe, Strasbourg, this first day of July one thousand nine hundred and sixty-one.

(signed) R. CASSIN
President

(signed) P. MODINOS
Registrar

Mr. G. MARIDAKIS, Judge, while concurring with the operative part of the judgment, annexed thereto an individual opinion, in accordance with Rule 50, paragraph 2 of the Rules of Court.

(Initialled) R.C.
(Initialled) P.M.

INDIVIDUAL OPINION OF MR. G. MARIDAKIS

The Irish Government have not violated the provisions of Article 15 of the Convention.

When the State is engaged in a life and death struggle, no one can demand that it refrain from taking special emergency measures: *salus rei publicae suprema lex est*. Article 15 is founded on that principle.

Postulating this right of defence, the Convention provides in this Article that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention", provided, however, that it does so only "to the extent strictly required by the exigencies of the situation" and "provided that such measures are not inconsistent with its other obligations under international law."

By "public emergency threatening the life of the nation" it is to be understood a quite exceptional situation which imperils or might imperil the normal operation of public policy established in accordance with the lawfully expressed will of the citizens, in respect alike of the situation inside the country and of relations with foreign Powers.

The Irish Government having determined that in July 1957 the activities of the IRA had assumed the character of a public emergency threatening the life of the nation, in order to meet this emergency, put into effect on 8th July 1957 the 1940 Act amending the Offences against the State Act, 1939.

In compliance with Article 15 (3), the Irish Government notified the Secretary-General of the Council of Europe of their intention to bring the 1940 Act legally into force by letter of 20th July 1957, in which it wrote:

"I have the honour also to invite your attention to section 8 of the Act, which provides for the establishment by the Government of Ireland of a Commission to inquire into the grounds of detention of any person who applies to have his detention investigated. The Commission envisaged by the section was established on the 16th July 1957."

The 1940 Act involves derogation from obligations under Article 5 (1) (c) and (3) of the Convention, since, in contrast to that Article, which imposes the obligation to bring the person concerned before a judge, the 1940 Act gives such person the right to request that the Commission established under the Act inquire into the grounds of his detention.

Nevertheless, the derogation does not go beyond the "extent strictly required by the exigencies of the situation." The Government had always been engaged in a struggle with the IRA. If, then, to prevent actions by the IRA calculated to aggravate the public emergency threatening the life of the nation, the Government brought in a law authorising the arrest of any person whom they had good reason to suspect of connections with that secret and unlawful organisation, they were acting within the limits imposed on the State by Article 15 of the Convention. The Act, moreover, does not leave an arrested person without safeguards. A special Commission inquires into the grounds for the arrest of such person, who is thus protected against arbitrary arrest.

It follows that the Offences against the State (Amendment) Act, 1940, was a measure which complied with Article 15 of the Convention in that it was "strictly required by the exigencies of the situation."

It remains to consider whether the conditions for arrest laid down in the 1940 Act were fulfilled in the person of the Applicant.

There is no doubt that the Applicant had been a member of the IRA. There is likewise no doubt that the IRA was an unlawful and secret organisation which the Irish Government had never ceased to combat.

The Applicant's arrest in July 1957 fitted into the general campaign launched by the Irish Government to suppress the activities of that unlawful and secret organisation. It is true that in July 1957 IRA activities

were on the wane, but that diminution was itself a deliberate policy on the part of the organisation. To appreciate that fact at its true value, it must not be taken in isolation but must be considered in conjunction with the IRA's previous activities, which necessarily offered a precedent for assessing the activities the organisation might engage in later.

Furthermore, since the Applicant was a former IRA member, the Irish Government, suspecting that even if he had ceased to be a member he was always liable to engage in activities fostering the aims of that organisation, applied the 1940 Act to his person legally.

In addition, out of respect for the individual, the Irish Government merely required of the Applicant, as the condition of his release, a simple assurance that he would in future acknowledge "the Constitution of Ireland and the laws". That condition cannot be considered to have been contrary to the Convention.

There is nothing in the condition which offends against personal dignity or which could be considered a breach of the obligations of States under the Convention. It would have to be held repugnant to the Convention, for example, if the State were to assume the power to require the Applicant to repudiate the political beliefs for which he was fighting as a member of the IRA. Such a requirement would certainly be contrary to Article 10, whereby everyone has the right to freedom of expression and freedom to hold opinions and to receive and impart information and ideas. But the text of that Article itself shows that the undertaking required of the Applicant by the Irish Government as the condition of his release, namely an undertaking to respect thenceforth the Constitution of Ireland and the laws, was in keeping with the true spirit of the Convention. This is apparent from the enumeration of cases where, under most of the Articles, the State is authorised to restrict or even prevent the exercise of the individual rights. And these cases are in fact those involving the preservation of public safety, national security and territorial integrity and the maintenance of order [Articles 2 (2) (c), 4 (3) (c), 5, 6, 8 (2), 9 (2) and 11 (2)].

Hence, if each Contracting State secures to everyone within its jurisdiction the rights and freedoms defined in section I of the Convention (Article 1) and moreover undertakes to enforce the said rights and freedoms (Article 13), the individual is bound in return, whatever his private or even his avowed beliefs, to conduct himself loyally towards the State and cannot be regarded as released from that obligation. This is the principle that underlies the aforementioned reservations to and limitations of the rights set forth in the Convention. The same spirit underlies Article 17 of the Convention, and the same general legal principle was stated in the Roman maxim: "*nemo ex suo delicto meliorem suam conditionem facere potest*" (Dig. 50.17.134 paragraph 4). (*Nemo auditur suam turpitudinem allegans*).

It follows from the foregoing that the Irish Government, in demanding of the Applicant that he give an assurance that he would conduct himself in conformity with the Constitution and the laws of Ireland were merely

reminding him of his duty of loyalty to constituted authority and in no way infringed the rights and freedoms set forth in the Convention, including the freedom of conscience guaranteed by Article 9.

It is true that the Applicant was arrested on 11th July 1957 under the 1940 Act and that on 16th July 1957 he was informed that he would be released provided he gave an undertaking in writing "to respect the Constitution of Ireland and the laws" and not to "be a member of, or assist, any organisation which is an unlawful organisation under the Offences against the State Act, 1939."

Between 16th July and 10th December 1957 the Applicant refused to make the said declaration, presumably because he was awaiting the outcome of the petition he submitted on 8th September 1957, whereby he applied "to have the continuation of his detention considered by a special Commission set up under section 8 of the 1940 Act," and also of the Application he made on 8th September 1957 to the Irish High Court, under Article 40 of the Irish Constitution, for a Conditional Order of habeas corpus ad subjiciendum. The High Court and, on appeal, the Supreme Court decided against the Applicant. The Supreme Court gave its reasoned judgment on 3rd December 1957, and the Detention Commission resumed its hearings on 6th and 10th December 1957. The Applicant then gave the Detention Commission a verbal undertaking not to engage in any illegal activities under the Offences against the State Acts, 1939 and 1940.

During the period between his arrest (11th July 1957) and 10th December 1957, the Applicant appealed to the High Court and the Supreme Court and refused, while the matter was *sub judice*, to give the assurance which the Irish Government made the condition of his release. Having so acted, the Applicant has no ground for complaint of having been deprived of his liberty during that period.

It is apparent from what has been stated above that the 1940 Act amending that of 1939 cannot be criticised as conflicting with Article 15 of the Convention and that the measures prescribed by the Act are derogations in conformity with the reservations formulated in Article 5 (1) (c) and (3). It follows that there is no cause to examine the merits of the allegation that the Irish Government violated their obligations under the latter provisions.

On the other hand, the Applicant's Application cannot be declared inadmissible by relying on Article 17 of the Convention, since that Article is designed to preclude any construction of the clauses of the Convention which would pervert the rights and freedoms guaranteed therein and make them serve tendencies or activities repugnant to the spirit of the Convention as defined in its Preamble. The Applicant, however improper his conduct may have been, cannot be held to have engaged in any activity forbidden by Article 17 such as would warrant the rejection of his Application as inadmissible under the terms of that text.

(Signed) G. MARIDAKIS

Jurisdiction with respect to waters and airspace above seabed beyond territorial waters—Louisiana law inapplicable to helicopter crash over nine miles from the low-water mark—Federal Death on the High Seas Act governs—situation of injury on “Texas tower” in such waters seen as possibly distinguishable

GUESS v. READ. 290 F. 2d 622.

U.S. Court of Appeals, 5th Cir., May 18, 1961.¹ Jones, Cir. J.

Humble Oil & Refining Company was engaged in the exploration for oil and gas at a site in the Gulf of Mexico about nine miles southeast of Grand Isle, Louisiana. At this location it had a drilling barge. Benjamin Franklin Wiley, Jr., was an employee of Humble. He lost his life as the result of the crash of a helicopter in the Gulf soon after it left the drilling barge. The location of the barge and the situs of the crash of the helicopter are more than a marine league from the shore of Louisiana but within the area subject to the operation of the Outer Continental Shelf Lands Act.² The widow of Wiley, in her own right, and as administratrix of his estate, brought suit by libel under the Death on the High Seas Act³ against several defendants, alleging unseaworthiness and unairworthiness of the aircraft and negligence in its operation. Among the defendants was United Aircraft Corporation which had manufactured the helicopter.

United Aircraft Corporation was dismissed from the suit on the ground that no valid service of process had been made upon it. The plaintiff, who is the appellant here, then attempted to join as a party defendant the negligence liability insurance carriers⁴ of United Aircraft under the Louisiana Direct Action Statute.⁵ The appellee, for the insurers, moved to dismiss the action as to them and him on the grounds that (1) the accident occurred outside of Louisiana, and the Direct Action Statute applies only if the accident or injury occurred within the State of Louisiana, (2) the Direct Action Statute does not apply to suits in Admiralty, and (3) the Direct Action Statute does not apply to suits brought under the Death on the High Seas Act. The district court granted the motion. From its order of dismissal this appeal was taken . . .

Unless the Federal statute allows the direct action to be brought, we must agree that no claim is asserted upon which relief can be granted. The Outer Continental Shelf Lands Act provides that,

“To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, civil and criminal laws of each adjacent State as of the effective date of this Act are hereby declared

¹ Excerpted text of opinion with footnotes by the court.

² 43 U.S.C.A. § 1331 *et seq.*; 48 A.J.I.L. Supp. 110 (1954).

³ 46 U.S.C.A. § 761 *et seq.*

⁴ Underwriters at Lloyds, represented at this litigation by Geoffrey Stewart Read pursuant to a stipulation.

⁵ L.S.A.—R.S. 22:655.

to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf." 43 U.S.C.A. § 1333(a)(2)....

The Continental Shelf Act was enacted for the purpose, primarily, of asserting ownership of and jurisdiction over the minerals in and under the Continental Shelf. Jurisdiction was asserted over "the subsoil and seabed" of the outer Continental Shelf. 43 U.S.C.A. § 1332(a). It is only for "that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon" that the State law applies. 43 U.S.C.A. § 1333(a)(2). This does not include the sea above the subsoil and seabed and does not include the air above the sea. That this is the intent is further shown by the provision that the Act "shall be construed in such a manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected." 43 U.S.C.A. § 1332(b). If the helicopter in which the appellant's husband was killed had cracked up on the drilling barge before completing its take-off, it could be urged that the accident occurred within the area over which the United States had declared [*sic*] its jurisdiction. Such a case is not before us and is not decided by us. In the case before us the plane had left the barge and was over the high seas, and hence there is no adoption by the federal act of the Louisiana law applicable to the situation here present.

... What we have said disposes of the appellant's contention that there is a cause of action under the Death on the High Seas Act⁶ which may be asserted, by invoking the Louisiana Direct Action Statute, against the insurer of an alleged wrongdoer. Cited to support the appellant's contention is *Lovless v. Employers' Liability Assurance Corporation*, 5 Cir., 1955, 218 F.2d 714. In the cited case the injury which gave rise to the cause of action arose, not upon the high seas, but in the Port of New Orleans and, of course, in the State of Louisiana. Other contentions need not be noticed...

⁶ "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." 46 U.S.C.A. § 761.

NOTES

Extradition—appeal from orders of magistrate in extradition—relevance of doctrine of non-appealable orders

Reviewability of orders of magistrates in international extradition proceedings has been involved in two recent cases:¹

(1) The petitioner (extradition defendant) sought to appeal an order of the Federal District Court denying his request that the U. S. Commissioner be directed to take depositions of certain persons in Mexico. The Circuit Court held that the action of the trial judge was not appealable, because it was neither a final order nor an interlocutory order from which appeal lies by statute. *Merino v. Hocke*, 289 F. 2d 636 (U. S. Ct. A., 9th Cir., April 26, 1961).

(2) The extradition defendant sought to appeal the denial by the Federal District Court of his request for a protective order against the taking of depositions. Noting that the Supreme Court might settle the issue in dealing with two cases² in which Circuit Courts had allowed appeals from orders denying motions to quash subpoenas *duces tecum* in extradition cases, the court denied jurisdiction on the ground that “. . . No statute, however, gives this Court jurisdiction of an appeal from an order, whether interlocutory or final, of a magistrate in an extradition proceeding.” Judge Brown concurred, but contested the view that an order in extradition is not appealable to the Circuit Court even if final. *Jimenez v. Aristeguieta*, 290 F. 2d 106 (U. S. Ct. A., 2d Cir., April 25, 1961). See 55 A.J.I.L. 171, 984 (1961) for previous proceedings.

Standing to sue in diversity jurisdiction in Federal court—American citizen domiciled in a foreign state ineligible

The district court holding, reported in 55 A.J.I.L. 747 (July, 1961), has been affirmed. *Pemberton v. Colonna*, 290 F. 2d 220 (U. S. Ct. A., 3rd Cir., May 1, 1961).

Jurisdiction of sending state over member of armed forces—assignment to United Nations unit in Korea not material

The district court holding, reported in 55 A.J.I.L. 493 (April, 1961), has been affirmed. *Jennings v. Markley*, 290 F. 2d 892 (U. S. Ct. A., 7th Cir., June 7, 1961).

Occupation—Germany—German contractor has no contractual relationship with U. S. Army—issues under U. S. Constitution not reached

In 1953 plaintiff, a German national, was the successful bidder in Germany on a U. S. Army proposal for the construction of an ammunition

¹ See also *U. S. ex rel D'Amico v. Bishopp*, 286 F. 2d 320 (U. S. Ct. A., 2d Cir., Jan. 23, 1961), reported in 55 A.J.I.L. 746 (1961).

² 81 S. Ct. 798, 803 (1961).

storage area. The German construction contractor encountered difficulties, which he claimed were the fault of the United States, and sued in the Court of Claims to recover his outlay over what the Army Claims Appeals Board allowed. Among plaintiff's contentions was one to the effect that his property had been taken by the United States contrary to the Constitution. The United States argued that the protection of the Constitution did not extend to an alien for acts of the United States in a foreign country. The Court of Claims gave summary judgment for the defendant on the ground that the plaintiff, despite his having made a bid in response to a call for bids and his bid having been accepted, had no contract with the United States. The transaction was not intended by the Army to be a contract of the United States. It was a military requisition by the United States as agent of the Allied High Commission for Germany, an international body with no capacity to sue or be sued. Since the United States acted only as agent of the Allied High Commission, the court specifically declared that the Constitutional question was not reached. *Best v. U.S.*, 292 F. 2d 274 (U. S. Ct. of Claims, July 19, 1961).

Diplomatic immunity—Soviet citizen having diplomatic rank in U.S.S.R. Foreign Ministry and assigned to United Nations Secretariat—contention that exclusive original jurisdiction for trial is in United States Supreme Court rejected

After losing in his effort to resist removal to the Northern District of Illinois to stand trial (see the opinion reported in 55 A.J.I.L. 734 (July, 1961)), the defendant and his co-defendants made a number of objections in the criminal trial on the merits. Melekh again contended for immunity and attacked the opinion previously reported; he had no success. Another renewed contention was that, under Article III, Section 2, Clause 2, of the Constitution of the United States, a proceeding against a foreign diplomat of any rank is a proceeding involving a "public minister" and within the original and exclusive jurisdiction of the Supreme Court of the United States. The court found on the word of the Department of State that Melekh had never been in the United States as a representative of the U.S.S.R. to the United States and hence could not be a "public minister" under the Constitution. *U. S. v. Melekh*, 193 F. Supp. 586 (U. S. Dist. Ct., N.D. Ill., E.D., March 20, 1961).

Civil aviation—Chicago Convention—variation in airport landing charges favoring domestic carriers enjoined

A foreign air carrier successfully invoked Article 15 of the Convention on International Civil Aviation, 61 Stat. 1180 (April 4, 1947), to enjoin more favorable rates to United States domestic air carriers than to foreign carriers at the Miami International Airport. The court ruled that the Convention did not permit variations on the grounds of "reasonableness"; that the treaty was self-executing; and that Florida administrative remedies did not have to be exhausted. The court did not adjudicate the petitions of three Cuban plaintiffs, because of uncertainty as to their continued cor-

porate existence as a result of nationalizations in Cuba, but kept jurisdiction pending further developments before the court. *Aerovias Interamericanas de Panama v. Dade County Board of County Commissioners*,³ 30 Law Week 2065 (U. S. Dist. Ct., S.D. Fla., June 30, 1961).

Nationalization—act of state doctrine—counterclaim against nationalizing state

The Republic of Cuba sued in the United States District Court for an accounting from a Cuban national. The defendant counterclaimed for the value of property allegedly taken from him by plaintiff without compensation. *Held*: The counterclaim cannot be considered, because the act of a foreign government against its own national with respect to property in its territory "is inviolable." A dissenting judge contended that the act of state doctrine should not apply to a counterclaim against the nationalizing state as plaintiff. *Pons v. Republic of Cuba*, 294 F. 2d 925 (U. S. Ct. A., D. C., July 27, 1961).

Tax convention—subsequent internal revenue regulation—effect of provision in convention for issuance of regulations

Article VIII of the U. S.-Swiss Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, 1 U. S. Treaties 396 (May 24, 1951), provides that

. . . royalties . . . from sources within one of the contracting states received by a resident . . . of the other contracting state not having a permanent establishment in the former state shall be exempt from taxation in such former state . . .

Internal Revenue Regulation § 509.110 was later issued and provided for no exemption of royalties unless the taxpayer had not had a permanent establishment in the United States *at any time* during the taxable year. The Regulation was held valid, because Article XIX of the convention clearly contemplates regulations, and the Swiss representatives at the negotiations were informed of the intended regulation and registered no objection. *Jules Samann*, 36 T.C. No. 103, 30 Law Week 2142 (Tax Court of the U. S., Sept. 14, 1961).

Injunction against picketing—foreign-owned vessels—jurisdiction of the National Labor Relations Board

The International Maritime Workers Union picketed an Italian-flag vessel, owned by Italians, registered in Liberia, using entirely alien crews

³ A few cases of possible current interest are herewith reported prior to their printing in the advance sheets. U. S. Law Week ordinarily prints excerpts taken from mimeograph copies of opinions as first delivered in court. Occasionally judges make modifications in their opinions after delivery but before printing in the advance sheets of the National Reporting System. Nonetheless, delays now noticed in advance sheet prints, coupled with the long lag between the Editor's deadline and the printing of the JOURNAL, suggest need for an occasional report based on sources less than entirely complete and entirely final.

signed on outside the United States, and in trade between Caribbean ports and New York. Plaintiff corporation, the American agent of the Italian owners of the vessel, and itself owned by the vessel's owners, sought an injunction against the picketing in the New York courts and argued against Federal pre-emption that the National Labor Relations Board clearly had no jurisdiction over disputes between aliens operating vessels under foreign flags. The high court of New York held that the State courts should not take jurisdiction until the NLRB should have refused it, because the dispute is "arguably subject" to the statutory jurisdiction of the NLRB. *Ingres Steamship Co. v. International Maritime Workers*, 219 N.Y.S. 2d 21 (N.Y. Ct. of Appeals, July 7, 1961).

Nationalization—Cuba—motion to open default judgment to permit intervention by Banco Nacional de Cuba granted

The Banco Nacional de Cuba, an agency of the Cuban state, was permitted to intervene in the place of the original defendant, the Industrial Bank of Cuba, in a case in which default judgment had already been rendered for the plaintiff. The court was of the opinion that the Banco Nacional was entitled to have the default judgment set aside and to appear as the successor to the Industrial Bank, and agreed with the contention of the defense that the Cuban state had never intended to abandon its defenses or accept a default judgment. The court refused to pass "at this time" on whether New York courts should accord "judicial recognition" to the acts of the present Cuban Government. *Gonzales v. Industrial Bank [of Cuba]*, 215 N.Y. S. 2d 632 (N.Y. Sup. Ct., App. Div., 1st D., May 29, 1961).

Nationalization—Cuba—appointment of receiver in New York for Cuban corporation

Resisting a stockholder's attempt to have a receiver appointed in New York, the corporation contended that it had not ceased to do business in New York within the meaning of § 977-b of the Civil Practice Act, and that if that section should authorize the appointment of a permanent receiver it would be unconstitutional under the due process clauses of the Federal and New York Constitutions. In an earlier hearing in this case, reported at 55 A.J.I.L. 748 (July, 1961), the Special Term held that the question whether the corporation had ceased to do business within the meaning of the statute was one of fact. The stockholder appealed the denial of his motion for summary judgment, and in the instant case the Appellate Division denied the stockholder's appeal and agreed that the facts alleged in the corporation's first defense should be established "to clarify the issues and avoid surprise on the trial." The court noted that the proof already at hand was sufficient to show that the corporation has not yet been entirely extinguished or made a mere agency of the Cuban state by the actions of the Castro Government in Cuba. If § 977-b is found applicable under the facts, the court stated that it is constitutional. *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 217 N.Y. S. 2d 711 (N.Y. Sup. Ct., App. Div., 2d D., July 17, 1961).

Nationalization—Cuba—corporation organized in Cuba—appointment of New York counsel by agent of Cuban state

In yet another case involving an attempt of stockholders to have a permanent receiver appointed in New York with respect to the assets there of a Cuban corporation adversely affected by Castro's decrees, attorney X claimed to represent the corporation by appointment of its president, while attorney Y claimed to represent the corporation by appointment of the "Interventor" installed by Castro to operate the company in Cuba. The court appointed a master to consider the issue, noting that before it could decide whether the Cuban order of intervention is entitled to extraterritorial recognition in New York, the relevant foreign law had to be clarified. *Mann v. Cia. Petrolera Trans-Cuba, S. A.*, 215 N. Y. S. 2d 894 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., Pt. I, April 12, 1961).

International Monetary Agreement—enforcement of Brazilian foreign exchange control denied

Banco do Brasil sued the defendant for fraud in obtaining from it foreign exchange resources. The defendant's motion to dismiss was granted on the grounds that

. . . as a general rule, laws furthering foreign governmental interests are not enforced in this jurisdiction . . . even if they be laws of a sister state . . . or countries with which the U. S. has traditionally had friendly and close relationships.

The plaintiff's contention that the International Monetary Fund [Bretton Woods] Agreement, 60 Stat. 1401 (1945), and prior New York cases (applying that agreement to allow defenses based on foreign exchange regulations) required the court to give a cause of action was rejected. The view was expressed that Article VIII, § 2 (b), of the Bretton Woods Agreement did not operate to require affirmative enforcement of foreign exchange laws within a signatory state in the absence of further accord. *Banco do Brasil, S. A. v. Israel Commodity Co.*, 215 N.Y.S. 2d 3 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., Pt. I, March 27, 1961).

Consular privileges—effect of most-favored-nation treaty provision—Italian consul not entitled to letters of administration in New York

The consular agent of Italy claimed the right to have letters of administration issued to him in the administration of the estate of an intestate of Italian birth but U. S. nationality by naturalization, who left (allegedly) only Italian heirs and next of kin. The claim was based on Article IX, § 2(a), (b), and (d), of the Consular Convention between the United States and Costa Rica, 1 U. S. Treaties 247 (March 19, 1950), made applicable by the most-favored-nation clause in the relevant U. S.-Italian treaty. The court rejected the petition on the ground that § 44 of the Surrogate's Court Act rejects the notion that non-resident aliens might have rights to letters of administration in such cases, and added:

... no treaty can change the statutes of the State of New York by giving to a Consular Agent acting in behalf of non-resident aliens rights which the non-resident aliens themselves are expressly denied by a statute of the State of New York . . .

In re Colella's Estate, 214 N. Y. S. 2d 466 (N. Y. Surrogate's Court, Onondaga Co., May 2, 1961).

Foreign heirs—Yugoslavia—adequate proof that heirs will have benefit and control—effect of U. S. Treasury regulations on transmission of U. S. Government checks

The court granted the petition of the Consul General of the Federal Peoples Republic of Yugoslavia for an order to pay to him a sum on deposit for Yugoslav beneficiaries of an estate in administration in New York. The court found that the burden placed by the Surrogate's Court Act on foreign legatees to prove that they would obtain the benefit and control of legacies was met by a letter from the United States Treasury Department to the effect that Treasury regulations do not prohibit the transmission of U. S. Government checks to Yugoslavia. In a previous case a New York Surrogate had relied upon a Treasury order forbidding transmission of Government checks to deny an order for the payment of a legacy. *Application of Popovic*, 215 N. Y. S. 2d 642 (N. Y. Surrogate's Court, Nassau Co., May 24, 1961).

Foreign legatees—Poland—adequate proof that legatees will have benefit and control—effect of judge's trip to Poland

The Surrogate of Kings County ruled in favor of a transfer of a bequest to legatees in Poland because, after a trip to Poland, he became satisfied that Polish nationals in Poland will receive "... full use, benefit, control and enjoyment" of the property transferred. The opinion contains a detailed analysis of the applicable Polish tax laws and foreign exchange regulations. *In re Tybus' Will*, 217 N. Y. S. 2d 913 (N. Y. Surrogate's Ct., Kings Co., July 12, 1961). Cf. *In re Swiderski's Estate*, 217 N. Y. S. 2d 918 (N. Y. Surrogate's Ct., Nassau County, July 19, 1961).

UNITED STATES DECISIONS ON NATIONALITY

Citizenship. Yee Tung Gay v. Rusk, 290 F. 2d 630 (9th Cir., May 5, 1961): Affirmed the finding below that plaintiff had not made out a case in his action for declaratory judgment of citizenship where plaintiff's evidence, although not contradicted by the United States, was "tainted" by interest, evasiveness, confusion, inconsistency, and improbability. *Kiyama v. Rusk*, 291 F. 2d 10 (9th Cir., May 9, 1961): Sustained the findings below that plaintiffs, husband and wife, native-born but of Japanese ethnic origin, had voluntarily renounced their U. S. citizenship while in protective custody following the mass evacuations of persons of Japanese origin from the West Coast during World War II.

Naturalization. U. S. v. Aronovici, 289 F. 2d 559 (7th Cir., April 26, 1961): Training duty in the United States Army Reserve suffices for

naturalization within three years under 8 U. S. C. § 1439 (a). *Keil v. U. S.*, 291 F. 2d 268 (9th Cir., May 25, 1961): Upheld the finding below that the petitioner had "knowingly and intelligently" waived his opportunity to become a citizen by claiming draft exemption as an alien. *In re Naturalization of Di Censo*, 218 N. Y. S. 2d 418 (Sup. Ct., Niagara Co., Aug. 4, 1961): Refused naturalization to a petitioner who had denied, contrary to fact, that he had been arrested and that he had committed adultery, rejecting the petitioner's argument that he thought "arrest" meant "confinement" with the observation that an applicant who fails to understand the meaning of "arrest" fails to meet the English comprehension requirements of the naturalization law.

Deportation. *Wolf v. Boyd*, 287 F. 2d 520 (9th Cir., Feb. 1, 1961): An alien, seeking by habeas corpus to prevent deportation to a country not designated by her and not the land of her birth, is entitled to have her attack on the constitutionality of 8 U. S. C. § 1253 (a) (7) decided by a three-judge Federal district court as a substantial constitutional question. *McConney v. Rogers*, 287 F. 2d 473 (9th Cir., March 10, 1961): Failure of Immigration Service to advise alien of the time and place of taking depositions relevant to his claim of citizenship through a parent is a denial of due process requiring dismissal of the order of deportation. *Liang v. U. S.*, 290 F. 2d 614 (9th Cir., March 30, 1961): Affirmed an order of deportation on the ground that the alien's evidence below was insufficient to establish that at the time of the administrative proceedings for deportation he had relied upon and had claimed privileges for remaining given by the China Area Aid Act of 1950, *e.g.*, Title II, §§ 201, 202, of the Foreign Economic Assistance Act of 1950, P. L. 535, 81st Cong., 22 U. S. C. § 1547; also held that Formosa is a "country" to which deportation may be made, following decisions previously reported in this JOURNAL. *Hudson v. Esperdy*, 290 F. 2d 879 (2d Cir., June 1, 1961): Affirmed that a conviction for loitering in a public place for soliciting men for homosexual activities supports a deportation order. *Quiroz v. Neelly*, 291 F. 2d 906 (5th Cir., June 23, 1961): An alien female is deportable as a "psychopathic personality" under 8 U. S. C. § 1182 (a) (4) if homosexual, because, "... whatever the phrase ... may mean to a psychiatrist, to the Congress it was intended to include homosexuals and sex perverts ...". *Williams v. Sahli*, 292 F. 2d 249 (6th Cir., July 3, 1961): Disallowed a motion to reopen a case under Rule 60(b), Federal Rules of Civil Procedure, to present a constitutional issue abandoned at trial and not raised on appeal or on writ of certiorari. *U. S. v. Yip Cheung Fong*, 291 F. 2d 676 (2d Cir., July 6, 1961): Affirmed per curiam a holding that failure to specify in the warrant of deportation the country to which the deportation is to be made, where the order of deportation clearly so specified, does not support habeas corpus to prevent deportation. *Dombrowskis and others v. Esperdy*, 195 F. Supp. 488 (D. C. S. D. N. Y., March 13, 1961): Alien seamen are entitled to a trial on their claim that they would be subject to physical persecution if deported to Yugoslavia; an examination of Immigration Service memoranda and other material negatives the aliens' contention that the Service had prejudged them as alien crewmen; motions for summary judgment by both parties were

denied. *Politis v. Sahli*, 193 F. Supp. 842 (D. C. E. D. Mich., May 3, 1961): An administrative determination, after full opportunity is afforded to the alien to present evidence that he would not be physically persecuted in the country to which deportation is ordered is sufficient on its face and further inquiry cannot be made by the court. *Marcello v. Kennedy*, 194 F. Supp. 748 (D. C. D. C., May 12, 1961): An alien resident in the United States for more than fifty years and treated in previous proceedings and in a Supreme Court opinion as a native of Tunis, but ordered deported to Guatemala (and actually deported there before his petition for an injunction was heard), is not entitled to a three-judge Federal court where he attacks the constitutionality, not of 8 U. S. C. § 1253 (a) (7), but of the conduct of the Immigration Service under that statute; case was remanded to a single judge for further proceedings. *Ibid.*, 194 F. Supp. 750 (D. C. D. C., May 22, 1961) on remand to the single Federal judge: The alien in the immediately preceding case is properly deportable to the country (Guatemala) which accepted him, even though his acceptance by that country was allegedly obtained by the U. S. Government's misrepresentation to Guatemala that the alien had been born there; later, the same court vacated a motion for summary judgment brought by the alien on the ground that he had already been deported from Guatemala, which he contended proved that Guatemala had not originally accepted him. *Langhammer v. Hamilton*, 194 F. Supp. 854 (D. C. Mass., May 31, 1961): Alien was held deportable for concealing former membership in the East German Communist Party. *Giaino v. Pederson*, 193 F. Supp. 527 (D. C. N. D. Ohio, E. D., June 28, 1960):¹ Voluntary election of alien to proceed without counsel at the administrative hearing on deportation prevents injunction against deportation on the ground that he was not so represented. *Liacakos v. Kennedy*, 195 F. Supp. 630 (D. C. D. C., June 29, 1961): The person sought to be deported was successful in establishing that he was a native-born citizen of the United States, where the claimed ground for deportation was the technical one that the party had briefly entered Canada and returned without presenting a re-entry permit or border-crossing pass, required of aliens but not of citizens.

Miscellaneous. *Ahrens v. Rojas*, 292 F. 2d 406 (5th Cir., June 30, 1961): An excluded alien may legally be held in custody until he can be sent out of the country, even though there is no possibility that such action can be taken immediately. *Licea-Gomez v. Pilliod*, 193 F. Supp. 577 (D. C. N. D. Ill., Oct. 11, 1960):¹ An excluded alien in the country on parole sought review of his denial of an immigration visa by an American consul; the suit was dismissed, because "... Congress has not seen fit to grant any review whatsoever to one who has been refused a visa by a consul . . . a consul's decision to withhold a visa is not reviewable, not even by the Secretary of State . . ." *Osman v. Ribicoff*, 195 F. Supp. 699 (D. C. E. D. Mich, S. D., July 24, 1961): An alien under a suspended deportation order is not "deported" under provisions ending Social Security payments to deported aliens.

¹ Reported late by the court.

EUROPEAN EXTRADITION CASES *

French-German Extradition Treaty—safeguarding against prosecution for political crimes—no safeguards against capital punishment—political asylum under Basic Law

ORDER OF THE GERMAN FEDERAL SUPREME COURT. January 11, 1961.

BAusl. 4/60, 4 ARs 32/60. 14 *Neue Juristische Wochenschrift* 738.

The French Government requested the German Government to extradite an Algerian having French nationality. It accused him of having ambushed and killed B, a Muslim Frenchman, probably because B had refused to pay contributions to the Algerian separatist movement, FLN, of which the accused was a member. The request for extradition was first based upon the crime of willful homicide and the misdemeanor of an attempt against the external security of the state. Subsequently the French Government notified the German Government that the accused was to be prosecuted solely for a common crime, i.e., willful homicide, that he would not be prosecuted for endangering the external security of the state, and that his position would in no way be aggravated by reason of political considerations. Accordingly, he would be tried by the ordinary courts rather than the military courts. The French Government also gave the assurance that if extradition was granted, the prosecution would be limited to the criminal acts for which extradition was requested. The accused protested against his extradition, arguing that the only motive for his act had been political differences, and that he was "a political refugee from France." The Cologne Court of Appeals, which had to decide on the legality of the extradition, submitted the case to the Federal Supreme Court, requesting a decision of the following questions:

(1) Does an Algerian whose extradition is requested by the French Government for a political murder, where express assurance is given that there will be no prosecution for a political crime, have a right to political asylum under Article 16, paragraph 2, second sentence, of the Basic Law,¹ if he is a member of the FLN, which fights for the separation of Algeria from France?

(2) Can an alien be extradited for a criminal act committed abroad where such act under the law of the requesting state provides the death penalty for such act, or must extradition be conditioned upon an assurance that the death penalty, if pronounced, will be commuted to imprisonment?

The Federal Supreme Court decided as follows:

I. As to the first question of law

1. Extradition between France and Germany is governed by the Extradition Treaty of November 29, 1951, which became effective on November 22, 1959 (BGBl.1959 II, 1251). According to Article 4, paragraph 1, of the

* Reported by M. Magdalena Schoch, United States Department of Justice, Washington, D. C.

¹ Art. 16, par. 2, of the Basic Law (Constitution) provides: "No German may be extradited to a foreign country. Political persecutees are entitled to asylum."

treaty, extradition shall not be granted where the act for which it is requested is considered a political crime by the requested state. According to Article 4, paragraph 3, however, the political nature of a crime shall not, as a rule, prevent extradition where the act does not involve an attack upon another's life made in open combat. Since the accused has not killed his victim in open combat, he would have to be extradited under this provision. Article 2, paragraph 1, of the treaty provides, however, that persons whose extradition is prohibited by the laws of the requested state shall not be extradited. Consequently, extradition can be refused if the accused is entitled to asylum as a political persecutee under Article 16, paragraph 2, of the Basic Law.

2. Since the treaty itself permits refusal of extradition in a case where the accused has a right of asylum, there is no conflict between the treaty and the Basic Law. Therefore, there is no reason to doubt that the first question of law does not come under the jurisdiction of the Federal Constitutional Court, but that the ordinary courts must themselves interpret Article 16, paragraph 2, second sentence.

3. Neither the Basic Law and other federal laws nor international law has clearly defined the concept of "political persecutee." In conformity with the decision of the Federal Constitutional Court (*BVerfGE* 174, 179/80),² this Court is of the opinion that the notion of political persecutee as used in Article 16, paragraph 2, second sentence, must be broadly interpreted. As it already held in 1953 (3 *BGH St.* 392, 395), the ban on extradition applies also to persons persecuted for non-political offenses, if such persons could be liable to be prosecuted—outside a criminal proceeding—for political reasons and thereby exposed to dangers to life or limb, or would be subject to restrictions of their personal liberty. It must be presumed that the legislature, when approving the Basic Law, did not intend to deviate from the basic principle laid down in Section 3, paragraph 3, of the German Extradition Law,³ as well as in many extradition treaties, *i.e.*, that a fugitive whose extradition is demanded for a crime against life which was committed from political motives but not in open combat, is not entitled to asylum as a political persecutee. But there must be a guarantee that the fugitive will not be in danger to life and limb or liberty, independent of his offense or in a degree which exceeds the requirements of just punishment under the rule of law. To that extent a right of asylum must be granted to a fugitive who is charged with a political crime against life which was not committed in open combat.

Therefore, the Court of Appeals which has to decide on the admissibility of extradition in such a case must examine whether there is a certainty

² Reported in 54 A.J.I.L. 416 (1960).

³ Sec. 3 of the Extradition Law of Dec. 23, 1929, reads as follows:

"Section 3 (1) Extradition is not permissible if the act for which extradition is requested is a political act or is connected with a political act in such manner that it was designed to prepare, secure, cover up or repel such political act.

"(2) Political acts are punishable attacks which are immediately directed against the existence or security of the state, against the head of the state or a member of the

that the fugitive, after he has been extradited, will not be subject to political persecution either within or outside the criminal proceeding. Such guarantee may be seen in an adequate assurance given by the foreign government which demands extradition. As the Federal Constitutional Court explained in the above-mentioned decision, in former times the assurance of "specificity" of prosecution (*i.e.*, the assurance that the fugitive would be prosecuted only for the acts specified in the request for extradition) constituted an essential and, as a rule, adequate guarantee against political prosecution of extradited persons. But, as that Court further declared, such an assurance is no longer "effective" today, since in many states "the politization of large spheres of life and the utilization of criminal law for securing and carrying out social and political revolutions have blurred the boundary line between criminal and political offenses." Moreover, as the Federal Constitutional Court pointed out, the criminal procedure in such countries frequently does not guarantee that, in cases involving political opponents, the prosecution will be restricted to the crimes specified.

This does not mean to say, however, that an assurance of "specificity" by the requesting state should not be regarded as an adequate guarantee against political persecution of extradited persons in every case. Where such an assurance is given by the government of a country whose government and authorities practice the rule of law, it can be presumed that the extradited person will not be subjected to measures of political persecution. Whether in a given case there is danger of political persecution is a question of fact which must be decided with the aid of the principles outlined.

II. *As to the second question of law*

1. This Court does not see fit to answer the question in the general form in which the Court of Appeal has raised it. It deems it sufficient to discuss the situation which exists under the Extradition Treaty between France and Germany.

2. Murder is among the offenses for which, under the rule of Article 3 of the treaty, extradition must be granted unless one of the exceptions laid down in Articles 4 to 7 of the treaty applies. Murder is subject to the death penalty under the French Penal Code; German law has abolished the death penalty (Article 102 of the Basic Law). Under the treaty this fact does not stand in the way of extradition. The treaty does not provide that Germany may condition an extradition on an assurance by the French Government that the death penalty will not be pronounced. Article 18 merely provides that, in granting extradition, the German Government may recommend that the death penalty, if pronounced, be commuted to a milder punishment. Such a recommendation is not binding on the French Government and the French courts. In negotiating the treaty the two

government of the state as such, against a constitutional body, against civic rights in elections or plebiscites, or against friendly relations with foreign countries.

"(3) Extradition is permissible if the act constitutes a deliberate crime against life, except where it was done in open battle."

governments have deliberately refrained from entering into such a binding obligation, as it did not seem possible to limit the Presidents of both states in the exercise of their pardoning powers. The question, therefore, arises whether Article 18 of the Law through which the treaty became effective in Germany (*BGBI.* 1953 II 151) is in conflict with Article 102 of the Basic Law to such an extent that an extradition is not permissible without a previous assurance by the French Government that the death penalty, if pronounced, will not be carried out.

3. This question cannot be decided by the Federal Supreme Court in a proceeding under Article 27 of the Extradition Law. The Federal Constitutional Court alone has jurisdiction to rule on the constitutionality of the Law of 1953 with regard to Article 18 of the Extradition Treaty.

4. Consequently, the Court of Appeal of Cologne itself will have to decide the second question of law which it has submitted to this Court. If it reaches the conclusion that the Law of 1953, as regards Article 18 of the treaty, is not in conflict with Article 102 of the Basic Law, it will have to make this conclusion the basis of its decision as to the permissibility of extradition in this case. If it should reach the conclusion that Article 18 is unconstitutional, it will have to submit the matter to the Federal Constitutional Court.

France-Switzerland Treaty of 1869—Federal Extradition Law of 1892—definition of political crime—no safeguard against death penalty

DECISION OF THE SWISS SUPREME FEDERAL COURT IN THE MATTER OF
KTIR AGAINST THE FEDERAL PUBLIC PROSECUTOR. May 17, 1961.
87 *Entscheidungen des Schweizerischen Bundesgerichts* I, 134.

In December, 1960, Belkacem Ktir, a French-Algerian national, was arrested in Switzerland after having illegally crossed the border. The French authorities demanded his extradition for the murder of Mezai, another Algerian, in France. Ktir stated the facts as follows: Both men were members of the Algerian FLN (Front for National Liberation). Mezai had been arrested by the French authorities but released afterwards. His superiors in the FLN suspected him of treason and decided to "suppress" him. They assigned Ktir and three others to the job. The men took Mezai for a ride, drove him to a deserted spot and two of them strangled him while Ktir sat in the front of the car with the driver.

Ktir opposed his extradition, arguing that France was at war with the FLN and that he, in participating in the killing of Mezai, had helped put to death an enemy in the course of a war; if he were extradited he would, in effect, be delivered to the enemy. Should, however, his extradition be inevitable, he demanded that it be made subject to the condition that, according to the principle of "the milder law," the death penalty be not imposed.

The Federal Department of Justice and Police submitted the case to the Federal Supreme Court. The Federal Prosecutor's office asked the Court

to approve the extradition. The Supreme Federal Court authorized the extradition, subject to the sole condition that Ktir could not be tried in France for his activities in organizing the FLN.

The Court's decision reasoned as follows:

1. Extradition between France and Switzerland is exclusively governed by the Treaty of July 9, 1869. The Swiss Federal Law on Extradition of January 22, 1892, is not applicable, except where it may be applied concurrently with the treaty or used to interpret the treaty, provided its application does not result in a solution contrary to the treaty.

2. Under Articles 1 and 2 of the treaty, extradition is required where the acts involved are punishable under both French and Swiss law, conform to the definition of one or the other of the crimes enumerated in the treaty, and do not constitute political crimes or delicts. Previous decisions of the Court have evolved the following principles: Political crimes are acts which, although they are in themselves common crimes, acquire a predominantly political character by reason of the circumstances under which they were committed, in particular, by reason of their motives and their aim. Such crimes, so-called relative political crimes, presuppose that the act, inspired by political passion, was committed in the framework of a fight to gain power or in order to break away from a power suppressing all opposition, and that the act is in direct and close relation to the political aim envisioned. In addition, the injury done must be proportionate with the result sought; in other words, the interests at stake must be sufficiently important, if not to justify, at least to excuse the impairment which the act has caused to certain private legal values. Where murder is concerned, this relationship exists only where the killing is the only means to safeguard the higher interests involved and to attain the political aim sought.

In applying these principles, the Court does not have the task of deciding the guilt of the accused and is bound by the facts stated in the request for extradition. But it examines freely whether the conditions for extradition are present and whether on the basis of the *dossier* the circumstances relied on by the accused in opposing the extradition can be considered proven.

Ktir is prosecuted in France for murder, which is punishable both under French and Swiss law and is listed as No. 1 in the enumeration contained in the first article of the treaty. The question, then, is, on the one hand, whether this involves a political crime, and, on the other hand, whether the act committed by Ktir was committed in the course of a war between France and the FLN.

As regards this second point, the defendant seems to rely on Article 11 of the Extradition Law, which provides that "extradition shall not be granted . . . for purely military offenses." The treaty, however, makes no such exception. Moreover, murder has never been regarded as a "purely military" offense.

As regards the political character of the offense, it should be stated at the outset that the FLN fights to seize power in Algeria. Its action extends

not only to that country but also to France. It has a manifest political character. The defendant affirms credibly that he is a member of the FLN and that it was in that capacity and at the orders of his superiors that he participated in the murder of Mezai. It may be concluded that he did not act from personal motives but for political reasons. But it does not follow that his act had a predominantly political character. In order to sustain this conclusion it would have to be shown that the murder of Mezai was the only means to safeguard the superior interests of the FLN and to attain the political aim of that organization. This is not the case. In fact, it has not been shown that the interests of the FLN were so gravely impaired by the alleged treason of Mezai that to "suppress" him was the only means to safeguard these interests. Nor can it be seen that the murder in which Ktir participated has in any way whatsoever furthered the liberation of Algeria. This murder appears above all as an act of revenge and terror. It is, therefore, not a political crime or misdemeanor in the meaning of Article 2, paragraph 1, of the treaty. Since the other conditions of the treaty are met, extradition must be granted as a matter of principle.

3. Under Article 302, paragraph 1, of the French Penal Code murder is punishable by death. [The Swiss Penal Code does not have the death penalty.] The defendant demands that if extradition should be granted, it should be granted on condition that the death penalty be not pronounced. However, the treaty does not make extradition dependent on the penalty which the requesting state imposes on the act involved.

Nor does Article 5 of the Extradition Law, assuming that it were applicable side by side with the treaty, justify such a reservation. To be sure, this article requires the Swiss authorities to subordinate extradition to the condition that the "corporal punishment" which could *in casu* be imposed in the requesting state be commuted to imprisonment or fine. Corporal punishment in the meaning of the law does not, however, include the death penalty. [There follows a discussion of legislative history.] Moreover, the Federal Supreme Court has already held that a request for extradition presented by France should be granted even if the crime involved were punishable by death in France (unpublished decision in the matter of *Billard*, of June 19, 1900).

It is true that, since that decision, the Swiss Penal Code has entered into effect and that it does not ordain the death penalty. However, this change in Swiss criminal law has no effect on the federal rules concerning extradition. The legislature understood this so well that on April 1, 1938, *i.e.*, four months after it had adopted the Penal Code, it approved an extradition treaty with Poland which permits the Swiss authorities to express the desire that the death penalty be commuted to imprisonment, but does not authorize them to make such commutation a condition for the extradition, and does not obligate the Polish authorities to accede to the desire expressed.

Hence the Swiss authorities may not attach to an extradition the condition that the death penalty must not be pronounced, except where an

extradition treaty excludes the death penalty (Treaties with Brazil, Article VI; Portugal, Article III, last paragraph; Uruguay, Article 8). In the present case it will be up to the Federal Council to examine whether a desire to that effect should be expressed to the French Government, as is expressly provided in some treaties (*e.g.*, Treaties with Poland, Final Protocol, Ch. 3, and with Turkey, Final Protocol, *litt.c.*).

4. According to Article 8 of the treaty "the individual who has been extradited cannot be prosecuted or tried for any offense other than the one for which extradition has been requested (and acts directly connected therewith) unless the accused expressly and voluntarily consented and his consent was communicated to the government which extradited him, or unless the offense is not covered by the treaty and the previous consent of the government which extradited him was obtained." This reservation applies to political offenses, for which extradition may not be granted (Article 2, paragraph 2, of the treaty).

In this case Ktir has declared that he acted for the FLN not only by participating in the assassination of Mezai but also in organizing its cadres and collecting funds. These two latter activities would seem to come under Articles 88 *et seq.* of the French Penal Code, which deal with "crimes against the internal security of the state," *i.e.*, political crimes. It is, therefore, appropriate to grant the extradition subject to the condition—provided in Article 8 of the treaty—that he must not be prosecuted or tried for these crimes. The same result would be reached if the Extradition Law were applicable (see Article 7, paragraph 1, of the Law).

BOOK REVIEWS AND NOTES

United States Commercial Treaties and International Law. By Robert R. Wilson. New Orleans: The Hauser Press, 1960. pp. xi, 380. Index. \$6.50.

To a study of the impact of United States commercial treaties on international law Professor Wilson brings practical experience as a State Department adviser on commercial treaties, as well as previous scholarly writing. The present book will be particularly welcome to those who, like the present reviewer, believe that the gradual consolidation of former international legal standards in commercial international relations is more likely to be achieved by bilateral rather than multilateral treaties. Obviously, in theory, the latter would be preferable. In practice, however, the price of a multilateral convention—for example, on the protection of foreign investment—would be a dilution of standards, and the insertion of many escape clauses such as “national emergency,” “public interest,” and the like, which would greatly reduce its value.

The United States has pioneered in the field of bilateral agreements, and especially through the postwar series of bilateral friendship, commerce and navigation treaties which, despite many variations in detail from case to case, follow a general pattern. Professor Wilson not only analyzes the principal matters dealt with in these treaties, such as access to the use of natural resources, taxation, judicial remedies, et cetera, but he also places the whole matter in perspective by illuminating introductory and concluding chapters. Dr. Herman Walker, whose article on “Treaties for the Encouragement and Protection of Foreign Investment” of some years ago is indispensable to teachers of the subject, has contributed the chapter on companies.

The main contribution of these bilateral treaties to the development of international law has been the consolidation of certain rights and status conditions which under general international law would be doubtful. They have, although with significant reservations, consolidated the “national treatment” of aliens in all except some reserved fields. They have established standards of property protection which fall short of the more radical demands of, for instance, the original Abs draft convention, but go well beyond what can fairly be described as generally accepted principles of international law. The treaties have also contributed to the clarification of the “nationality” and other status questions affecting foreign-controlled companies. While it must be conceded that the great majority of the friendship, commerce and navigation treaties have so far been concluded between the United States and other industrially developed countries with comparable standards, some have been concluded with economically less developed countries whose outlook and interests are in many ways different.

In the concluding chapter Professor Wilson asks what part international law has played in this type of commercial treaty. He singles out a number of specific ways in which these treaties are related to general international law. To the present reviewer it seems that here, as in other newly developing branches of international law, there is a give and take, but that bilateral instruments, such as the commercial treaties, contribute more than they receive by making articulate, condensing and modifying, by way of compromise, principles left vague or controversial in general international law. In this the commercial treaties join hands with the growing number of public-private agreements, such as the Iranian Oil Agreement, the major concession agreements between governments and foreign investors, and arbitration awards such as the Arameo Award. Out of all these instruments there is gradually developing a new body of international economic law which may in time eclipse in importance much of the classical international law. To this new branch of international law Professor Wilson's analysis has made an indispensable contribution.

W. FRIEDMANN

The Law of International Transactions and Relations: Cases and Materials.

By Milton Katz and Kingman Brewster, Jr. Brooklyn: The Foundation Press, 1960. pp. xliv, 863. Index. \$11.50.

In all respects but one, this casebook follows traditional lines. It consists largely of excerpts from the decisions of national and international tribunals and from statutes and treaties. Notes and comments are of modest length and scope. There is no significant attempt to introduce relevant economic or political data.

The only innovation—an important one—is in the subject matter. This is not a casebook on public or private international law, or on comparative law. It is an attempt to present materials drawn from many fields of law which the authors believe to be particularly relevant to “the practical everyday experience of individuals and business organizations and governments which engage in productive transactions and fruitful relationships spanning national boundaries.” (Page 3.) Most of the cases, drawn in almost equal numbers from American and foreign sources, are concerned with municipal rather than international law. As the authors note, they “do not reach the actual and potential role of international law in providing a framework for international governmental relations and settling international disputes which threaten the peace or otherwise primarily involve the interests of states as entities in the family of nations.” (Pages 4-5.) In short, the book is addressed to future legal technicians whose clients will seek to do business abroad. It is not addressed to those who aspire to advise foreign offices, military establishments or international organizations, or to plead before international tribunals. It pays little attention to the nature and sources of public international law, its manifold functions, or the processes of its growth and change.

Part I deals with the legal status of persons abroad and the legal impli-

cations of activities extending to more than one country. Many of the chapters are divided into sections entitled "Rights, Opportunities, and Risks Under the Law of the Foreign Country" and "Rights, Opportunities, and Risks Under Public International Law," respectively. The topics include entry, residence, movement, communication, personal security, property, economic activities, doing business through corporations, transactions with foreign governments, judicial assistance, and enforcement of foreign civil money judgments. Five pages suffice for a description of the organization and jurisdiction of international tribunals, including the International Court of Justice. Part II, entitled "The Reach of Legal Systems: Interaction, Conflict and Accommodation," deals with criminal jurisdiction, trade regulation, labor and welfare standards, currency controls, taxation, and "Nationalization, Expropriation, Annulment of Contracts or Concessions."

The selection of topics for inclusion must have presented a very difficult problem and has been undoubtedly influenced by considerations of the American law school curriculum. Some topics clearly relevant to the subject matter of the book are omitted. In the field of private international law, for example, the important problem of "choice of law" is not treated, although there is a 58-page chapter on enforcement of foreign judgments. In the field of public law, numerous topics which can be relevant to doing business abroad are not even mentioned. The student will learn nothing about such matters as the problem of the width of territorial waters, the continental shelf and its relation to off-shore oil rights, jurisdiction in the contiguous zone, airspace, the making and termination of treaties, the effects of changes of sovereignty on private rights (including concession contracts), the functions and privileges of consuls, diplomatic immunities, the status of international organizations, the regulation of international trade by GATT and regional agreements, the regulation of transport and communications, or the fate of private rights in time of war.

The choice of materials for inclusion in a casebook is always a matter of individual judgment. Katz and Brewster present many interesting and little-known cases. Among the omissions, the most surprising is that of the *Pink* case, which is not even mentioned in a note, although some fifty pages are devoted to the "Effect of Expropriation Under the Law of Another State." The wide range of the subject matter prevents the treatment of some topics in depth. Bibliographical references are hardly adequate. The reader is not always informed whether a certain treaty is in force (see, *e.g.*, page 846).

The casebook represents a worthwhile experiment in the teaching of some of the law relevant to international business transactions. It introduces the American law student into the vast world of international and foreign law and may stimulate him to further exploration. It is not, nor is it intended to be, an adequate tool of instruction in all the manifold practical and jurisprudential aspects and implications of international law.

O. J. LISSITZYN

Wörterbuch des Völkerrechts. Vol. 1. 2d ed. Edited by Hans-Jürgen Schlochauer. Berlin: Verlag Walter de Gruyter & Co., 1960. pp. xx, 800.

The completion and the publication of the first of three volumes of the revised edition of Strupp's well-known *Wörterbuch* marks a milestone in the renaissance of international law in Germany. The editor graciously pays tribute to Strupp's pioneering effort in the preface and in the suggested citation as "Strupp-Schlochauer, *Wörterbuch*." Broadly, the pattern of the first edition is followed with some changes: articles on countries or states are omitted unless they present, as in the case of Egypt, a special interest for international lawyers. Also omitted are biographical and bibliographical articles, but many of the articles contain ample bibliography, including books and articles in languages other than German. Special consideration is given to cases, although some of the old entries have been omitted. All judgments of the World Court, both old and new, are included, and advisory opinions are grouped under two headings. Each volume contains an alphabetical list of entries with their authors, and the third volume is to provide a full index. It is to be noted that certain entries are given in their accepted English abbreviated version, such as GATT. When possible, the original contributors were invited to revise their entries. The *Wörterbuch* is the result of the efforts of German, Swiss and Austrian writers, including some now living abroad, such as Kunz, Domke, and Wehberg. The completed dictionary will contain about 1200 entries, of which roughly 700 are new.

It is not possible, nor probably desirable, to provide an analysis of the 400 entries in the first volume. Some articles are obviously skimpy, like that on the *Altmark* incident, while others are of a high scholarly quality both in form and substance. Subjects largely of theoretical interest, like a concept of the fundamental norm, are treated along with largely political slogans such as the containment (*eo nomine*) policy. Reading articles at random, one discovers what may be regarded as omissions as, for instance, failure to mention in the article on the Geneva Protocol its significance in the Nuremberg proceedings. One might question from a systematic viewpoint the propriety of discussing the problem of contiguous zones in the article on Hovering Acts (*eo nomine*). And some readers may raise their eyebrows on reading that the International Court of Justice, in referring to general principles of law in the *Corfu Channel* case, contributed in the matter of fundamental rights and duties of states to the recognition of a sort of supra-positive international law. The article on fundamental rights of states contains a bibliography of some 70 items covering close to two columns, which may indicate the significance still attached to that subject in Germany. One notes with satisfaction in the article on *clausula rebus sic stantibus* a dissent from the extreme position represented by E. Kaufmann's work. One could question, though, whether it is correct or meaningful to say that the reservation of the right to withdraw from the United Nations is based on that clause. In this article there is no reference

to the Harvard Draft on the Law of Treaties, nor is there reference to the work of the International Law Commission.

The editor's job is not an enviable one, and we should not expect him to establish, apart from providing cross-references, the necessary co-ordination of substance or point of view between articles dealing with the same subject matter. Thus there is a general article on peace treaties, a separate article on the Peace Treaty with Japan of 1951, and another on the Peace Treaties with Italy, Bulgaria, et cetera; but the general article maintains the traditional point of view that the consent of the defeated state is necessary and that without it the treaty would lack binding force internationally. The article on the Peace Treaty with Italy correctly points out that the consent of Italy was not required for the coming into force of the treaty and that, in fact, Rumania and Hungary did not ratify the treaties concerning them, though Finland, Italy and Bulgaria did. Now does this mean that the Peace Treaties with Rumania and Hungary have no international validity? The general article also makes a point that, in the case of coalition wars, it may be agreed that no participant shall make a separate peace and that to do so in disregard of such a stipulation would constitute a treaty violation, which, however, would not affect the validity of the separate peace treaty. In point of fact, the Declaration by the United Nations on January 1, 1942, contains such a stipulation, but the article on the Peace Treaty with Japan does not mention it, although it does refer to the resistance of the Soviet Union, a co-signer of the 1942 Declaration, against the treaty without relating the two facts. Perhaps in a future edition of the *Wörterbuch* one could arrange for sub-editors to take charge of greater co-ordination—without suppressing individual points of view—by allocating to them the editorial function for a series of articles in the same field, or in related fields.

The revised edition, in the tradition established by Strupp, maintains high standards of scholarship, excellent over-all organization with freedom of individual approach or expression. The editors and their collaborators, the German Foreign Office, and private donors who contributed financially to the venture, are to be congratulated on this remarkable accomplishment. It will serve the beginner well, permit the expert a quick orientation, and the profession will benefit generally from the availability of this important reference work.

LEO GROSS

Politics and Culture in International History. By Adda B. Bozeman. Princeton: Princeton University Press, 1960. pp. xiii, 560. Index. \$10.00.

This book is the fruit of an industrious search through the histories of the principal power and/or cultural constellations since the third millennium B.C. for explanations both of the persistent search for unity and of the obstacles that impede it. If the harvest of discovery is meager in proportion to the labor that has gone into the enterprise, the author should at least be thanked for an elaborate documentation of propositions that

have been widely accepted on less impressive evidence. More than that, she has compressed and molded a vast array of detail into a coherent and readable record of accessible proportions.

Her work has special claims to the attention of students of international law, for in several relatively obscure periods and regions it depicts with conviction the living relations of which legal formulae are abstractions. In the long run, too, after extensive passages that leave the reader in some doubt whether the author herself distinguishes between image and reality, the book does something to correct the juristic propensity for confusing theory and practice and overvaluing the verbal evidence of consensus. Thus, though at the half-way point she seems to have accepted *in toto* the romantic myth of medieval unity with her culminating assertion of an "all-pervading sense of community" (page 253), her frequent references to incessant conflict between Papacy and Empire, Emperor and Kings, Monarchies and Republics reveal how ineffective that abstraction was in the actual control of policy. Finally, returning to this theme (pages 441-443), she strikes a truer balance.

As in all books that purport to find unifying patterns in vast segments of human history, different readers will dispute particular findings upon which the principal generalizations are based. For the reviewer the weakest part of this work is that devoted to Roman law and its contribution to later legal and political theory. The nature and magnitude of that contribution are so essential a part of Professor Bozeman's theme that one would have expected special care in its elaboration. In fact, judging by her footnotes, she has relied upon secondary sources of varying merit to the neglect of the easily available original texts. The result is a confused and sometimes anachronistic account of the factors that shaped the growth of the system up to the *Digest*, *Code*, *Institutes* and *Novellae* of the sixth century, which she groups under the incomprehensible phrase—"the codification of the Institutional Treatise of Justinian" (page 192).

More serious is the inadequacy of her belated qualification of the assertion of a "general Roman theory that law is antecedent and thus superior to the state." One may admit that under the Republic and Principate the apparatus of the state, if not the state itself, was subject to law. Even then the ancient principle, *Salus populi suprema lex*, left a wide margin of discretion to the highest magistrates. As for the later Empire, while the author finally admits that the popular will behind the *Quod principi placuit legis habet vigorem* of *Institutes* 1, 2, 6 and *Digest* 1, 4, 1, 1, had been pure fiction since the third century, she has nothing to say of the *Princeps legibus solutus est* of *Digest* 1, 3, 31. This passage may well be an instance of the compilers' practice of putting later principles into the mouths of classical jurists, but a history of ideas might have been expected to emphasize the fact that it was the interpolated *Digest* that, from the twelfth century on, penetrated Europe as Roman law, and that it was precisely the *Digest's* recognition of imperial autocracy that provided the French legists with authority for the concentration in the monarch of powers previously dissipated through the feudal hierarchy.

Professor Bozeman concludes her book with a study of the part that Byzantine, Venetian, Florentine and Hanseatic diplomacy has had in shaping Soviet and Western conduct of foreign relations. Here she treads more confidently and, while specialists will take her to task for rejecting some generally respected theses, she makes out an impressive case for her interpretations. Here will be found an informed, sensitive and revealing exploration of some of the most important institutions of international law and politics—a final reason for warmly recommending *Politics and Culture in International History* to all workers in these fields.

P. E. CORBETT

International Law in an Expanded World. By B. V. A. Röling. Amsterdam: Djambatan N.V., 1960. pp. xxvi, 126. Fl. 15; 28s. 6d.

This is the first volume of a series of "Contributions to the Progressive Development of International Law," edited jointly by Professor Röling, of the University of Groningen, The Netherlands, and Judge Radhabinod Pal, of Calcutta, India, both of whom served on the International Military Tribunal for the Far East for the trial of Japanese war criminals (1946–1948). The purpose of the series is "to give a clear expression of the opinions prevailing in the different parts of the world, and then to arrive at an evaluation of the chances of bringing about a solution" (page xxv). Various problems will be dealt with by specialists from different countries, trying to build a bridge between the East and the West.

In this volume, Professor Röling proceeds from the following assumptions: that the traditional law of nations must be broadened to include the values of other "main forms of civilization" (page xvi); that the military and economic situation makes the adoption of the "one world" concept inevitable (page viii); that this concept can, however, be realized only gradually, and that a long transition period will be necessary (page ix); that in this transition period the "'progressive development of international law' is of greater significance than its codification" (page x); that "the prohibition of war would lead to a crisis in international law if it is not accompanied by an effective regulation of peaceful change" (page xx); and that "since the Second World War, the individual has made his appearance in positive, international law as the bearer of international rights (human rights recognized universally or regionally) and as the bearer of international obligations (*inter alia* the international, individual, criminal responsibility)" (page xxii).

In discussing the present state of international law, the author comments that "the community in which traditional law came into being was one of ancient, prosperous and highly developed states"; and that "the majority of the members of the world community today is formed by states which are young (in the sense that they only recently became independent), poor, and technologically in an early stage of development" (page 11). He also asserts that the Christian origin of international law provided a double standard for treating Christian and non-Christian nations, as Christianity served as "the justification of, or the legal title to, the domination of non-Christian peoples" (page 21).

The concept of "civilized nations" which was also connected with the domination of one group of nations over all the other nations, according to Röling, "no longer corresponds with the concept [of] 'advanced, industrial, commercial nation'"; the "Europe-centric concept of 'civilization' has clearly been replaced by the multiple concept of the 'main forms of civilization'" (pages 35, 44). International law was for a while a "ruler's law," of which the "non-European, colonized peoples were the object rather than the subject"; this part of the European law of nations cannot be recognized by the new majority in the community of nations, which rejects "the colonial system and the 'unequal treaties'" (pages 47-48). "For the new majority, poor and with an alarmingly low living standard, the economic aspect is of the utmost importance"; poor states "want the law to protect them against exploitation by the economically stronger and they want the family of nations to take care of its weak and indigent members"; they want a "protective international law," a law "based on the principle of mutual assistance," and a world community which is a "welfare-community" (page 50). The new law of the peace-loving nations should not only be an "anti-war law" but also a "pro-peace law," dealing constructively with the political and economic well-being of the members of the world community (page 53).

Professor Röling concludes that the Western nations must choose in the near future "between adjustment based on reasonableness, and war in which might is right; between a gradual change through evolution, or else the stubborn maintenance of the existing law until it is thrown aside by bloody revolution" (page 125). He hopes that a new international law will evolve "consonant with the new sociological structure of the community of nations" and with the need to create "both a welfare community and a community of peace"; "'One world' is in everyone's long-term interest and is everyone's moral necessity" (page 126).

This powerful plea for a better understanding of the changes which are occurring in the world community and for the adaptation of international law to these changes deserves close study. The author raises more questions than he answers, but they must be answered before we can hope to avoid the threatening revolution. Perhaps the succeeding volumes of this series will show us how to develop international law so that it can meet its new task.

LOUIS B. SOHN

Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit.

By Hans Kelsen. Vienna: Verlag Franz Deuticke, 1960. pp. xii, 534. Index. S. 390; DM. 65.

The pure theory of law has evolved through a series of monographs, beginning in 1910, which Hans Kelsen, the founder of the school, devoted to an analysis of fundamental problems of constitutional and international law. It was only in 1934 that Kelsen, in his *Reine Rechtslehre*, published a comprehensive presentation of his theory. The present work is the second, enlarged and revised edition of the 1934 volume. Together with the excursus on the problem of justice and the doctrine of natural law, it is

almost double the size of the first edition. It also has grown in substance. Basic notions of the pure theory of law have been refined in the 1960 edition and restated in such a way as to preclude, for the future, misunderstandings to which earlier formulations had given rise. Thus, the meaning of the *Grundnorm* (basic norm) of a legal order—what it actually is and what it is not—is defined with absolute clarity in the present volume. In some other cases Kelsen has not hesitated to modify views previously held by him. This applies not only in relation to the *Reine Rechtslehre* of 1934 but also to the *General Theory of Law and State*, published in this country in 1949. Like the latter, the *Reine Rechtslehre* in its revised form is more than a mere restatement of the pure theory of law. It is rather an attempt to apply its methodological principles to the solution of the chief problems of jurisprudence.

The present treatise should be particularly interesting and useful for the student of international law. It is true that Kelsen deals specifically with international law merely in one out of eight chapters and discusses therein only such questions as the nature of international law and its relationship to municipal law, which he has analyzed before in his *General Theory of Law and State* and in the *Principles of International Law* (1952). However, the present discussion considerably adds to the clarification of the problems involved, especially of the monistic construction. Moreover, as one expects in the treatise of an author who has been a lifelong and profound student of international law, the analysis of many general questions of law, such as the types of legal norms, responsibility, sanctions and others, contributes to the elucidation of the respective issues in international law as well. The most significant deviation from previously held views probably is Kelsen's abandonment in this volume of his former opinion that the state of law is necessarily and essentially a state of peace. Kelsen now maintains that at best, we may say that law tends to develop in that direction.

Kelsen modestly suggests that the pure theory of law is not a radical innovation, but rather a continuation and development of trends that can be traced back into nineteenth-century legal science. Indeed, Kelsen's concern for the purity of the theory of law, i.e., for its separation and independence from ethics, politics and natural science, is part of current general efforts to purify the methods of the social sciences in the hope of thus securing the certainty and precision of their results. The list of Kelsen's publications included in this volume most impressively testifies to the scope and depth of his contribution to those efforts.

ERICH HULA

Manuale di Diritto Internazionale Pubblico. By Riccardo Monaco. Rome: Unione Tipografico-Editrice Torinese, 1960. pp. xi, 639. Index. L. 4800.

Monaco's new *Manual* is an elaboration and amplification of the first part of the author's *Manuale di Diritto Internazionale Pubblico e Privato*, published in 1949. Most chapters of the *Manual's* first part, dealing with

general principles of international law, have been transferred unrevised from the author's previous monograph. Professor Monaco attempts to present objectively the principal views on controversial problems, indicating at the same time his own positions. In general, his views conform to those traditionally expounded by the Italian School. The dualistic theory of the relationship between international and municipal law is unequivocally supported, and in its defense the author has added an interesting new section on Italian law and the international legal system. The Italian Constitution specifically requires that the Italian juridical order conform to the generally recognized norms of international law. Professor Monaco attempts the difficult task of rationalizing that clause into the dualistic pattern; many will find his concept of automatic but voluntary "adaptation" by the municipal legal system artificial and unconvincing.

Despite the author's avowed intention to avoid *a priori* reasoning (page 15), ramifications of the dualistic doctrine permeate his analysis of international legal principles; *e.g.*, he elaborately supports the ingenious but contrived positivist concept of "common organs," through which contracting member states perform international functions, but only by pooling their respective municipal legal systems. But it is encouraging that Professor Monaco, unlike the strict dualists of the Italian School, recognizes recent developments in the enforcement of individual rights under international law; he admits that the evolution of international practice is no longer consistent with the denial of the individual's international juridical personality (page 169).

Part Two of the *Manual*, entitled "Sanctions and Guarantees," deals primarily with the law of war, covering the rights and obligations of combatants, neutrals, and occupation forces. These new sections fill a noticeable gap in the author's earlier manual, where their treatment was at best tangential.

The final and most original part of Professor Monaco's monograph, included with the purpose of providing "greater adherence to international realities," considers the organizations of the international community. After a general inquiry into the juridical basis of international entities, the organs and specialized agencies of the United Nations and of the different institutions of the European Community are outlined in terms of their jurisdiction and powers. Professor Monaco's treatment of these concrete instruments of the international order solidifies the impression, conveyed in earlier chapters, that the author is governed by traditional Italian preoccupation with the theoretical aspects of international law. Here, as elsewhere in the *Manual*, there is little effort to portray that law in action. The historical development of United Nations organs is bypassed in favor of a full inquiry into their constitutional possibilities under the Organization's Charter. Thus, the Uniting for Peace Resolution and the organic growth of the Secretariat under Lie and Hammarskjöld are mentioned only perfunctorily, while abstention or absence of a permanent member of the Security Council, problems of little practical significance in 1960, are considered in some depth.

An apparent by-product of the author's preference for general theory rather than practice is his reference, almost without exception, only to other writers and secondary sources in the principal languages. Even in the area of responsibility of states, which some may think received rather cursory treatment, Professor Monaco tends to neglect the decisions of international tribunals and the practice of states. This limitation would seem, at least to a common lawyer, to restrict the *Manual's* usefulness as an aid to international legal research. But certainly as an elementary text on public international law, designed primarily for pedagogical purposes, Professor Monaco's work is a valuable addition to international legal science.

HAROLD E. FITZGIBBONS, JR.

Los Derechos Humanos—Preocupación Universal. By Carlos García Bauer. Guatemala City: Editorial Universitaria, 1960. pp. 532.

The author provides an up-to-date and exhaustive treatment of human rights in a richly documented, broadly conceived volume. Dr. García Bauer writes with deep personal conviction as well as first-hand experience as the Guatemalan member of several international bodies dealing with the topic, yet he never disregards the obstacles. His approach is strictly objective when assaying the current status and the future prospects of the various declarations, commissions and proposals. Although he has written a number of other monographs, this manuscript was prepared as a special dissertation for the first doctorate conferred at the University of San Carlos since the colonial period.

Useful comparisons are provided of the various human rights "systems": the universal, the European and the inter-American. The questions of limitation on sovereignty and of domestic jurisdiction or intervention are wisely dealt with; the advantages of giving individuals and groups the right of petition are set forth. There is an interesting discussion of the advantages and disadvantages of moving toward implementation on the regional, as contrasted with the universal, level.

The literature in the major European languages, including English, is well represented; the contribution of the United States to the present emphasis on the dignity of man is not overlooked, as is often the case. The five cases pertaining to individual rights handled by the Central American Court of Justice are conveniently briefed. Part Six is a collection of the major documents in use today; the bibliography runs to thirty-four pages.

García Bauer takes the position that, in general terms, it goes without saying that the observance of human rights "has become the province of international law." But international action to protect this concern can so far be seen (and at times not with the desired precision) only "with respect to certain human rights and to certain countries and to certain forms of action." (Page 332.) He believes that the achievement of adequate protection would remove "one of the most serious existing ob-

stacles to the assurance of peace." And the most important thing "is not the problem of the definition or enumeration of rights, but the problem of achieving their effective enjoyment and respect." (Pages 361-362.)

Some proofreading lapses (*e.g.*, notes on pages 330-333) and a tendency to inject too directly the author's own activity (especially in the first person, *e.g.*, pages 254-261, 269, 277-278) do not mar this fine and sober study of a central issue of our time.

ROBERT D. HAYTON

Osnovnye Voprosy Teorii Mezhdunarodnogo Dogovora [*The Fundamental Questions of Theory of the International Treaty*]. By V. M. Shurshalov. Moscow: Academy of Sciences of the U.S.S.R., 1959. pp. 472. 17 R. 40 k.

Soviet attitudes toward the sanctity of treaties may be determined, together with technical matters, from this authoritative monograph devoted solely to treaty law. While recognition of the principle of *pacta sunt servanda* is espoused as a necessary rule of international order (page 207), exceptions are declared to be imperative, and several of them, as stated by the author, have a special Soviet ring. Thus the *clausula rebus sic stantibus* may be validly applied to void treaties after a social revolution, during the course of development of a national liberation movement, if an alliance becomes aggressive and violative of the U.N. Charter (page 206), and if other changes in objective conditions not anticipated by poor draftsmen occur. The first three reasons for denunciation are assumed by the author to be inapplicable to treaties concluded within the family of peoples' democracies, and even the latter technical point is declared inapplicable because

the strength and conviction of foreign policy treaties of the U.S.S.R. and countries of the Peoples' Democracies lies in the fact that they have been adopted with full consideration of objective conditions. (Page 284.)

Soviet diplomats are, therefore, better draftsmen than those of the West.

To determine appropriate instances for application of the *clausula*, the author favors negotiation between the parties, or even submission to a court, but only if both parties agree. If there can be no agreement, then the author would admit unilateral denunciation (page 207). The Harvard Draft's strictures on being a judge in one's own case, when third-party decision is rejected, are specifically opposed as to "substantial" matters because parties must retain their sovereign right to revise all matters concerned with a treaty, having the sole right to control the conclusion and termination of treaties (pages 187-188). The reader cannot but conclude from this position that as to substantial matters the author would make treaties binding only if self-restraint is a compelling force for a party. In taking this view, he associates himself with all Soviet writing on the subject and with Soviet practice in most instances.

In some areas the author suggests a willingness to accept majority votes without vetoes. Thus, with regard to reservations to treaties, the author hails the practice of the General Assembly and the International Court in supporting the validity of reservations when there is no unanimity of the parties in accepting them. The contrary view is castigated because it permits one state to enforce its will over all others, and this "violates the principle of sovereignty and equality of states." Some readers will be tempted to compare situations where the Soviet veto has prevented majority action.

The problem of supremacy of international law over municipal law in Soviet courts is treated much the same as U. S. authors now treat the subject in U. S. courts. The author declares that Soviet courts are bound only by Soviet municipal law, for to accept the supremacy of international law would be to permit interference in domestic affairs. Still, the author recognizes the international obligation created by the treaty, though the consequences of this recognition are not stated. The domestic supremacy of municipal law is strengthened with a special Soviet argument, namely, that municipal law is a reflection of the will of the governing class and cannot be interfered with (page 353), presumably by an international law that represents in the author's view a working compromise between antagonistic class wills.

Wide reading in foreign sources is evidenced in the book, though the author has quoted a named author in the *New York Times* as representing the *Times*, and he has further concealed his source by giving only a page reference without the date of the issue. It might appear, were the reference checked, that the view was in a letter to the Editor of the *Times*. Also, the author would win wider acceptance of his views were he not so chauvinistic. He says that all aid treaties of the United States are representative of inequality (page 52), whereas, "every international treaty of the Soviet Union with any state may serve as a clear illustration of Lenin's teaching on the equality of treaties" (page 58), and

Every foreign political act of the proletarian state, reflecting the will of the people of its state, objectively conforms to the will of the broad masses of other states, interested in strengthening peace and establishing peaceful relations between all peoples. (Page 69.)

Some statements suggest points of future danger, as "All wars for liberation are not in violation of international law" (page 74), and the attempt is made to justify this view as being within the spirit of the U.N. Charter. When taken with the earlier rejection of third-party determination of fact, the issue is raised as to how a war of liberation is to be defined and determined. Does he mean anti-colonial wars only, or wars conducted to oust what Marxists define as the bourgeois ruling class in a given state? The winter war with Finland, when the Soviet Government refused at first to negotiate with any Finnish government other than the Communist group set up by the advancing armies in Terijoki makes the question practical.

JOHN N. HAZARD

Internationales Recht. By Walter Schätzel. Vol. I: *Das Recht des Völkerrechtlichen Gebietserwerbs*. pp. 283. Index. DM. 28; Vol. II: *Internationale Gerichtsbarkeit*. pp. 384. Index. DM. 36. Bonn: Ludwig Röhrscheid Verlag, 1959, 1960.

The author, whose passing on April 9, 1961, was mourned by an ever widening circle of sympathetic colleagues and students, had joined as a young scholar the group of international lawyers around Walther Schücking and Hans Wehberg. Their aim, proclaimed in the time before, during and after the first world war, was the establishment of an international organization of states and a system of compulsory arbitration of international conflicts.

In 1920 Schätzel published his first important work, *Die Annexion im Völkerrecht*, prefaced by Walter Schücking. This study appears as the main content of Volume I of the work under review. Its significance lies in the author's courage and scholarly arguments with which he—when writing still as a Prussian officer with the Kaiser's forces in France—rejects any plans for a possible incorporation of foreign territory by an occupier without international recognition. The reader must not forget that a vast majority of the German people and of the Crown jurists believed in and hoped for a *Siegfrieden* (victorious peace) with ruthless annexations to be effectuated conforming to the Crown's pleasure. Annexation itself, declares Schätzel bluntly, is illegal under all circumstances (page 194). This thesis leaves much room for discussion. Schätzel does not analyze the many changes of the Napoleonic era, since all of them eventually had to be submitted to the Congress of Vienna, which acted as the highest and last forum, and issued, as it were, the necessary regulations under its own undoubted seal of legitimacy. The Congress of Vienna legalized a certain number of Napoleonic annexations (page 203), which this reviewer explained with the tendency to "legitimize" any actual possession held for about one generation.¹

The author is convinced that annexation itself will disappear and adjudication will take its place: Right will defeat Might. This view is strongly accentuated in a more recent article Schätzel incorporated as the concluding essay in the first volume.

Volume II treats the procedure of international tribunals. The author is able to contribute many observations and suggestions out of the wealth of his experience as counsel for the German Reich before the Franco-German Mixed Arbitral Tribunal. The book is divided into four main parts which show the orbit of Schätzel's interests and competence. The first part is entitled (in the reviewer's translation): *Validity and Redress of Judgments issued by International Courts*; the second, *Challenging a Member of an International Court because of Presumed Partiality*. While these parts discuss exhaustively certain significant topics of international arbitration, they have in common a more theoretical and abstract treatment by the author who, in the third and fourth parts, presents the his-

¹ Cf. R. Rie, *Der Wiener Kongress und das Völkerrecht* 77 ff.

tory and structure of the Mixed Arbitral Tribunals after the first world war; therefore the third part is entitled: *The German-French Mixed Arbitral Tribunal—Its History, Judicature and Results*; the fourth, *The Mixed Arbitral Tribunals as Established by the Peace Treaties of Paris after the First World War*.

An appendix dealing with certain more important trials before the tribunals and a list of such cases complete the second volume.

As these lines are written, the third volume, *Internationales Staatsangehörigkeitsrecht*, and the fourth, *Krieg und Kriegsausbruch* are still in preparation. They will contain the results of Schätzel's research undertaken when teaching at the universities of Königsberg, Marburg, Mayence, and finally Bonn, where he organized that university's School of International Law and edited the *Archiv des Völkerrechts*.

Schätzel's life and work are fascinating because there emerges the development of a scholar who began as a subject and public official of the Prussian Crown and emerged as an advocate of truly international and supranational law.

ROBERT RIE

Prem's Law of Indian and American Constitutions. Vols. 3 and 4. By Daulat Ram Prem. New Delhi: Arora Law House, 1960. Vol. 3: pp. iv, 1013–1524; Vol. 4: pp. iv, 1533–1982. Index.

These volumes complete, with continuous pagination, the work reviewed in this JOURNAL for April, 1961 (page 527). They discuss rights of property; equality before the law; executive, legislative and judicial powers; war; and international relations. As in the earlier volumes, on each of these subjects, United States and Indian precedents and practices are discussed, but only occasionally comparatively.

Under nationalization the author says:

Enhancement of the economic role of the state is by no means incompatible with capitalism. . . . State intervention far from being socialist is in fact a necessary condition for the very existence of capitalistic institutions in the epoch of monopoly and imperialism. (p. 1129.)

Instances of nationalization in Russia, Mexico, Iran and Egypt are considered, with the conclusion:

It is an indisputable right of every state, a principle of national sovereignty, to nationalize any business or undertaking whether owned by nationals or aliens. . . . It is also clear that when property is taken, just and equitable compensation should be paid, but the exploitation extending over a number of years by the foreign company and the huge advantage gained by it must be taken into account while assessing the quantum of compensation. (p. 1132.)

Problems of international law are alluded to in many parts of the book but more particularly in the last sections dealing with war and international relations. The principles for avoiding and limiting war, evidenced in the ancient literature of India, are quoted (pages 866 ff.) and

there is also much citation of the United States' precedents on the conduct of war and war powers (pages 1855 ff.). Under international relations, attention is given to the status of foreign corporations, enforcement of foreign judgments, and immunities of foreign states and ambassadors. On the latter, illustrations are given of Indian practices back to the *Rig Veda* (page 1927). Under the head "international law" the author discusses the question of whether it is really law, concluding:

The way for the total acceptance of international law as law is a steep way. Rome is not built in a day. No man becomes a saint in his sleep. Struggle and ceaseless struggle alone would be able to attach the proper meaning and respect for this law on which alone balances the peace of the world. (p. 1932.)

Private international law, neutrality, jurisdiction, human rights, international crimes are discussed under this head. In ancient India, according to the author, international law was recognized, but it was different from European international law, springing from *Dharma* (ethical sense) rather than from the common consent of nations (page 1939).

Dealing with the World Court, the author cites the United States Connally Reservation without comment (page 1943). On the United Nations he says:

In time, this machinery may operate smoothly and effectively, but at present it lacks the motive power which a widespread feeling of world loyalty could supply. . . . The modern Europe in spite of its common culture, common interests, and ease of communication, finds it difficult to accept the idea of limiting national sovereignty to common good of mankind and follow the mandates of the United Nations in the true spirit.

On the other hand,

the secret of the successful working of the League of Nations amongst ancient Hindus was the existence of a single word that pervaded the whole country—*Dharma* (Righteous Conduct). Unless *Dharma* prevails, United Nations organization and the world is doomed to destruction. (p. 1948.)

The fourth volume provides an index to the entire work, which is needed because, otherwise, a vast mine of interesting but unsystematically arranged material would be difficult to use.

QUINCY WRIGHT

The Nuremberg Trials in International Law. By Robert K. Woetzel. New York: Praeger; London: Stevens & Sons, Ltd., 1960. pp. xv, 287. Index. \$9.00.

During the war, the demand to punish the war criminals was elemental and universal. After the International Military Tribunal had spoken, the U.N. General Assembly, by Resolution 1(95) of December 11, 1946, unanimously identified itself with the principles of international law "recognized" by the Charter and Judgment. But there has been much criticism of the Nuremberg doctrine. We can thank Professor Woetzel

for removing much of the confusion about Nuremberg. His book analyzes succinctly, cautiously and convincingly the main targets of the criticisms of the law the Tribunal applied, and especially the international character of, and individual responsibility for, the three types of crimes tried: crimes against peace, war crimes, and crimes against humanity; the meaning of "acts of state"; the defense of superior orders; non-retroactivity of international criminal law; and "military necessity."

Woetzel proceeds systematically, quoting courts, writers, and resolutions of international bodies, to reach conclusions based on the preponderance or intrinsic logic of the views examined. He makes no short shrift of opinions with which he disagrees. In fact, at times he counts quantitatively where qualitative weighing would be justified. But his conclusions are usually unequivocal. For example: "In no area more than in that of war crimes is the responsibility of the individual under international law as undisputed and recognized." (Page 189.) Pleas of superior orders "can never justify a crime against international law"; in support he refers to the United States and British military codes, and could have mentioned the German, although, he adds correctly, to hold a person responsible it must be shown that he knew or should have known the illegality of the order, *and* failed to do what he should have reasonably done to oppose it (page 188). On the *ex post facto* argument, he explains at length that, international law being largely uncodified, the test is whether the perpetrator had, or should have had, a *mens rea*, an awareness of wrong-doing. The non-retroactivity rule is a "general principle of justice," fully applicable in international criminal justice: nobody should be punished for something which, when he did it, he could not have known to be a wrong. This is essential. But it does not mean that the wrongness had to be stipulated in a previous treaty (page 161). Under this criterion, the crime against peace, which "was based on a long development of international law" (the author makes a short but illuminating historical survey), the Nuremberg Tribunal "was justified in assuming that this delict was a valid crime under international law." (Page 242; see also pages 163, 170.) Insofar as crimes against humanity victimized German nationals, "there existed a strong and convincing basis for the affirmation of those as crimes against the law of nations by the international community" (page 186), if committed in execution of or in connection with war crimes or crimes against peace.

On the whole, Woetzel focuses attention on two orthodox points: that the Nuremberg doctrine (a) received affirmation from the international community, in various trials, including the Tokyo trial, and international declarations; and (b) was in accordance with international law. He sees this conclusion strengthened by the fact that

there are no conflicting decisions of other international tribunals, nor acts of the international community expressing opposite opinion, or an overwhelming practice of nations, that would invalidate the law of Nuremberg. It has been contradicted in international incidents since the Nuremberg trial . . . but . . . it stands strong and undiminished in its legal significance, constantly reaffirmed by the nations

seeking peace in this world and the protection of individual liberties.
(p. 243.)

This is the main point. On some details the reviewer would, unavoidably, disagree. A limitation of the book, perhaps dictated by shortage of space, is the brevity of the summary (pages 219-226) of the 12 Nuremberg cases tried by U. S. judges (Krupp, I.G. Farben, Fieldmarshals, Ministries, Justice, Einsatzgruppen cases, etc.). Woetzel's conclusion that they confirmed "with minor alterations and enlargements" the Nuremberg doctrine is correct, but these matters are so important and the range of the 12 trials was so wide that a fuller coverage would have been rewarding. But the author has succeeded in saying very much in a slim book, which is highly recommended.

JOHN H. E. FRIED

Chronique de Politique Etrangère. Vol. XIII, No. 3, May, 1960: *Les Recours en Annulation et en Cas de Carence dans le Droit de la CECA à la Lumière de la Jurisprudence de la Cour de Justice des Communautés*. Brussels: Institut Royal des Relations Internationales, 1960. pp. 292-402. Fr. 100.

The *Chronique de Politique Etrangère*, published periodically by the Belgian Royal Institute of International Relations under the editorship of Dr. Emmanuel Coppieters, has become an indispensable tool for scholars and practitioners concerned with European institutions. The special issues on the European Defense Community, on the Council of Europe and on the Free Trade Area, and the collection of documents on the Common Market and Euratom are now followed by a volume on *The Appeal for Annulment and for Failure to Act in the Law of the European Coal and Steel Community in the Light of the Jurisprudence of the Court of Justice of the Communities*. It is a telling testimony to the rapid growth of "European law" within the framework of the new institutions that an entire issue can be usefully devoted to such a specialized legal-technical subject. The volume is the product of a joint effort by a group of lawyers from the Community countries—Messrs. Bonaert and Michotte of Belgium, Frowein and Houben of The Netherlands, Galland of France, and Wieacker of Germany. In this respect it represents another example of how the new institutions help break down national barriers and bring together European scholars of different nationalities.

The core of the volume under review consists of an analytical survey of some thirty selected judgments rendered by the Court of Justice of the European Communities up to June 30, 1959, on appeal against acts of the High Authority of the Community. The authors do not deal with the substantive issues of economic law raised in these cases, but focus exclusively upon five categories of problems relating to the right of appeal and the scope of judicial review of the acts.

The authors consider, first, the types of acts by the High Authority that are subject to appeal. The Coal and Steel Community Treaty limits

the right of appeal to binding "decisions" and "recommendations," but the question arose early in the Court's existence whether a mere letter or an "opinion" of the High Authority, which is alleged to have certain legal consequences for the appellant, may be appealed. The Court ruled that the legal impact of the act rather than its form determines the appealability. Again, the scope of the right of appeal of enterprises differs according to whether a decision is "individual" (affecting only certain specified producers) or "general" (a generally applicable norm) and the treaty does not define these terms. In a series of decisions the Court has begun a pragmatic process of interpretation designed to supply the distinguishing criteria. While it has construed liberally the right of appeal of an enterprise against an "individual" decision, the Court has been subject to criticism because of its fairly narrow construction of the right of appeal against "general" decisions.

The treaty lays down four basic grounds of appeal: lack of competence, substantial procedural violation, violation of the treaty, and misapplication of power. These grounds were drawn from the national administrative laws of the member states, and particularly from the jurisprudence of the French Conseil d'Etat. Our study deals with two of the four grounds of appeal. It considers substantial procedural violations, such as the failure by the High Authority to notify the enterprise-addressee of an individual decision, to publish a general decision in the Official Journal of the Communities, or to state adequate reasons for the decision so as to enable the Court to pass upon its legality. While the Court has not hesitated to annul a decision for what it considered an insufficient statement of reasons, it has at times, the authors point out, accepted as adequate a rather laconic motivation.

The second ground for appeal analyzed in some detail consists of misapplication of power (*détournement de pouvoir*), which is of particular importance to enterprises, since, in order to obtain judicial review of a *general* decision, an appellant enterprise must allege that such decision entailed misapplication of power "affecting it." Thus far the Court has refused to annul an act expressly on this ground, although appellants have relied on it in a number of cases. While embracing at first what appears to be the French definition of the concept of misapplication of power, that is, use of power for a purpose different from that for which the power was granted, the Court in later judgments seems to point to an original and broader concept, including situations where the High Authority might have deliberately employed one procedure rather than another for the purpose of eluding certain procedural safeguards and guarantees.

The penultimate chapter of the study analyzes the impact of the limitation on the scope of the Court's power to go behind the conclusions drawn by the High Authority from the economic facts underlying its act—a limitation which was not written into the subsequent Common Market and Euratom treaties. The last chapter deals with the scope of appeal against an "implicit negative decision," that is, against the failure of the High Authority to act where under the treaty it is duty-bound to act.

Two helpful annexes are appended to the volume: one, setting forth an analytical outline of the problems surrounding the appeal for annulment and against inaction; the other, a table of cases before the Court, grouped according to subject matter. The index is confusing because it intermingles references to Court cases and decisions of the High Authority. A rigid division of the chapters into sections entitled "Contents of the Jurisprudence" and "Evaluation of the Jurisprudence" makes for repetition and does not add to the readability of the study.

The volume should be useful primarily to the practitioner before the Community Court. As a valuable contribution to the growing continental literature on the Court's jurisprudence, it should also be of interest to students of comparative administrative law and to scholars concerned with the "common law" which the Court is evolving on the basis of the Community treaties.

ERIC STEIN

BRIEFER NOTICES

Atomic Energy and Law. Inter-American Symposium. Edited by Jaro Mayda. (Rio Piedras: University of Puerto Rico, 1960. pp. xi, 255. Index.) This volume contains the papers presented at the November 16-19, 1959, Inter-American Symposium on legal and administrative problems connected with peaceful atomic energy programs, together with the brief discussions which followed them. The scope of the program was broad: the nature and uses of nuclear materials and facilities; safety problems associated with widespread use of radiation source; United States pattern of governmental activity to protect against radiation hazards; nuclear risks liability and insurance; legal framework for atomic energy programs; international co-operation; and special problems of peaceful uses in Latin America.

The papers were presented by knowledgeable U. S. Atomic Energy Commission personnel, private practitioners in the field, and several Latin American and international civil servants. They are all short, competent, descriptive accounts of present programs in the areas covered, and should be very useful to those who wish to get a bird's-eye view of where we had gotten a year or so ago in achieving peaceful uses of atomic energy in research, medicine, industry, and power-generation, and in the creation of ancillary standards of safety, insurance and international co-operation. They disclose the substantial advances made in research and the disappointingly slow progress in power-generation, and the hard work and steady forward movement toward international regimes relating to nuclear indemnity and insurance programs to protect the public.

The University of Puerto Rico Law School and Dr. Mayda deserve the thanks of all interested in atomic energy law for bringing out this useful addition to public information about a program which may yet bring great good to all peoples.

STANLEY D. METZGER

1959 Annual Survey of American Law. Edited by Albert H. Garretson and Dorothy L. Killam. (New York: New York University School of Law; Oceana Publications, 1960. pp. x, 807. Table of Cases. Index. \$10.00.) The *1959 Annual Survey* is divided into six parts, dealing re-

spectively with Public Law in General, Government Regulation and Taxation; Commercial Law, Torts, and Family Law; Property; Procedure; and Legal Philosophy, History, and Reform. Almost all of the parts deal with subjects of interest to the well-rounded international lawyer. Part One deals specifically with international law. Part Two contains articles on taxation and immigration and nationality matters. Part Three includes articles on admiralty, shipping, and arbitration. Part Five deals with Federal jurisdiction and practice, and Part Six contains articles on jurisprudence, legal bibliography, and history.

The lead article, possibly accorded this position by reason of the increasingly high level of interest in the subject, deals with international law. The author is Albert H. Garretson, Professor of Law and Acting Director of the Institute of International Law at New York University School of Law. Professor Garretson summarizes in twenty-nine pages many of the highlights of international law and organization during 1959. The subjects analyzed by Professor Garretson include the United Nations, the European Economic Community, the European Court of Human Rights, the International Court of Justice, national court decisions, and the American Law Institute's current tentative draft on International Agreements. The article clearly reflects the close relationship between international institutions and international law. Regional developments in Europe call striking attention to the development of individual remedies in transnational or cross-frontier situations. While not all of the institutions and the substance of existing international law were employed to their full potential in 1959, it is nonetheless encouraging to note that the dynamic qualities of both the law and the institutions were constantly recognized.

Professor Garretson's contribution, along with that of his co-authors, reflects a high standard of legal writing. He and his colleagues continue to earn the respect of the legal community through the publication of this useful work.

CARL Q. CHRISTOL

Documents on American Foreign Relations, 1959. Edited by Paul E. Zinner. (New York: Harper & Brothers, for the Council on Foreign Relations, 1960. pp. xxiii, 541. Index. \$6.95.) Mr. Zinner has provided a perceptive review of his own book in the Preface, where he notes the difficulty of selecting meaningful documents in an era marked by "an apparently unabating urge to loquacity on the part of statesmen and diplomats," and offers the comment that "Even documents of the greatest historic importance nowadays seem to be written without regard for intrinsic literary quality." The editor's expression of sympathy for the reader should be reciprocated; beyond this, the editor is entitled to the gratitude of scholars for his able work in continuing this valuable series of documentary volumes.

Students of American foreign policy will find this a well-organized compilation of papers bearing on international events of 1959. The nature of the collection tells us a great deal about the style of contemporary diplomacy. For instance, the selections indicate clearly the recent prominence of peripatetic diplomacy, the propensity of statesmen to issue communiqués which do not actually say anything and to formulate agreements which do not actually commit anyone to anything, and the increasing tendency to use regional and general international organizations as the formal settings for diplomatic activity. The rise of electronic diplomacy is strikingly illustrated by the inclusion of the transcript of the famous "Well, Mr. President—Well, Harold" television exchange between Mac-

millan and Eisenhower on August 31, 1959. Documents of this sort have great symptomatic, if not substantive, value.

The editor includes a few documents which relate only indirectly to the foreign relations of the United States, having a more general bearing on international relations. It might be suggested that he consider including in this category, in future volumes, excerpts from the Introduction prepared by the Secretary General of the United Nations for each of his *Annual Reports on the Work of the Organization*.

INIS L. CLAUDE, JR.

Sovremennyyi Neitralitet. By B. V. Ganyushkin. (Moscow: Izdatelstvo IMO, 1958. pp. 164. R. 6.95.) In this monograph on "modern neutrality," the Soviet author distinguishes three "basic forms" of neutrality—wartime neutrality (non-participation in war), peacetime policy of neutrality or non-alignment (neutralism), and permanent neutrality as a legal status guaranteed or recognized by treaty. The monograph deals principally with the latter two forms of neutrality, and with their political and legal implications. A chapter is devoted to the problem of compatibility of permanent neutrality with participation in collective security organizations such as the United Nations. Displaying considerable familiarity with Western literature, the author is cautious in his legal conclusions. In consonance with recent Soviet policy, his general attitude toward neutralism and permanent neutrality in this period of history is favorable. He regards them as contributing to "the struggle for peace," and believes that permanent neutrality is not incompatible with membership in the United Nations.

O. J. LISSITZYN

Völkerrecht. By Akademie der Wissenschaften der UdSSR—Rechtsinstitut. German translation by Lothar Schultz. Preface by Eberhard Menzel. (Hamburg: Hansischer Gildenverlag Joachim Heitmann & Co., 1960. Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, Vol. 43. pp. xxvii, 492. DM. 44.) With the consent of the Soviet Academy of Science, this translation was published by the Institute for International Law at the University of Kiel. For a review of the Russian original of this important treatise, published in 1957, see Hazard, in this JOURNAL, Vol. 52 (1958), pages 804–807.

Professor Menzel contributes a useful preface in which he reviews briefly the several stages through which the Soviet science of international law has passed. He also points out some peculiarities of the current stage, characterized as it is by the offensive and defensive uses to which the Soviet Government and doctrine put international law. Having entered his *caveat*, he also finds that in some of its parts the textbook of the Soviet Academy is indistinguishable from Western writings. He also says that translations of other Soviet works on international law will be made available by his Institute in the near future. The Institute of which Professor Menzel is the Director has certainly made a most useful contribution by publishing the first translation in a Western language of an authoritative Soviet text.

LEO GROSS

Derecho Internacional Público. Vol. I. By Daniel Guerra Iñiguez. (Caracas: Tipografía Velazquez, 1960. pp. 239. Bs. 25.) Here is the first volume of a treatise on international law, written by the Professor of Public and Private International Law at the University of "Santa María," who is at the same time Professor of Private International Law at the

Central University of Venezuela. The volume is constructed along classical lines, and its points of view are, in general, conservative. What gives it a place in the category of treatises is that it reflects the established attitude of the Foreign Office of Venezuela and the traditional background of its conception of international rights and duties.

But international law has during the past decade or more come to be presented with new problems, and it is the author's views on these points that have special interest for us. What is the place of regional law within the universal system? Must the new nations of Africa accept the traditional law of Western Europe in becoming Members of the United Nations? Has the individual now become a proper subject of international law? Does the responsibility of the state to aliens extend beyond the decisions of the national courts in respect to denial of justice? Professor Iñiguez's volume is too brief to go into these and other points in detail; but his volume has laid solid foundations upon which the answers may subsequently be built.

C. G. FENWICK

Relaciones entre las Administraciones Nacionales y las Organizaciones Internacionales. Documentos para un Seminario. (Havana: Inter-American Academy of Comparative and International Law, 1960. pp. 138). At the beginning of 1958, negotiations started between the Inter-American Academy and UNESCO for the preparation at Havana of a session to study the relations between national administrations and international organizations. UNESCO designated a scientific director and three experts; all the American governments and many international organizations, universal and regional, were invited. The study should have been made in the form of round-table debates on the basis of prepared papers. At the end of 1958 not enough invitations had been accepted; it was therefore necessary, first to postpone, and then to cancel, the meeting. In 1960 the Academy published the papers which had been prepared.

The principal contents of the publication are the papers, prepared by the persons designated by UNESCO. The scientific director, M. Guy de Lacharrière, of the French Foreign Office, studies the external relations of international organizations with member and non-member states, with intergovernmental and private international organizations (pages 15-35). Two experts look at the problem from the side of the national administrations. Professor Manuel Fraga Iribarne of the University of Madrid studies the possibilities of making the international organizations better known to national functionaries (pages 37-50). Professor George I. Blanksten of Northwestern University discusses (pages 101-109) the structure and financing of American administrative organs charged with maintaining relations with international organizations, particularly as far as the distribution of competences between the Department of State and technical departments is concerned, and with special emphasis on bilateral and multilateral technical assistance.

By far the most interesting paper is that by the well-known French professor, Georges Langrod (pages 51-100). This paper is dedicated to the problem of relations between states (members of international organizations) and what he calls "private organizations which function on the international level." He includes here not only private international organizations, many of which have now consultative status with international organizations, but also private national organizations which are component parts of private international organizations, and, finally, the international private organizations of industrial, commercial and economic character. He emphasizes "groups of interests," "pressure groups,"

"lobbying," and so on. The author states that the problem with which he deals is not new, but is only very little known and rarely studied in its totality. Giving a wealth of information, statistics and examples, he stresses that nowadays the co-existence and the complementary character of the "public" and the "private" sector on the international level is a fundamental fact. It is an excellent paper and deserves an English translation.

JOSEF L. KUNZ

Annual Review of United Nations Affairs, 1959. Edited by Waldo Chamberlin, Thomas Hovet, Jr., and Richard N. Swift. (New York: Oceana Publications, by arrangement with New York University Press, 1960. pp. 240. Index. \$6.00.) This volume, like the preceding volume (for 1957-58) in the series produced by the New York University Institute for Annual Review of United Nations Affairs, consists of excerpts from debates within, and speeches about, the United Nations by representatives of Member States and by the Secretary General, with a brief introductory summary by the editors of United Nations activities. The 1959 *Annual Review* excludes economic, social, and humanitarian matters (which were covered in 1957-58), presenting statements relating to the United Nations system in general terms, "Arms and Atoms" (including outer space), political disputes, and organizational, administrative, and financial problems. Despite its title, it covers 1958 as well as 1959.

The method chosen for presenting a survey of United Nations activities in the specified areas has serious limitations. A digest of debates on various issues could be very useful. However, the editors have arranged the passages in alphabetical order according to the nationality of the spokesmen, and chronologically under each national heading, with the result that continuity is lost and the reader is prevented from gaining any sense of the confrontation of views which characterized a given debate. Moreover, many of the excerpts included are trivial and platitudinous, or so trimmed as to be bereft of meaning. One wonders, for instance, what purpose is served by quoting Khrushchev to the effect that the question of control is a major obstacle to agreement on disarmament (page 85), without including any of the substantive statement regarding the Soviet position on this question, which followed that assertion.

In this reviewer's opinion, the attempt to survey United Nations affairs by the method employed in this volume comes off badly, and it is reassuring to know that the next *Annual Review* will revert to the original format of informal addresses by officials of the United Nations, followed by panel discussions.

INIS L. CLAUDE, JR.

Yearbook of the United Nations, 1959. (New York: Columbia University Press, in co-operation with the United Nations, 1960. (Sales No.: 60.I.1.) pp. xii, 660. Index. \$12.50.) This is the thirteenth edition of this valuable reference work. As usual it covers in Part I (pages 1-448) the work of the United Nations itself, and in Part II (pages 449-533) the work of the 13 specialized agencies. Several appendices contain useful information on Members, the structure and membership of the principal and subsidiary organs of the United Nations, et cetera. As in previous volumes, the relevant resolutions are given in full, and for each item handled by the U.N. General Assembly, the Security Council, and other organs, documentary references are included, which are of the greatest value for anyone who desires to find his way through the maze of U.N.

documents. The expansion of United Nations activities makes severe condensation necessary. This may make the *Yearbook* less attractive to the lay user. The students of the United Nations will take it in their stride and take the *Yearbook* for what it is: an indispensable one-volume guide to all activities of the United Nations family.

LEO GROSS

Yearbook on Human Rights for 1956. (New York: United Nations, 1959 (Sales No.: 58.XIV.2); Columbia University Press, 1960. pp. xii, 312. Index. \$4.00.) The eleventh volume in the series contains reports on human rights developments in 74 states (Part I, pages 3-259), in some trust and non-self-governing territories (Part II, pages 265-285), and the texts of pertinent international instruments, lists of ratifications of certain international instruments in the broad field of human rights, and finally an Annex of documentary references on United Nations action in relation to human rights. This Annex supersedes the section contained in earlier *Yearbooks* which dealt with "The United Nations and Human Rights." The country articles are prepared in some cases by the U.N. Secretariat and often consist of a few lines, or are communicated to the Secretariat by Missions to the United Nations or by other government agencies. For some countries, such as Australia, Germany, France, Israel, Japan, Italy and others, they are compiled by a government-appointed correspondent of the *Yearbook on Human Rights*, and it seems to this reviewer, at any rate, that they are far superior to the colorless report submitted for the United States by its Permanent Representative to the United Nations. Not only is it unnecessarily self-laudatory, but also contains material of dubious relevance. Could the United States not improve its showing in this widely distributed *Yearbook* by appointing as correspondent a competent lawyer or a group of lawyers to furnish the Secretariat with a survey which, if not original and overly analytical, would at least match the craftsmanship of, say, the German or French articles?

The chief value of the *Yearbook* continues to consist in making available in English a vast amount of legislation and judicial material which otherwise might escape attention. For students of nationality problems the laws promulgated by Egypt, Ireland and Tunisia will be of special interest.

LEO GROSS

The United Nations and U. S. Foreign Policy. By Lincoln P. Bloomfield. (Boston: Atlantic-Little, Brown & Co., 1960. pp. xi, 276. Index. \$4.75.) The question to which this book addresses itself—Just what are the uses of the United Nations from the standpoint of American national interests?—is a highly important one. Mr. Bloomfield is to be commended for undertaking the first full-scale attempt to provide the answers. Yet the book is disappointing, particularly in its treatment of questions of international law.

There is the too-easy assumption that only the Communists are likely to be initiators of violence, and that no actions of ours would ever endanger world peace. Inadequate attention is devoted to the function of the Charter as a code of international conduct. As between the two opposing military coalitions "the rule of law" is relegated to a highly indefinite future. There is a brief chapter on the problem of subversion and indirect aggression, but the application of the rule against the use of force to such situations seems to be rejected entirely. This retreat from the Charter principles evidently receives considerable support in official circles, but it leaves dangerously free from any international legal controls situations of the Hungarian and Cuban types, and this

reviewer remains unconvinced that it is in the national interest of the United States. Bloomfield does suggest that there is room for a rule of law among a limited community of like-minded states, but it is hard to see why he believes that the opening for signature of a new protocol for compulsory legal jurisdiction, to be vested in special arbitration tribunals or "regional or other subbodies of the International Court" (page 244), would hold more promise than increased support of the already existing option for compulsory jurisdiction (Article 36 of the Court's Statute).

Nevertheless, the book raises some important questions which need to be debated. It is thus a useful contribution to the discussion of the ends and means of United States foreign policy.

EDWIN C. HOYT

Indonesian Independence and the United Nations. By Alastair M. Taylor. (Ithaca: Cornell University Press, 1960. pp. xxix, 503. Index. \$7.50.) If somewhat too detailed for the general reader, this excellent study of the rôle of the United Nations in Indonesia's struggle for independence from The Netherlands is a valuable primary source for students of international organization and of international politics. Mr. Taylor participated in the events of which he writes as an international civil servant serving with the U.N. Security Council's field machinery in Indonesia. A large part of the book is devoted to a careful historical review of the attempts to achieve a peaceful settlement, first by the exercise of United Nations' "good offices," which ended in a renewed Dutch attempt to achieve a military solution, and then by more overt political intervention of the Security Council. Skillfully brought out is the complex interaction of cold-war pressures, Asian opinion and United Nations agencies. There follows an appraisal of the policies and tactics of the two protagonists and an illuminating discussion, which will be of particular interest to international lawyers, of the Charter reservation of "domestic jurisdiction," which here received its first major test. Before the Indonesian question had been disposed of, it was already apparent, as Lester Pearson puts it in his Foreword to this book, that that provision was "not much more than something to be observed at the United Nations only if you have the votes, or the influence, to make good your claim that it must be."

Benefiting from the co-operation of Dutch and Indonesian officials, and of Dr. Frank P. Graham and other participants in the United Nations' effort, Mr. Taylor's study is a significant addition to the source materials for the study of the United Nations' peace-keeping function.

EDWIN C. HOYT

China Crosses the Yalu. The Decision to Enter the Korean War. By Allen S. Whiting. (New York: Macmillan Co., 1960. pp. x, 219. Bibliography. Index. \$7.50.) Thoroughly and skillfully, Mr. Whiting has collected and analyzed the available evidence concerning the way in which the Chinese leaders made their decision to intervene in Korea. This evidence remains in many respects unsatisfactory, but it does point to a number of important conclusions which seem fairly proven: that until August, 1950, Russian influence in North Korea was paramount and direct Chinese influence was excluded; that China's active interest in the Korean war was declared for the first time in late August, 1950, following the rebuff of Russian hints at willingness to end the war by compromise; that Peiping then decided to act to prevent total defeat and United Nations occupation of North Korea; and that the determining factor which brought Chinese military intervention was the U.N. Command's disregard

of China's warnings that she would intervene if the border between North and South Korea were crossed by the U.N. forces.

An interesting section of the book considers "the hazard of miscalculation" in limited war situations. There was, of course, a major miscalculation by the United States as to the probable effects of the decision to attempt the occupation of North Korea. The results were disadvantageous to the United States: three years of unnecessary war, a great increase in Communist China's military power and prestige, and the creation of a built-in source of implacable conflict between that country and the United States. How might this miscalculation have been avoided? Whiting believes that a failure to communicate in believable terms Peiping's intention to take military action, if the U.N. forces did not halt at the 38th parallel, was the factor most responsible for the widening of the conflict. However, another factor in the United States' miscalculation was evidently its underestimation of the military capabilities of the Chinese Communists. Since he confines himself to evidence from the Chinese side, Whiting does not deal with this point. Nor is he concerned with legal considerations, although one means of avoiding expansion of hostilities by miscalculation may be closer adherence to the rules of the U.N. Charter as to what uses of force are legitimate. This tangential question illustrates the fact that the evidence assembled by Whiting is relevant to many fundamental problems of international politics.

EDWIN C. HOYT

American-Chilean Private International Law. (Bilateral Studies in Private International Law, No. 10.) By Alfredo Etcheberry O. (New York: Oceana Publications, 1960. pp. 96. Index. \$5.00.) This short monograph is the tenth contribution of the Parker School of Foreign and Comparative Law to studies in private international law. Professor Etcheberry O. of the University of Chile gives us a neat résumé of Chilean law pertaining to nationality, domicile, aliens, succession, commerce, monetary and exchange control and civil procedure. Helpful comparisons are made with the laws of American nations already surveyed in other volumes of this series.

Very little United States material is referred to in this volume, inasmuch as the Commercial Treaty of 1832 between the United States and Chile is apparently no longer effective, notwithstanding a reference to it in the Department of State's *Treaties in Force*. The ineffectiveness of treaties in dealing with complicated conflicts questions is again demonstrated. Objections to the so-called Bustamante Code of 1928 in other volumes of this series are confirmed by the author, who suggests that in some cases the uniformity sought has been reduced to "a purely verbal formula." Two countries which have ratified the Code, for example, may be bound to decide a particular case by the "personal" law of the parties, but one country may look to the law of domicile and the other to the law of nationality in determining personal law.

No argument for a Bricker Amendment seems necessary in Chile. Professor Etcheberry O. states that the Chilean Supreme Court can declare a treaty unconstitutional. He suggests that the U. S.-Chile Treaty on the Recovery of Nationality¹ would probably be declared invalid because it is clearly inconsistent with the Constitution of Chile, which specifies the precise methods by which nationality may be obtained. Clearly treaties dealing with private rights cannot be drafted without an understanding of local law which these studies help to give.

GORDON B. BALDWIN

¹ 37 Stat. 1653, Treaty Series, No. 575.

Taxation of Foreign Income. Cases and Materials. By Boris I. Bittker and Lawrence F. Ebb. (International Legal Studies Program. Preliminary edition. Stanford: Stanford University Law School, 1960. pp. xii, 580. \$5.00.) Although only a few law schools can afford the luxury of a course solely devoted to the application of tax laws to income derived from foreign sources, this splendid volume deserves the close reading of teachers of international law as well as instructors in the field of taxation, conflict and procedure. Much of the material cuts across other fields of interest and should be referred to in other courses. The book could easily supply useful material for several international trade and law seminars. Questions of jurisdiction to proscribe, frequently examined in an introductory course in procedure or international law, could fruitfully be raised with the use of the materials Professors Bittker and Ebb present in Chapter I, "Bases for Taxation of Foreign Income." The part dealing with theories of jurisdiction is excellent. The student ought to be able to understand the everyday problems of conflicting bases of jurisdiction much more clearly when tax cases are used as examples. Illustrative is *Wallace Bros. v. Commissioner* (page 59), a Privy Council decision which sustained the power of India to define as a resident for tax purposes a company transacting most of its business in England, but whose income within India exceeded its income from without India. Although the legislation authorizing the definition has since been repealed, the good discussion of the case in the notes which follow poses the question whether international law will supply limitations upon the authority of a nation to tax the entire income of corporations which earn only a part of their income in the taxing nation.

Chapter II, which is substantially in text form, deals with the various methods of engaging in foreign business and investment. The authors face the risk that much of their material may prove obsolete in the face of proposed solutions for relieving our balance-of-payments deficit. However, the discussion in Chapter II is helpful in educating legislative draftsmen as well as practitioners. The authors are successful in maintaining a strong policy orientation, and at the same time they offer the student ample material in developing lawyerlike techniques for dealing with tax problems.

Income tax treaties are dealt with for over 100 pages in Chapter III. Their limitations are amply demonstrated and their relationship to other types of treaties are shown.

Chapter IV presents five special problem areas having to do with fluctuations in foreign exchange, blocked currency, foreign situs trusts, international transportation industries and the enforcement of foreign taxes. An appendix contains pertinent provisions of the Internal Revenue Code relating to the taxation of foreign income and the income of aliens.

Any collection of materials which purports to deal with current problems must have occasional supplements. The bulk of the material in this volume, however, will remain helpful, whatever tax policy is eventually adopted, and accordingly this reviewer hopes that the soft cover and photo-offset format will be abandoned in favor of a more permanent volume.

GORDON B. BALDWIN

Private International Law. By Shri N. K. Dixit and Shri Neglur Ranganath. (Dharwar: Karnatak University, 1960. pp. xiv, 264. Index.) This is the first book on the Indian law of conflict of laws, and as such, is a remarkable achievement. Most of its shortcomings must no doubt be excused by the fact that lack of a usable library apparently limited the authors to secondary sources. If the authors should nevertheless ex-

pect to realize their hope "to be useful to foreign jurists" (page iv), they will, in their next edition, have to put greater emphasis on the fifty-odd Indian cases, while broadening their exclusively English analysis to include American and Continental tradition. Moreover, one may hope that future peculiarly Indian contributions will render unnecessary uncalled-for criticisms of "wrong" Western attitudes which, we are told, in contrast to *Dharma*, treat duty as a mere incident of right (page 2), as well as the untenable claim according to which India had developed sound principles of law in the 5th century B.C., "when the western civilization had not even made a beginning" (Solon gave his laws in the 7th century B.C.). If we are to build a bridge between the cultures of the West and the East, we shall have to start building at *both* ends.

Jurisprudence de Droit International Privé. Annotée dans La Revue Critique de Droit International Privé 1948-1959. By Ph. Francescakis. (Paris: Recueil Sirey, 1961. pp. 375. Index.) This book is important to American conflicts lawyers for two reasons: it renders accessible in one volume a collection of the most important French decisions on the law of conflict of laws within the 12-year period from 1948 to 1959; and, more welcome yet, it gathers together for ready reference the valuable comments previously published by the author in the *Revue Critique de Droit International Privé*. As the Index and Table of Contents show, the collection of these comments falls little short of a complete text on the subject and thus makes us hope that the present volume is only the first step to the publication of a treatise which, coming from one of our outstanding specialists, would be a great event.

ALBERT A. EHRENZWEIG

The Caughnawaga Indians and the St. Lawrence Seaway. By Omar Z. Ghobashy. (New York: The Devin-Adair Co., 1961. pp. xi, 137. Bibliography. Index. \$3.00, cloth; \$2.00, paper). This is essentially a brief for the Indians in their dealings with the Canadian Government, which the author holds to be an international question. Dr. Ghobashy performs a most useful service to those of us who tend to forget this only partially dormant question on the United States' legal doorstep. Although the reviewer demurs on several points and finds the portrayal of the constitutional principles of Canada somewhat removed from mid-twentieth century reality, the presentation is provocative and instructive. Counselor roams broadly over much legal terrain. The questions of subjects of international law and treaty-making power are only partially developed here. Particularly suggestive are the reports of Indian use of the League of Nations and the United Nations. Despite the author's insistence that in these matters the Canadian Government may not legally deal with individual Indians, but only with the Band Council, nowhere discussed is the technical question of the competence of the Caughnawaga to treat unilaterally now with the white man, when the Indian contractor in law was the Six Nations. The case for Canada appears only in a summary of the Canadian Memorandum of February 7, 1924 (page 110 ff.).

ROBERT D. HAYTON

Second Colloquium on the Law of Outer Space, London, 1959. Proceedings. Edited by Andrew G. Haley and Welf Heinrich, Prince of Hanover. (Vienna: Springer-Verlag, 1960. pp. vii, 176. \$6.00.) A second Colloquium on the Law of Outer Space was held as part of the tenth annual Congress of the International Astronautical Federation in Sep-

tember, 1959, in London. This volume contains addresses and papers prepared for that meeting. Despite the editors' belief that these *Proceedings* "set a very definite pattern of important areas of thinking on the problems of cosmic law" (page iii), many of the comments are fragmentary at best, while, with a few exceptions, the rest are rather elementary restatements of matters which have already received an abundance of attention. Among the useful contributions are those by Samuel Kucherov, surveying official and semi-official U. S. and Soviet statements with respect to the use of outer space, and by Philip Yeager, imaginatively exploring the possibility of substituting man's drive for knowledge in place of his traditional drive for conflict and conquest. It is also helpful to a reader in the United States to have even the brief exposure provided by these papers to the thoughts of such scholars as Goedhuis of Holland, Valladão of Brazil, and, in a longer paper reviewing political developments and legal opinions, of S. S. Lall of India.

HOWARD TAUBENFELD.

India's Constitution in the Making. B. N. Rau. Edited by B. Shiva Rao. (Bombay, Calcutta, Madras, New Delhi: Orient Longmans Private Ltd., 1960. pp. lxxii, 510. Index.) Dr. Benegal Rau had a distinguished career as civil servant and judge in India, as adviser to the Indian Constitutional Convention, as representative of India in the United Nations, as a member of the International Law Commission of the United Nations, and as Judge of the International Court of Justice. He died in 1953, and the present volume has been edited from manuscripts which he left and from reports which he made to the Indian Constitutional Convention. In a foreword, Dr. Rajendra Prasad, President of India, indicates the important contribution which Rau made to the Constitution.

Of interest to international lawyers is the discussion of the place of treaties, and especially of the United Nations Charter, in Indian constitutional law (pages 89 ff.), of succession to treaty obligations (pages 91, 403 ff., 414 ff.), of the option given the Princely States to join India or Pakistan (pages 153 ff.), of the right succession from the Commonwealth (pages 161 ff.), of the meaning of foreign affairs (pages 177 ff.), of fundamental rights (pages 232 ff.), of the relations of India to the Commonwealth (pages 342 ff.), and of the status of the Princely States (pages 408 ff.) and Bhutan (pages 367 ff.). On these and other questions, Rau cites precedents and text-writers, and gives practical advice on each in relation to the Indian Constitution and Indian policy. As the memoranda and reports were written before 1947, there is nothing specifically on the Kashmir, Indus, or other problems in the relations between India and Pakistan.

The book has a good index and provides insight into the problems of British-Indian relations, of the Indian Constitution in the process of making, and of certain points of international law as viewed by an important Indian jurist at the time India became independent.

QUINCY WRIGHT

America and the Russo-Finnish War. By Andrew J. Schwartz. (Washington, D. C.: Public Affairs Press, 1960. pp. vi, 103. Index. \$3.25.) In this brief monograph, utilizing State Department files and drawing heavily on published memoirs and Wuorinen's classic study of Finland and World War II, the author has recounted incidents of Finland's constant problems of relations with the U.S.S.R., beginning with 1938 and concluding with the final war settlement, using as his focal point U.S. relationship and reaction to the events.

To the international lawyer, struggling with the complex problems of U. S. policy in the 1960's, the early sections on U. S. neutrality, and the varying views of what it seemed to require with regard to Finland's struggle with the Russians, provide a sharp reminder of the distance traveled in American thinking since the end of the war. To the professional diplomat the activity of U. S. Minister Schoenfeld in trying to interpret the Finnish position to the United States and vice versa will serve as a case study in what a diplomat may still do in spite of being tied to Washington by cable.

To those who have to negotiate with the Russians, the book can be a guide to Soviet techniques, especially when the Soviet negotiators feel they represent strength. In spite of this strength, Finland has survived, and Schwartz asks: Why? He gives no confident answer, but he credits Sweden's concern as a major element in the answer, and also Finland's willingness to avoid even minuscule threat to Soviet security.

For partisans of President Roosevelt, the account of his fine line in preserving traditional American friendship, while facing the reality of co-belligerence with Germany against the United States' wartime ally, provides another chapter in the strategic skill of a complex man.

JOHN N. HAZARD

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* Mention here neither assures nor precludes later review.

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ELEANOR H. FINCH

OFFICIAL DOCUMENTS
UNITED NATIONS
REPORT OF THE INTERNATIONAL LAW COMMISSION
COVERING THE WORK OF ITS THIRTEENTH SESSION, MAY 1-JULY 7, 1961*

CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly Resolution 174 (II) of 21 November 1947, and in accordance with the Statute of the Commission annexed thereto, as subsequently amended, held its thirteenth session at Geneva from 1 May to 7 July 1961. The meetings were held at the European Office of the United Nations until 2 June and thereafter at the International Labour Office at the invitation of its Director-General. The work of the Commission during the present session is described in this Report. Chapter II of the Report contains the draft articles on Consular Relations, with commentaries. Chapter III deals with a number of administrative and other questions.

I. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoš	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Nihat Erim	Turkey
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. André Gros	France
Mr. Shuhsi Hsu	China
Mr. Eduardo Jiménez de Aréchaga	Uruguay
Mr. Faris El-Khoury	United Arab Republic
Mr. Ahmed Matine-Daftary	Iran
Mr. Luis Padilla Nervo	Mexico

* U.N. General Assembly, 16th Sess., Official Records, Supp. No. 9 (A/4843). For reports of the International Law Commission covering its previous sessions, see Supplements to this JOURNAL, Vol. 44 (1950), pp. 1, 105; Vol. 45 (1951), p. 103; Vol. 47 (1953), p. 1; Vol. 48 (1954), p. 1; Vol. 49 (1955), p. 1; and Official Documents, Vol. 50 (1956), p. 190; Vol. 51 (1957), p. 154; Vol. 52 (1958), p. 177; Vol. 53 (1959), p. 230; Vol. 54 (1960), p. 229; Vol. 55 (1961), p. 223.

Mr. Radhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Senjin Tsuruoka	Japan
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Sir Humphrey Waldock	United Kingdom of Great Britain and Northern Ireland
Mr. Mustafa Kamil Yasseen	Iraq
Mr. Jaroslav Zourek	Czechoslovakia

3. On 2 May 1961, the Commission elected Mr. André Gros (France), Mr. Senjin Tsuruoka (Japan) and Sir Humphrey Waldock (United Kingdom of Great Britain and Northern Ireland) to fill the vacancies caused by the death of Mr. Georges Scelle, the resignation of Mr. Kisaburo Yokota and the election of Sir Gerald Fitzmaurice to the International Court of Justice. Mr. Gros attended the meetings of the Commission from 5 May, Sir Humphrey Waldock from 8 May and Mr. Senjin Tsuruoka from 23 May onwards. Mr. Faris El-Khoury did not attend the meetings of the Commission.

II. OFFICERS

4. At its 580th meeting, held on 1 May 1961, the Commission elected the following officers:

Chairman: Mr. Grigory I. Tunkin;

First Vice-Chairman: Mr. Roberto Ago;

Second Vice-Chairman: Mr. Eduardo Jiménez de Aréchaga;

Rapporteur: Mr. Ahmed Matine-Daftary.

5. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

III. AGENDA

6. The Commission adopted an agenda for the thirteenth session consisting of the following items:

1. Filling of casual vacancies in the Commission (Article 11 of the Statute)
2. Consular intercourse and immunities
3. State responsibility
4. Law of treaties
5. Co-operation with other bodies
6. Planning of future work of the Commission
7. Date and place of the fourteenth session
8. Other business

7. In the course of the session, the Commission held forty-eight meetings. It considered all the items on its agenda except item 3 (state responsibility).

The decisions taken on items 4, 5, 6 and 7 are dealt with in Chapter III below.

CHAPTER II

CONSULAR INTERCOURSE AND IMMUNITIES

I. INTRODUCTION

8. At its first session, in 1949, the International Law Commission drew up a provisional list of fourteen topics the codification of which it considered necessary or desirable. On this list was the subject of "Consular intercourse and immunities," but the Commission did not include this subject among those to which it accorded priority.¹

9. At its seventh session, in 1955, the Commission decided to begin the study of this topic and appointed Mr. Jaroslav Zourek as Special Rapporteur.²

10. In the autumn of 1955 the Special Rapporteur, wishing to ascertain the views of the members of the Commission on certain points, sent them a questionnaire on the matter.

11. The subject of "Consular intercourse and immunities" was placed on the agenda for the eighth session of the Commission, which devoted two meetings to a brief exchange of views of certain points made in a paper submitted by the Special Rapporteur. The Special Rapporteur was requested to continue his work in the light of the debate.³

12. The topic was retained on the agenda for the Commission's ninth session. The Special Rapporteur submitted a report (A/CN.4/108), but in view of its work on other topics, the Commission was unable to examine this report.⁴

13. The Commission began discussion of the report towards the end of its tenth session, in 1958. After an introductory exposé by the Special Rapporteur, followed by an exchange of views on the subject as a whole and also on the first article, the Commission was obliged, for want of time, to defer further consideration of the report until the eleventh session.⁵

14. At the same session, the Commission decided to make the draft on consular intercourse and immunities the first item on the agenda for its eleventh session (1959) with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft on which governments would be invited to comment. It further decided that if, at the eleventh session, it could complete a first draft on consular intercourse and immunities to be sent to governments for comments, it would not take up the subject again for the purpose of preparing a final draft in the light

¹ Official Records of the General Assembly, 4th Sess., Supp. No. 10 (A/925), para. 16 and 20.

² *Ibid.*, 10th Sess., Supp. No. 9 (A/2934), par. 34.

³ *Ibid.*, 11th Sess., Supp. No. 9 (A/3159), par. 36.

⁴ *Ibid.*, 12th Sess., Supp. No. 9 (A/3623), par. 20.

⁵ *Ibid.*, 13th Sess., Supp. No. 9 (A/3859), par. 56.

of those comments until its thirteenth session (1961), and would proceed with other subjects at its twelfth session (1960).⁶

15. The Commission also decided, because of the similarity of this topic to that of diplomatic intercourse and immunities which had been debated at two previous sessions, to adopt an accelerated procedure for its work on this topic. Lastly, it decided to ask all the members who might wish to propose amendments to the existing draft presented by the Special Rapporteur to come to the session prepared to put in their principal amendments in writing within a week, or at most ten days, of its opening.⁷

16. The Special Rapporteur for this topic, Mr. Jaroslav Zourek, having been prevented by his duties as *ad hoc* judge on the International Court of Justice from attending the meetings of the Commission during the first few weeks of the eleventh session, the Commission was not able to take up the consideration of the draft articles on consular intercourse and immunities until after his arrival in Geneva, starting from the fifth week. At its 496th to 499th, 505th to 511th, 513th, 514th, 516th to 518th and 523rd to 525th meetings, the Commission considered Articles 1 to 17 of the draft and three additional articles submitted by the Special Rapporteur. It decided that at its next session, in 1960, it would give top priority to "Consular intercourse and immunities" in order to be able to complete the first draft of this topic and submit it to governments for comments.⁸

17. At the twelfth session the Special Rapporteur submitted his second report on consular intercourse and immunities (A/CN.4/131), dealing with the personal inviolability of consuls and the most-favoured-nation clause as applied to consular intercourse and immunities, and containing thirteen additional articles. For the convenience of members of the Commission and to simplify their work, he also prepared a document reproducing the text of the articles adopted at the eleventh session, a partially revised version of the articles included in his first report, and the thirteen additional articles (A/CN.4/L.86).

18. At the twelfth session, the Commission devoted to this topic its 528th to 543rd, 545th to 564th, 570th to 576th, 578th and 579th meetings, taking as a basis for discussion the two reports and the sixty draft articles submitted by the Special Rapporteur. In view of the Commission's decisions concerning the extent to which the articles concerning career consuls should be applicable to honorary consuls, it proved necessary to insert more detailed provisions in the chapter dealing with honorary consuls, and consequently, to add a number of new articles. The Commission provisionally adopted sixty-five articles together with commentaries. In accordance with Articles 16 and 21 of its Statute, the Commission decided to transmit the draft to governments through the Secretary-General, for their comments.⁹

19. In accordance with the Commission's decision, the draft articles on consular intercourse and immunities were transmitted to the governments

⁶ *Ibid.*, para. 57 and 61.

⁷ *Ibid.*, par. 64.

⁸ *Ibid.*, 14th Sess., Supp. No. 9 (A/4169), para. 7, 29 and 30.

⁹ *Ibid.*, 15th Sess., Supp. No. 9 (A/4425), par. 18.

of the Member States by circular letter dated 27 September 1960, which asked them to communicate their comments on the draft by 1 February 1961.

20. During the discussion by the General Assembly of the International Law Commission's report on the work of its twelfth session,¹⁰ of which the draft articles on consular intercourse and immunities form the main part, there was an exchange of views on the draft as a whole and on the form it should take, although, owing to its provisional nature, the draft had been submitted to the Assembly for information only. While reserving the positions of their respective Governments, the representatives in the Sixth Committee of the General Assembly expressed general satisfaction with the draft.

21. Almost all representatives approved the Commission's proposal to prepare a draft which would form the basis of a multilateral convention on the subject.¹¹

22. During the Sixth Committee's debate on the Commission's report, several representatives stressed the need to maintain separate provisions on the legal status of honorary consuls and on their privileges and immunities.¹²

23. In some cases, the remarks of representatives in the Sixth Committee also related to particular articles or chapters of the draft. These remarks were summarized in the Special Rapporteur's third report, which analysed the comments of governments (see paragraph 25 below).

24. By 16 June 1961, the date on which it completed its consideration of the comments of governments, the Commission had received comments from nineteen governments. The text of these comments (A/CN.4/136 and Add.1-11) was circulated to the members of the Commission and is reproduced as an annex to the present report.*

25. On the whole, the draft articles on consular intercourse and immunities were considered by the governments which submitted comments as an acceptable basis for the conclusion of an international instrument codifying consular law. The Government of Guatemala said it was prepared to accept the draft as worded by the Commission. The Government of Niger said it had no comments to make, and the Government of Chad stated that it was not in a position to present comments. The other comments received contained a number of proposals and suggestions relating to the various articles of the draft. To facilitate discussion of the comments of governments, the Special Rapporteur, in his third report on consular intercourse and immunities (A/CN.4/137), analysed and arranged the comments in accordance with the Commission's usual practice, adding the conclusions drawn from them and proposals for amending or supplementing the draft accordingly. The comments transmitted later by governments were, for the most part, considered by the Commission in connexion with articles still remaining to be dealt with at the time when the comments were received.

¹⁰ *Ibid.*, 15th Sess., Supp. No. 9 (A/4425). ¹¹ *Ibid.*, par. 24.

¹² Official Records of the General Assembly, 15th Sess., Annexes, Agenda Item 65, Doc. A/4605, par. 12.

* Not printed here.

26. At its present session, the Commission discussed the text of the provisional draft at its 582nd to 596th, 598th to 614th, 616th to 619th and 622nd to 627th meetings, taking the comments of governments into account. In producing the final text of the draft, it also took into account and on some points followed, as far as it thought possible, the wording of the Vienna Convention on Diplomatic Relations of 18 April 1961. In addition, it dealt with certain articles left outstanding in its report on the work of its twelfth session (1960), and certain new articles proposed by the Special Rapporteur in the light of the comments of governments.

II. RECOMMENDATION OF THE COMMISSION TO CONVENE AN INTERNATIONAL CONFERENCE ON CONSULAR RELATIONS

27. At its 624th meeting, the Commission, considering that it should follow the procedure previously adopted by the General Assembly in the case of the Commission's draft concerning diplomatic privileges and immunities, decided, in conformity with Article 23, paragraph 1(d), of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft on consular relations and conclude one or more conventions on the subject.

III. GENERAL CONSIDERATIONS

28. Consular intercourse, privileges and immunities are governed partly by municipal law and partly by international law. Very often regulations of municipal law deal with matters governed by international law. Equally, consular conventions sometimes regulate questions which are within the province of municipal law (*e.g.*, the form of the consular commission). In drafting a code on consular intercourse and immunities, it is necessary, as the Special Rapporteur has pointed out,¹³ to bear in mind the distinction between those aspects of the status of consuls which are principally regulated by municipal law and those which are regulated by international law.

29. The codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perforce remain incomplete and have little practical value. For this reason, the Commission agreed, in accordance with the Special Rapporteur's proposal, to base its draft articles not only on customary international law, but also on the material furnished by international conventions, especially consular conventions.

30. An international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion

¹³ Yearbook of the International Law Commission, 1957, Vol. II (U. N. pub., Sales No.: 1957.V.5, Vol. II), p. 80, par. 80.

of other similar conventions containing identical or similar provisions, and also through the operation of the most-favoured-nation clause. The Special Rapporteur's analysis of these conventions revealed the existence of rules widely applied by states, which, if incorporated in a draft codification, may be expected to obtain the support of many states.

31. If it should not prove possible, on the basis of the two sources mentioned—conventions and customary law—to settle all controversial and obscure points, or if there remain gaps, it will be necessary to have recourse to the practice of states as evidenced by internal regulations concerning the organization of the consular service and the status of foreign consuls, insofar, of course, as these are in conformity with the fundamental principles of international law.

32. It follows from what has been said that the Commission's work on this subject is both codification and progressive development of international law in the sense in which these concepts are defined in Article 15 of the Commission's Statute. The draft to be prepared by the Commission is described by the Special Rapporteur in his report in these words:

"A draft set of articles prepared by that method will therefore entail codification of general customary law, of the concordant rules to be found in most international conventions, and of any provisions adopted under the world's main legal systems which may be proposed for inclusion in the regulations."¹⁴

33. The choice of the form of the codification of the topic of consular intercourse and immunities is determined by the purpose and nature of the codification. The Commission had this fact in mind when (bearing in mind also its decision on the form of the Draft Articles on Diplomatic Intercourse and Immunities) it approved at its eleventh session, and again at the present session, the Special Rapporteur's proposal that the draft should be prepared on the assumption that it would form the basis of a convention.

34. The draft articles on consular relations consist of four chapters, preceded by Article 1 (Definitions).

(a) Chapter I deals with *Consular relations in general* and is subdivided into two sections entitled respectively *Establishment and conduct of consular relations* (Articles 2 to 24) and *End of consular functions* (Articles 25 to 27).

(b) Chapter II, entitled *Facilities, privileges, and immunities of career consular officials and consular employees* contains the articles dealing with the facilities, privileges and immunities accorded to the sending state both in regard to its consulates and in regard to consular officials and employees. This chapter is subdivided into two sections, the first containing articles dealing with *Facilities, privileges and immunities relating*

¹⁴ *Ibid.*, par. 84.

to a consulate (Articles 28 to 39) and the second with *Facilities, privileges and immunities regarding consular officials and employees* (Articles 40 to 56).

(c) Chapter III contains the provisions governing the facilities, privileges and immunities accorded to the sending state in respect of *honorary consular officials*; for the purposes of facilities, privileges and immunities, *career consular officials who carry on a private gainful occupation* (Article 56) are placed on a footing of equality with honorary consular officials.

(d) Chapter IV contains the *General provisions*.

35. The chapters, sections and articles are headed by titles indicating the subjects to which their provisions refer. The Commission regards the chapter and section titles as helpful for an understanding of the structure of this draft. It believes that the titles of articles are of value in finding one's way about the draft and in tracing quickly any provision to which one may wish to refer. The Commission hopes, therefore, that these titles will be retained in any convention which may be concluded in the future, even if only in the form of marginal headings, such as have been inserted in some earlier conventions.

36. The Commission having decided that the draft articles on consular relations should form the basis for the conclusion of a multilateral convention, the Special Rapporteur also submitted a draft preamble,¹⁵ for which purpose he was guided by the preamble of the Vienna Convention of 18 April 1961 on Diplomatic Relations.* When this draft preamble, as amended by the Drafting Committee, was submitted to the Commission some members took the view that the drafting of the preamble should be left to the conference of plenipotentiaries which might be convened to conclude such a convention. Not having the time to discuss the point, the Commission decided that the text proposed for the preamble would be inserted in the commentary introducing this draft. The preamble prepared by the Drafting Committee reads as follows:

¹⁵ The text of this draft preamble reads as follows:

"The States Parties to this Convention,

"Recalling that, since the most ancient times, economic relations between peoples have given rise to the institution of consular missions,

"Conscious of the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security and the development of friendly relations among nations,

"Considering it desirable to establish the essential rules governing relations between States in the matter of consular relations,

"Considering that in the Vienna Convention on Diplomatic Relations dated 18 April 1961 it is stipulated (article 3) that nothing in that Convention shall be construed as preventing the performance of consular functions by a diplomatic mission,

"Convinced that an international convention on consular relations, privileges and immunities would contribute to the development of friendly relations among countries, irrespective of the diversity of their constitutional and social systems,

"Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of this Convention,

"Have agreed as follows:"

* For text of Vienna Convention of 1961, see 55 A.J.I.L. 1064 (1961).

"The States Parties to the present Convention,

"Recalling that consular relations have been established among peoples of all nations since ancient times,

"Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations.

"Considering that a United Nations Conference adopted on 18 April 1961 the Vienna Convention on Diplomatic Relations,

"Believing that an international convention on consular relations would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

"Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

"Have agreed as follows:"

37. The text of draft Articles 1 to 71 and the commentaries, as adopted by the Commission on the proposal of the Special Rapporteur, are reproduced below.

IV. DRAFT ARTICLES ON CONSULAR RELATIONS AND COMMENTARIES

ARTICLE 1

Definitions

1. For the purpose of the present draft, the following expressions shall have the meanings hereunder assigned to them:

(a) "Consulate" means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

(b) "Consular district" means the area assigned to a consulate for the exercise of its functions;

(c) "Head of consular post" means any person in charge of a consulate;

(d) "Consular official" means any person, including the head of post, entrusted with the exercise of consular functions in a consulate;

(e) "Consular employee" means any person who is entrusted with administrative or technical tasks in a consulate, or belongs to its service staff;

(f) "Members of the consulate" means all the consular employees in a consulate;

(g) "Members of the consular staff" means the consular officials other than the head of post, and the consular employees;

(h) "Member of the service staff" means any consular employee in the domestic service of the consulate;

(i) "Member of the private staff" means a person employed exclusively in the private service of a member of the consulate;

(j) "Consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the consulate;

(k) "Consular archives" means all the papers, documents, correspondence, books, and registers of the consulate, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

2. Consular officials may be career officials or honorary. The provisions of Chapter II of this draft apply to career officials and to consular employees; the provisions of Chapter III apply to honorary consular officials and to career officials who are assimilated to them under Article 56.

3. The particular status of members of the consulate who are nationals of the receiving state is governed by Article 69 of this draft.

Commentary

(1) This article has been inserted in order to facilitate the interpretation and application of the convention.

(2) Paragraph 1 of this article contains definitions of certain expressions which need to be defined and are used more than once in the text of the articles. As regards the expressions which are used in one article only, the Commission preferred to define them in the relevant articles. For example, the term "*exequatur*" is defined in Article 11 and the expression "official correspondence" in Article 35, paragraph 2, of this draft.

(3) The Commission considered it unnecessary to define expressions the meaning of which is quite clear, such as "sending state" and "receiving states."

(4) The expression "members of the consulate" means all the persons who belong to a particular consulate, that is to say, the head of post, the other consular officials and the consular employees. By contrast, the expression "members of the consular staff" means all persons working in a consulate under the responsibility of the head of post, that is to say, consular officials other than the head of post, and the consular employees.

(5) The expression "private staff" means not only the persons employed in the domestic service of a member of the consulate, but also persons employed in any other private service, such as private secretaries, governesses, tutors, and the like.

(6) The expression "consular archives" means all the papers of the consulate, the correspondence, documents, books, the registers of the consulate, the codes and ciphers, card-indexes and the articles of furniture intended for the protection and safekeeping of all papers and objects coming under the definition of consular archives. The term "books" covers not only the books used in the exercise of the consular functions but also the consulate's library. It should be noted that although this definition of consular archives covers the official correspondence and documents of the consulate, it does not make the use of these two expressions superfluous in certain articles and in particular in Articles 32 and 35 of the draft. It is necessary, sometimes, to use these expressions separately as, for example, in the provisions regulating the freedom of communications.

Further, the correspondence which is sent by the consulate or which is addressed to it, in particular by the authorities of the sending state, the receiving state, a third state or an international organization, cannot be regarded as coming within the definition if the said correspondence leaves the consulate or before it is received at the consulate, as the case may be. Similarly, documents drawn up by a member of the consulate and held by him can hardly be said to form part of the consular archives before they are handed over to the chancery of the consulate. For all these reasons, certain expressions comprised by the general term "consular archives" have to be used according to the context and scope of a particular provision.

(7) As some governments in their comments drew attention to the desirability of defining the family of a member of the consulate, the Special Rapporteur had included in the draft of Article 1 a clause defining this expression as meaning, for the purposes of these articles, the spouse and unmarried children who are not engaged in any occupation and who are living in the home of a member of the consulate. The Drafting Committee proposed the following definition: "Member of the family of a member of the consulate means the spouse and the unmarried children not of full age, who live in his home." The Commission was divided with respect to the insertion of a definition of "family" in the draft and also as to the scope of the definition submitted by the Drafting Committee, which several members found too restrictive. Eventually, inasmuch as the United Nations Conference on Diplomatic Intercourse and Immunities had been unable to reach agreement on this point, the Commission decided by a majority not to include a definition of member of the family of a member of the consulate in the draft.

(8) Since Article 1 constitutes a sort of introduction to the whole draft, paragraph 2 was included in order to indicate that there are two categories of consular officials, namely, career consular officials and honorary consular officials, the two categories of consular officials having a different legal status so far as consular privileges and immunities are concerned.

(9) The purpose of paragraph 3 of this article is to indicate that members of the consulate who are nationals of the receiving state are in a special position since they enjoy only very limited privileges and immunities as defined in Article 69 of the draft. Several governments suggested in their comments that in certain articles of the present draft express reference should be made to Article 69 in order to show more clearly that the provisions in question do not apply to members of the consulate who are nationals of the receiving state. The Commission did not feel able to follow this suggestion, for it is not possible to refer to Article 69 in certain articles only, as the limitation laid down in that article covers all the articles which concern consular privileges and immunities. It considered that the same purpose could be achieved by inserting in Article 1 a provision stipulating that members of the consulate who are nationals of the receiving state are in a special position. For the purpose of interpreting any of the articles of the draft one has to consult

Article 1 containing the definitions, which give notice that the members of the consulate who are nationals of the receiving state enjoy only the privileges and immunities defined in Article 69. As a consequence it is unnecessary to encumber the text with frequent references to Article 69, and yet it is not difficult to find one's way in the draft or to interpret its provisions.

CHAPTER I. CONSULAR RELATIONS IN GENERAL

SECTION I: ESTABLISHMENT AND CONDUCT OF CONSULAR RELATIONS

ARTICLE 2

Establishment of consular relations

1. The establishment of consular relations between states takes place by mutual consent.
2. The consent given to the establishment of diplomatic relations between two states implies, unless otherwise stated, consent to the establishment of consular relations.
3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

Commentary

(1) The expression "consular relations" means the relations which come into existence between two states by reason of the fact that consular functions are exercised by authorities of one state in the territory of the other. In most cases these relations are mutual, consular functions being exercised in each of the states concerned by the authorities of the other. The establishment of these relations presupposes agreement between the states in question, and such relations are governed by international law, conventional or customary. In addition, the legal position of consuls is governed by international law, so that by reason of this fact also, a legal relationship arises between the sending state and the receiving state. Finally, the expression in question has become hallowed by long use, and this is why the Commission has retained it, although some members would have preferred another.

(2) Paragraph 1 which lays down a rule of customary international law indicates that the establishment of consular relations is based on the agreement of the states concerned. This is a fundamental rule of consular law.

(3) Consular relations may be established between states that do not entertain diplomatic relations. In that case, the consular relations are the only official relations of a permanent character between the two states in question. In some cases, they merely constitute a preliminary to diplomatic relations.

(4) Where diplomatic relations exist between the states in question, the existence of diplomatic relations implies the existence of consular relations, unless these latter relations were excluded by the wish of one of the

states concerned at the time of the establishment of diplomatic relations. It is in this sense that the words "unless otherwise stated" should be interpreted.

(5) As a first consequence of the rule laid down in paragraph 2, if one of the states between which diplomatic relations exist decides to establish a consulate in the territory of the other state, the former state has no need to conclude an agreement for the establishment of consular relations, as provided in Article 2, paragraph 1, but solely an agreement respecting the establishment of the consulate as laid down in Article 4 of the present draft. This consequence is important both from the theoretical and from the practical points of view.

(6) Paragraph 3 lays down a generally accepted rule of international law.

ARTICLE 3

Exercise of consular functions

Consular functions are exercised by consulates. They are also exercised by diplomatic missions in accordance with the provisions of Article 68.

Commentary

(1) Paragraph 2 of Article 2 of this draft lays down that the consent given to the establishment of diplomatic relations implies, unless otherwise stated, consent to the establishment of consular relations. The rule laid down in the present article corresponds to the general practice according to which diplomatic missions exercise consular functions. The rule in question was recently confirmed by Article 3, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, which provides that "nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission."

(2) It follows that, in modern times, consular functions may be exercised by consulates or by diplomatic missions. If the sending state has no consulates in the receiving state the competence of the diplomatic mission in consular affairs covers automatically the entire territory of the receiving state. If the sending state has consulates in the territory in question, the exercise of consular functions by the diplomatic mission is limited as a general rule to that part of the territory of the receiving state which is outside the consular district or districts allotted to the consulates of the sending state. Hence only in the exceptional cases where the sending state has in the receiving state consulates whose consular districts cover the whole territory of the state in question will the diplomatic mission not exercise consular functions. But even in such cases the sending state may reserve certain consular activities to its diplomatic mission. For example, questions of special importance or the issue of visas on diplomatic passports are sometimes reserved to the diplomatic missions in the case under discussion.

ARTICLE 4

Establishment of a consulate

1. A consulate may be established in the territory of the receiving state only with that state's consent.

2. The seat of the consulate and the consular district shall be determined by mutual agreement between the receiving state and the sending state.

3. Subsequent changes in the seat of the consulate or in the consular district may be made by the sending state only with the consent of the receiving state.

4. The consent of the receiving state shall also be required if a consulate-general or a consulate desires to open a vice-consulate or an agency in a locality other than that in which it is itself established.

5. The sending state may not, without the prior express consent of the receiving state, establish offices forming part of the consulate in localities other than those in which the consulate itself is established.

Commentary

(1) Paragraph 1 of this article lays down the rule that the consent of the receiving state is essential for the establishment of any consulate (consulate-general, consulate, vice-consulate or consular agency) on its territory. This principle derives from the sovereign authority which every state exercises over its territory, and applies both in those cases where the consulate is established at the time when the consular relations are established, and in those cases where the consulate is to be established later. In the former case, the consent of the receiving state to the establishment of a consulate will usually already have been given in the agreement for the establishment of consular relations; but it may also happen that this agreement is confined to the establishment of consular relations, and that the establishment of the consulate is reserved for a later agreement.

(2) An agreement on the establishment of a consulate presupposes that the states concluding it agree on the boundaries of the consular district and on the seat of the consulate. It sometimes happens in practice that the agreement on the seat of the consulate is concluded before the two states have agreed on the boundaries of the consular district. The agreement respecting the seat of the consulate and the consular district will, as a general rule, be an express agreement. Nevertheless it may also be concluded tacitly. If, for example, the receiving state grants the *exequatur* on presentation of a consular commission in which the seat of the consulate and the consular district are specified as laid down in Article 10, then it must be concluded that the state has consented to the seat of the consulate being established at the place designated in the consular commission and that the consular district is the district mentioned therein.

(3) The consular district, also sometimes called the consular region, determines the territorial limits within which the consulate is authorized to exercise its functions with respect to the receiving state. Nevertheless,

in the case of any matter within its competence it may also apply to the authorities of the receiving state which are outside its district insofar as this is allowed by the present articles or by other international agreements applicable in the matter (see Article 38 of this draft).

(4) The Commission has not thought it necessary to write into this article the conditions under which an agreement for the establishment of a consulate may be amended. It has merely stated in paragraph 3, in order to protect the interests of the receiving state, that the sending state may not change the seat of the consulate, nor the consular district, without the consent of the receiving state. The silence of the article as to the powers of the receiving state must not be taken to mean that this state would always be entitled to change the consular district or the seat of the consulate unilaterally. The Commission thought, however, that in exceptional circumstances the receiving state had the right to request the sending state to change the seat of the consulate or the consular district.

(5) The sole purpose of paragraph 3 is to govern any changes that may be made with respect to the seat of the consulate or the consular district. It does not restrict the right of the sending state to close its consulate temporarily or permanently if it so desires.

(6) Paragraph 4 applies to cases where the consulate, having already been established, desires to open a vice-consulate or consular agency within the boundaries of its district. Under the municipal law of some countries the consuls-general and the consuls have authority to appoint vice-consuls or consular agents. Under this authority the consuls-general and the consuls may establish new consular posts on the territory of the receiving state. It has therefore been necessary to provide that the consent of the receiving state is required even in those cases.

(7) As distinct from the case mentioned in the preceding paragraph which refers to the establishment of a vice-consulate or a consular agency, i.e., of a new consular post, the purpose of paragraph 5 is to regulate those cases in which the consulate desires, for reasons of practical convenience, to establish outside the seat of the consulate an office which constitutes part of the consulate.

(8) The expression "sending state" means the state which the consulate represents.

(9) The expression "receiving state" means the state in whose territory the activities of the consulate are exercised. In the exceptional case where the consular district embraces the whole or part of the territory of a third state, that state should for the purposes of these articles also be regarded as a receiving state.

ARTICLE 5

Consular functions

Consular functions consist more especially of:

(a) Protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) Promoting trade and furthering the development of economic, cultural and scientific relations between the sending state and the receiving state;

(c) Ascertaining conditions and developments in the economic, commercial, cultural and scientific life of the receiving state, reporting thereon to the government of the sending state and giving information to persons interested;

(d) Issuing passports and travel documents to nationals of the sending state, and visas or other appropriate documents to persons wishing to travel to the sending state;

(e) Helping and assisting nationals of the sending state;

(f) Acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature;

(g) Safeguarding the interests of nationals, both individuals and bodies corporate, of the sending state in cases of succession *mortis causa* in the territory of the receiving state;

(h) Safeguarding the interests of minors and persons lacking full capacity who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) Representing nationals of the sending state before the tribunals and other authorities of the receiving state, where, because of absence or any other reason, these nationals are unable at the proper time to assume the defence of their rights and interests, for the purpose of obtaining, in accordance with the law of the receiving state, provisional measures for the preservation of these rights and interests;

(j) Serving judicial documents or executing letters rogatory in accordance with conventions in force or, in the absence of such conventions, in any other manner compatible with the law of the receiving state;

(k) Exercising rights of supervision and inspection provided for in the laws and regulations of the sending state in respect of vessels used for maritime or inland navigation, having the nationality of the sending state, and of aircraft registered in that state, and in respect of their crews;

(l) Extending necessary assistance to vessels and aircraft mentioned in the previous sub-paragraph, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping ships' papers, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the law of the sending state.

Commentary

(1) The examination of the questions relating to consular functions passed through several stages and gave rise to a broad exchange of views in the Commission. At first, the Special Rapporteur had prepared two variants on consular functions. The first, following certain precedents, specially the Havana Convention (Article 10) merely referred the matter to the law of the sending state, and provided that the functions and

powers of consuls should be determined, in accordance with international law, by the states which appoint them. The second variant, after stating the essential functions of a consul in a general clause, contained a detailed enumeration of the most important functions of a consul, by way of example.¹⁶

(2) During the discussion, two tendencies were manifested in the Commission. Some members expressed their preference for a general definition of the kind which had been adopted by the Commission for the case of diplomatic agents, in Article 3 of its Draft Articles on Diplomatic Intercourse and Immunities. They pointed to the drawbacks of an excessively detailed enumeration, and suggested that a general definition would be more acceptable to governments. Other members, by contrast, preferred the Special Rapporteur's second variant with its detailed list of examples, but requested that it should be shortened and contain only the heads of the different functions as set out in Arabic numerals 1-15 in the Special Rapporteur's draft. They maintained that too general a definition, merely repeating the paragraph headings, would have very little practical value. They also pointed out that the functions of consuls are much less extensive than those of diplomatic agents, and that it was therefore impossible to follow in this respect the Draft Articles on Diplomatic Intercourse and Immunities. Lastly, they argued that governments would be far more inclined to accept in a convention a detailed and precise definition than a general formula which might give rise to all kinds of divergencies in practice. In support of this opinion they pointed to the fact that recent consular conventions all defined consular functions in considerable detail.

(3) In order to be able to take a decision on this question the Commission requested the Special Rapporteur to draft two texts defining consular functions: one containing a general and the other a detailed and enumerative definition. The Special Rapporteur prepared these two definitions and the Commission, after a thorough examination of the first proposal, decided to submit both definitions to the governments for comment. In addition, it decided to include the general definition in the draft and to reproduce the more detailed definition in the commentary.¹⁷

(4) Although the majority of the governments which sent in comments on the Commission's draft expressed a preference for the general definition, nevertheless several of them, as also several representatives at the fifteenth session of the General Assembly, expressed the wish that the definition should be supplemented by an enumeration of the principal and most important functions.

(5) The Special Rapporteur took these views into account and in his third report proposed a new formula respecting consular functions.¹⁸ This text reproduced the various paragraphs of the definition adopted at

¹⁶ Yearbook of the International Law Commission, 1957, Vol. II (U. N. pub., Sales No.: 1957.V.5, Vol. II), pp. 91 to 92, Article 13.

¹⁷ Report of the International Law Commission covering the work of its Twelfth Session, Official Records of the General Assembly, 15th Sess., Supp. No. 9 (A/4425), pp. 6, *et seq.*

¹⁸ A/CN.4/137, pp. 15, *et seq.*

the twelfth session of the Commission and added to each paragraph some examples selected from the more detailed version of the definition.

(6) The Commission adopted several of the Special Rapporteur's proposals and broadened the definition of the consular functions which enumerates by way of example—as is clearly reflected in the words “more especially” in the introductory phrase—the most important consular functions recognized by international law.

(7) The function of safeguarding the interests of the sending state and of its nationals is the most important of the many consular functions. The consul's right to intervene on behalf of the nationals of his country does not, however, authorize him to interfere in the internal affairs of the receiving state.

(8) As the article itself says expressly the term “national” means also bodies corporate having the nationality of the sending state. It may occur that the receiving state declines to recognize that the individual or body corporate whose interests the consul desires to protect possesses the nationality of the sending state. A dispute of this nature should be decided by one of the means for the pacific settlement of international disputes.

(9) For the sake of consistency with the terminology of the Vienna Convention on Diplomatic Relations (Article 3, paragraph 1(b)) the Commission employs the term “interests” in paragraph (a), although some members of the Commission would have preferred different expressions.

(10) The provision of paragraph (a) concerning the protection of the interests of the state and of its nationals is distinct from that of paragraph (e), which concerns the help and assistance to be given to the nationals of the sending state, in that the former relates to the function which the consular official exercises vis-à-vis the authorities of the receiving state, whereas the latter covers any kind of help and assistance which the consul may extend to nationals of his state: information supplied to a national, provision of an interpreter, introduction of commercial agents to business concerns, assistance in cases of distress, assistance to nationals working in the receiving state, repatriation and the like.

(11) The notarial functions are varied and may consist, for instance, in:

(a) Receiving in the consular offices, on board vessels and ships or on board aircraft having the nationality of the sending state, any statements which the nationals of the sending state may have to make;

(b) Drawing up, attesting and receiving for safe custody, wills and all unilateral instruments executed by nationals of the sending state;

(c) Drawing up, attesting and receiving for safe custody, deeds the parties to which are nationals of the sending state, or nationals of the sending state and nationals of the receiving state, or of a third state, provided that they do not relate to immovable property situated in the receiving state or to rights *in rem* attaching to such property;

(d) Attesting or certifying signatures, stamping, certifying or translating documents, in any case for which these formalities are requested by

a person of any nationality for use in the sending state or in pursuance of the laws of that state. If an oath or a declaration in lieu of oath is required under the laws of the sending state, such oath or declaration may be sworn or made before the consular official.

(12) In his capacity as registrar, the consul or any other consular official keeps the registers and enters all relevant documents relating to births, marriages, deaths, legitimations, in accordance with the laws and regulations of the sending state. Nevertheless, the persons concerned must also make all the declarations required by the laws of the receiving state. The consular official may also, if authorized for that purpose by the law of the sending state, solemnize marriages between nationals of his state or between nationals of the sending state and those of another state, provided that this is not prohibited by the law of the receiving state.

(13) The administrative functions mentioned under paragraph (f) are determined by the laws and regulations of the sending state. They may consist, for instance, in:

(a) Keeping a register of nationals of the sending state residing in the consular district;

(b) Dealing with matters relating to the nationality of the sending state;

(c) Certifying documents, indicating the origin of goods, invoices and the like;

(d) Transmitting to the persons entitled any benefits, pensions or compensation due to them under the law of the sending state or international conventions, in particular under social welfare legislation;

(e) Receiving payments of pensions or allowances due to the nationals of the sending state absent from the receiving state, provided that no other method of payment has been agreed to between the states concerned.

(14) Paragraph (g), which provides for the safeguarding of the interests of the nationals of the sending state in matters of succession *mortis causa*, recognizes the right of the consul, in accordance with the law of the receiving state, to take all measures necessary to ensure the conservation of the estate. He may, accordingly, represent, without producing a power of attorney, the heirs and legatees or their successors in title until such time as the person concerned undertakes the defence of his own interests or appoints an attorney. By virtue of this provision, consuls have the power to appear before the courts or to approach the appropriate authorities of the receiving state with a view to collecting, safeguarding or arranging for an inventory of the assets, and to propose to the authorities of the receiving state all measures necessary to discover the whereabouts of the assets constituting the estate. The consul may, when the inventory of the assets is being drawn up, take steps in connexion with the assessment of the assets left by the deceased, the appointment of an administrator and all legal acts necessary for the preservation, administration and disposal of the assets by the authorities of the receiving state. The consular con-

ventions frequently contain provisions conferring upon consuls, in matters of succession, rights that are much more extensive and in particular, the right to administer the estate. As the previous agreements concluded between the states who will become parties to the convention are to remain in force pursuant to Article 71, the provisions of those agreements will apply in the first instance to the cases under consideration.

(15) Among the nationals of the sending state, minors and persons lacking full capacity are those who stand in special need of protection and assistance from the consulate. That is why it seemed necessary to set forth in paragraph (*h*) the consul's function of safeguarding the interests of minors and persons lacking full capacity who are nationals of the sending state. This function will be exercisable in particular where the institution of trusteeship and guardianship is required.

(16) Paragraph (*i*) recognizes the consul's right to represent before the courts and other authorities of the receiving state nationals of the sending state who are unable to defend their own rights and interests. Nevertheless, the consul's right of representation is limited to provisional measures for the preservation of the rights and interests of the person concerned. Where judicial or administrative proceedings have already been begun, the consul may arrange for the representation of the national of the sending state before the court or administrative authority concerned. In no case, however, does this provision empower the consul to dispose of the rights of the person he is representing. Furthermore, the consul's right of representation is also limited in time; it ceases as soon as the person concerned himself assumes the defence of his rights or appoints an attorney. The right of representation, as is stressed in the text, must be exercised in accordance with the laws and regulations of the receiving state. This right is absolutely essential to the exercise of consular functions which consist (among others) of that of protecting the interests of the sending state and of its nationals (Article 5, paragraph (*a*)). The consul could not carry out these functions without the power of inquiring into the affairs of absent nationals of the sending state from courts and administrative authorities, transmitting to courts and other competent authorities information and proposals which may help to safeguard the rights of nationals of the sending state, drawing the attention of the courts to the provisions of any international treaties which may be applicable to the particular case, and arranging for the representation of absent nationals before the courts and other competent instances until the persons concerned can themselves assume the defence of their rights and interests.

(17) The function referred to in paragraph (*i*) is a general one, which relates to all cases where the nationals of the sending state, whether individuals or bodies corporate, are in need of representation owing to their absence or for any other reason. The latter phrase means, in particular, cases where the person concerned is prevented from looking after his interests by serious illness or where he is detained or imprisoned. Nevertheless, since the purpose of this provision is to ensure provisional representation, it cannot apply to the special case contemplated in para-

graph (h) where the consul's function of safeguarding the interests of minors and persons lacking full capacity is necessarily exercised on a long-term basis, and where his powers must therefore be broader than those provided for in paragraph (i).

(18) Paragraph (j) confirms a long-established practice whereby consuls ensure the service on the persons concerned, directly or through local authorities, of judicial documents sent to them by the authorities of the sending state. They may do so, as this provision indicates, by procedures laid down by a convention in force, or in the absence of such a convention, in a manner compatible with the law of the receiving state. This practice found expression in the Hague Convention of 17 July 1905 relating to Civil Procedure, replacing an earlier convention of 14 November 1896. This convention prescribes that notifications shall be made "at the request of the Consul of the requesting State, such request being addressed to the authority designated by the requested State" (Article 1). Proof of service is given either by a dated authenticated receipt from the addressee or by an attestation by the authority of the requested state, stating that the document has been served and specifying the manner and date of service (Article 5). In its Article 6, the convention expressly stipulates that its provisions shall be without prejudice to the power of each state to have documents addressed to persons abroad served directly through its diplomatic or consular agents. The convention contains a general reservation whereby the right of direct communication exists only if it is recognized in conventions between the states concerned or if, in default of such conventions, the receiving state does not object. But the article also stipulates that this state may not object where documents are served by diplomatic or consular agents if the document is to be served on a national of the requesting state without duress. This provision was reproduced without change in the Convention relating to Civil Procedure of 1 March 1954, to which twelve states have so far become parties.

(19) The execution of certain procedural or investigatory documents through consuls meets practical needs. A consul may execute letters rogatory in accordance with the procedure prescribed by the law of the sending state, whereas the courts of the receiving state would be obliged to do so in accordance with the procedure prescribed by the law of the receiving state. Furthermore, this procedure is much speedier, apart from the fact that the foreign court is not obliged, in the absence of conventions on the subject, to accede to the request made in the letters rogatory. However, a consul cannot execute letters rogatory in the absence of a convention authorizing him to do so, unless the receiving state does not object. This opinion is confirmed by Article 15 of the Hague Convention of 1905 relating to Civil Procedure and this rule was reproduced in the similar Convention of 1954 (Article 15).

(20) From time immemorial consuls have exercised manifold functions connected with maritime shipping by virtue of customary international law, but their scope has been considerably modified in the course of centuries. Nowadays, functions are defined in great detail in certain

consular conventions. As the Commission decided on a general definition of consular functions, it obviously could not adopt this method. It confined itself to including in the general definition the most important functions which consuls exercised in connexion with shipping.

(21) It is generally recognized nowadays that consuls are called upon to exercise rights of supervision and inspection provided for in the laws and regulations of the sending state in respect of vessels used for maritime or inland navigation which have the nationality of the sending state and aircraft registered in that state and in respect of their crews. These rights of supervision and protection, referred to in paragraph (*k*), are based on the sending state's rights in respect of vessels having its nationality, and the exercise of those rights is one of the prerequisites for the exercise of consular functions in connexion with navigation.

(22) The question of the criteria for determining the nationality of vessels, boats and other craft, in cases of conflict of laws should be answered by reference to Article 5 of the 1958 Geneva Convention on the High Seas and to other rules of international law.

(23) One of the consul's important functions in connexion with navigation is to extend necessary assistance to vessels, boats and aircraft having the nationality of the sending state and to their crews. This function is provided for in paragraph (*l*) of this article. In the exercise of this function, a consul may go personally on board a vessel as soon as it has been admitted to *pratique*, examine the ship's papers, take statements concerning the voyage, the vessel's destination and any incidents which occurred during the voyage (log book) and, in general, facilitate the ship's or boat's entry into port and its departure. He may also receive protests, draw up manifests, and, where applicable, conduct investigations into any incidents which occurred and, to this end, interrogate the master and the members of the crew. The consul or a member of the consulate may appear before the local authorities with the master or members of the crew to extend to them any assistance, and especially to obtain any legal assistance they need, to act as interpreter in any business they may have to transact or in any applications they have to make, for example, to local courts and authorities. Consuls may also take action to enforce the maritime laws and regulations of the sending state. They also play an important part in the salvage of vessels and boats of the sending state. If such a vessel or boat runs aground in the territorial sea or the internal waters of the receiving state, the competent authorities are to inform the consulate nearest to the scene of the occurrence without delay, in accordance with Article 37. If the owner, manager-operator or master is unable to take the necessary steps, consuls are empowered, under paragraph (*l*) of this article, to take all necessary steps to safeguard the rights of the persons concerned.

(24) This article does not itemize all the functions which consuls may perform in accordance with international law. Consuls may exercise, in addition to the functions enumerated in this article, the functions of arbitrator or conciliator *ad hoc* in any disputes which nationals of the

sending state submit to them, provided that this is not incompatible with the laws and regulations of the receiving state.

(25) Furthermore, consuls may exercise the functions entrusted to them by the international agreements in force between the sending state and the receiving state.

(26) Lastly, consuls may also perform other functions which are entrusted to them by the sending state, provided that the performance of these functions is not prohibited by the laws and regulations or the authorities of the state of residence.

ARTICLE 6

Exercise of consular functions in a third state

The sending state may, after notifying the states concerned, entrust a consulate established in a particular state with the exercise of consular functions in a third state, unless there is express objection by one of the states concerned.

Commentary

Sometimes states entrust one of their consulates with the exercise of consular functions in a third state. Sometimes the territory in which the consulate exercises its functions covers actually two or more states. This article authorizes this practice, but leaves each of the states concerned the right to make an express objection.

ARTICLE 7

Exercise of consular functions on behalf of a third state

With the prior consent of the receiving state and by virtue of an agreement between the sending state and a third state, a consulate established in the first state may exercise consular functions on behalf of that third state.

Commentary

(1) Whereas Article 6 deals with the case in which the competence of a consulate extends to all or part of the territory of the third state, the purpose of this article is to regulate cases in which a consulate is also called upon to exercise consular functions on behalf of a third state within the consular district. Such a situation may arise, first, if a third state does not maintain consular relations with the receiving state but still wishes to ensure consular protection for its nationals in that state. Thus the Agreement of Caracas between Bolivia, Colombia, Ecuador, Peru and Venezuela concerning the powers of consuls in each of the contracting republics, signed on 18 July 1911, provided that the consuls of each contracting republic residing in any of them could exercise their powers on behalf of individuals of the contracting republics which did not have a consul at the place in question (Article VI).

(2) The law of a large number of countries makes provision for the exercise of consular functions on behalf of a third state, subject to the authorization either of the head of state or of the government or of the Minister for Foreign Affairs.

(3) Obviously, in the cases covered by this article, consuls will rarely be in a position to perform all consular functions on behalf of a third state. In some cases they may exercise only some of these functions. The article covers both the occasional exercise of certain consular functions and the continuous exercise of these functions. The consent of the receiving state is essential in both cases.

ARTICLE 8

Appointment and admission of heads of consular posts

Heads of consular posts are appointed by the sending state and are admitted to the exercise of their functions by the receiving state.

Commentary

This article states a fundamental principle which is developed in the ensuing articles. It states that a person must fulfil two conditions if he is to have the status of head of consular post within the meaning of these articles. He must, first, be appointed by the competent authority of the sending state as consul-general, consul, vice-consul or consular agent. Secondly, he must be admitted to the exercise of his functions by the receiving state.

ARTICLE 9

Classes of heads of consular posts

1. Heads of consular posts are divided into four classes:

- (1) Consuls-general;
- (2) Consuls;
- (3) Vice-consuls;
- (4) Consular agents.

2. The foregoing paragraph in no way restricts the power of the contracting parties to fix the designation of the consular officials other than the head of post.

Commentary

(1) Whereas the classes of diplomatic agents were determined by the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818 and recently codified anew at the 1961 Vienna Conference, the classes of consuls have not yet been codified. Since the institution of consuls first appeared in international relations, a large variety of titles has been used. At present, the practice of states, as reflected in their domestic

law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in Article 9 to enable the classes of heads of consular posts to be codified.

(2) This enumeration of four classes in no way means that states accepting it are bound in practice to have all four classes. They will be obliged only to give their heads of consular posts one of the four titles in Article 9. Consequently, those states whose domestic law does not provide for all four classes (*e.g.* does not recognize the class of consular agents) will not be in any way obliged to amend it.

(3) It should be emphasized that the term "consular agent" is used in this article in a technical sense differing essentially from the generic meaning given to it in some international instruments, as denoting all classes of consular officials.

(4) The domestic law of some (but not very many) states allows the exercise by consular officials, and especially by vice-consuls and consular agents, of gainful activities in the receiving state. Some consular conventions authorize this practice by way of exception (see, as regards consular agents, Article 2, paragraph 7 of the consular convention of 31 December 1951 between the United Kingdom and France). Career consuls who carry on a private gainful activity are treated on the same footing, as regards facilities, privileges and immunities, as honorary consular officials (see Article 56 of this draft).

(5) It should be added that some states restrict the title vice-consul or consular agent solely to honorary consular officials.

(6) In the past, various titles were used to designate consuls: *commissaires*, residents, commercial agents and so forth. The term "commercial agent" was still used to designate a consular agent as recently as in the Havana Convention of 1928 regarding consular agents (Article 4, paragraph 2).

(7) Although paragraph 1 determines the title to be held by the head of a consular post, it in no way purports to restrict the powers of states which become parties to the convention to determine rank and title of officials other than the head of post. They may use for this purpose the titles specified in paragraph 1 of this article or any other title specified by their laws and regulations. In practice, the most diverse titles are used: alternate consuls, deputies, pro-consuls, consular attachés, pupil consuls, chancery attachés, chancery pupils, *chanceliers*, consular secretaries, pupil *chanceliers*, interpreters, etc. Paragraph 2 has been added precisely to prevent paragraph 1 being construed as reserving the titles used in that paragraph solely to heads of post.

ARTICLE 10

The consular commission

1. The head of a consular post shall be furnished by the sending state with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as

a general rule, the full name of the head of post, his category and class, the consular district, and the seat of the consulate.

2. The sending state shall communicate the commission or similar instrument through the diplomatic or other appropriate channel to the government of the state in whose territory the head of a consular post is to exercise his functions.

3. If the receiving state so accepts, the commission or similar instrument may be replaced by a notice to the same effect, addressed by the sending state to the receiving state.

Commentary

(1) As a general rule, the head of a consular post is furnished with an official document known as "consular commission" (variously known in French as *lettre de provision*, *lettre patente* or *commission consulaire*). Vice-consuls and consular agents are furnished with a similar instrument which bears a different name—*brevet*, *décret*, *patente* or *licence*.

(2) For purposes of simplification, Article 10 uses the expression "consular commission" to describe the official documents of heads of consular posts of all classes. While it may be proper to describe differently the full powers given to consular officials not appointed by the central authorities of the state, the legal significance of these documents from the point of view of international law is the same. This *modus operandi* is all the more necessary in that the manner of appointment of consuls pertains to the domestic jurisdiction of the sending state.

(3) While the form of the consular commission remains nonetheless governed by municipal law, paragraph 1 of the article states the particulars which should be shown in any consular commission in order that the receiving state may be able to determine clearly the powers and legal status of the consul. The expression "as a general rule" indicates expressly that this is a provision the non-observance of which does not have the effect of nullifying the consular commission. The same paragraph specifies, in keeping with practice, that a consular commission must be made out in respect of each appointment. Accordingly, if a consul is appointed to another post, a consular commission must be made out for that appointment, even if the post is in the territory of the same state. Another consular commission will also be necessary if the head of post receives promotion and the rank of the consular post is raised simultaneously. In the practice of some states the head of a consular post is even supplied with a new consular commission if the consular district is altered or the location of the consulate is moved.

(4) Some bilateral conventions specify the content or form of the consular commission (see, for example, Article 3 of the convention of 31 December 1913 between Cuba and the Netherlands, the convention of 20 May 1948 between the Philippines and Spain, Article IV of which stipulates that regular letters of appointment shall be duly signed and sealed by the Head of State). Obviously, in such cases the content or form of

the consular commission must conform to the provisions of the convention in force.

(5) The consular commission, together with the *exequatur*, is retained by the consul. It constitutes an important document which he can make use of at any time with the authorities of his district as evidence of his official position.

(6) While the consular commission as described above constitutes the regular mode of appointment, the recent practice of states seems to an ever-increasing extent to permit less formal methods, such as a notification of the consul's posting. It was therefore thought necessary to allow for this practice in paragraph 3 of the present article.

ARTICLE 11

The exequatur

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving state termed an *exequatur*, whatever the form of this authorization.

2. Subject to the provisions of Articles 13 and 15, the head of a consular post may not enter upon his duties until he has received an *exequatur*.

Commentary

(1) The *exequatur* is the act whereby the receiving state grants the foreign consul final admission, and thereby confers upon him the right to exercise his consular functions. The same term also serves to describe the document by which the head of post is admitted to the exercise of his functions.

(2) In accordance with the general practice of states, it is the municipal law of each state which determines the organ competent to grant the *exequatur*. In many states, the *exequatur* is granted by the head of the state if the consular commission is signed by the head of the sending state, and by the Minister for Foreign Affairs in other cases. In many states, the *exequatur* is always granted by the Minister for Foreign Affairs. In certain countries, competence to grant the *exequatur* is reserved to the government.

(3) As is evident from Article 12, the form of the *exequatur* is likewise governed by the municipal law of the receiving state. As a consequence, it varies considerably. According to the information at the Commission's disposal, the types of *exequatur* most frequently found in practice are the following.

Exequaturs may be granted in the form of:

(a) A decree by the head of the state, signed by him and countersigned by the Minister for Foreign Affairs, the original being issued to the head of consular post;

(b) A decree signed as above, but only a copy of which, certified by the Minister for Foreign Affairs, is issued to the head of consular post;

(c) A transcription endorsed on the consular commission, a method which may itself have several variants;

(d) A notification to the sending state through the diplomatic channel.

(4) In certain conventions the term "*exequatur*" is used in its formal sense as referring only to the forms mentioned under (a) to (c) above. As allowance must be made for cases in which the *exequatur* is granted to the consul in a simplified form, these conventions mention, besides the *exequatur*, other forms of final authorization for the exercise of consular functions (consular convention of 12 January 1948, between the United States and Costa Rica, Article I), or else do not use the term "*exequatur*."

(5) The term "*exequatur*" is used in these articles to denote any final authorization granted by the receiving state to a head of consular post, whatever the form of such authorization. The reason is that the form is not *per se* a sufficient criterion for differentiating between acts which have the same purpose and the same legal significance. The term "*exequatur*" also denotes the authorization given to any other consular official in the special case provided for in Article 19, paragraph 2.

(6) Inasmuch as subsequent articles provide that the head of a consular post may obtain provisional admission before obtaining the *exequatur* (Article 13), or may be allowed to act as temporary head of post in the cases referred to in Article 15, the scope of the article is limited by an express reference to these two articles.

(7) The grant of the *exequatur* to a consul appointed as head of a consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility. It is therefore not necessary for consular officials who are not heads of post to present consular commissions and obtain an *exequatur*. Notification by the head of a consular post to the competent authorities of the receiving state suffices to admit them to the benefits of the present articles and of the relevant agreements in force. However, if the sending state wishes in addition to obtain an *exequatur* for one or more consular officials who are not heads of post, there is nothing to prevent it from making a request accordingly. Provision is made for this case in Article 19, paragraph 2.

(8) It is universally recognized that the receiving state may refuse the *exequatur* to a consul. This right is recognized implicitly in the article, and the Commission did not consider it necessary to state it explicitly.

(9) The only controversial question is whether a state which refuses the *exequatur* ought to communicate the reasons for the refusal to the government concerned. The Commission preferred not to deal with this question in the draft. The draft's silence on the point should be interpreted to mean that the question is left to the discretion of the receiving state, since, in view of the varying and contradictory practice of states, it is not possible to say that there is a rule requiring states to give the reasons for their decision in such a case.

ARTICLE 12

Formalities of appointment and admission

Subject to the provisions of Articles 10 and 11, the formalities for the appointment and for the admission of the head of a consular post are determined by the law and usage, respectively of the sending and of the receiving state.

Commentary

(1) As distinct from the case of diplomatic representatives, there is no rule of international law specifying the mode of appointing heads of consular posts. This matter is governed by the law and usage of each state which determine the requirements for appointment as head of a consular post, the procedure for appointment and the form of documents with which consuls are supplied. In some states, for example, consular agents are appointed by a central authority on the recommendation of the head of post under whose orders and responsibility they are to work. In other states they are appointed by the consul-general or by the consul, subject to confirmation by the Minister for Foreign Affairs.

(2) The mistaken opinion has sometimes been voiced that only heads of state are competent to appoint consuls, and some claims have even been based on these opinions. Accordingly, it seemed desirable to state in this article that the modes of appointing heads of consular posts are determined by the law and usage of the sending state; for this purpose the term "formalities" should be construed as meaning also the determination of the organ of the state competent to appoint heads of consular posts. Such a rule, by removing all possibility of differences of view on the point, will prevent friction that may harm good relations between states.

(3) International law does not settle the question which particular authority is competent to admit consuls to the exercise of consular functions nor does it settle, except for the provisions of Article 11 dealing with the *exequatur*, the forms of such admission. To avoid all divergence of opinion it was necessary to state expressly that the formalities for the admission of heads of consular posts are determined by the law and usage of the receiving state, including the determination of the organ competent to grant admission to the head of a consular post.

(4) As this draft in its Articles 10 and 11 contains certain other provisions relating to the formalities of the appointment and admission of the head of a consular post, the scope of the rule stated has had to be restricted by an explicit reference to those articles.

(5) The idea underlying this article was codified in a different form in the 1928 Havana Convention regarding consular agents, Article 2 of which provides:

"The form and requirements for appointment, the classes and the rank of the consuls, shall be regulated by the domestic laws of the respective State."

ARTICLE 13

Provisional admission

Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions and to the benefit of the present articles.

Commentary

(1) The purpose of provisional admission is to enable the head of post to take up his duties before the *exequatur* is granted. The procedure for obtaining the *exequatur* takes some time, but the business handled by a consul will not normally wait. In these circumstances the institution of provisional admission is a very useful expedient. This also explains why provisional admission has become so prevalent, as can be seen from many consular conventions, including the Havana Convention of 1928 regarding consular agents (Article 6).

(2) It should be noted that the article does not prescribe a written form for provisional admission. It may equally be granted in the form of a verbal communication to the authorities of the sending state, including the head of post himself.

(3) Certain bilateral conventions go even further, and permit a kind of automatic recognition, stipulating that consuls appointed heads of posts shall be provisionally admitted as of right to the exercise of their functions and to the benefit of the provisions of the convention unless the receiving state objects. These conventions provide for the grant of provisional admission by means of a special act only in cases where this is necessary. The Commission considered that the formula used in the article was more suitable for a multilateral convention such as is contemplated by the present draft.

(4) By virtue of this article, the receiving state will be under a duty to afford assistance and protection to a head of post who is admitted provisionally and to accord him the privileges and immunities conferred on heads of consular posts by the present articles and by the relevant agreements in force.

ARTICLE 14

Obligation to notify the authorities of the consular district

As soon as the head of a consular post is admitted to the exercise of his functions, the receiving state shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of the consular post to carry out the duties of his office and to have the benefit of the provisions of the present articles.

Commentary

(1) Under this article, the admission of the head of a consular post to the exercise of his functions, whether provisional (Article 13) or de-

finitive (Article 11), involves a twofold obligation for the government of the receiving state:

(a) It must immediately notify the competent authorities of the consular district that the head of post is admitted to the exercise of his functions;

(b) It must ensure that the necessary measures are taken to enable the head of post to carry out the duties of his office and to enjoy the benefits of the present articles.

(2) As is evident from Article 11, the exercise by the head of post of his functions does not depend on the fulfilment of these obligations.

ARTICLE 15

Temporary exercise of the functions of head of a consular post

1. If the position of head of post is vacant, or if the head of post is unable to carry out his functions, an acting head of post may act provisionally as head of the consular post. He shall as a general rule be chosen from among the consular officials or the diplomatic staff of the sending state. In the exceptional cases where no such officials are available to assume this position, the acting head of post may be chosen from among the members of the administrative and technical staff.

2. The name of the acting head of post shall be notified, either by the head of post or, if he is unable to do so, by any competent authority of the sending state, to the Ministry for Foreign Affairs of the receiving state or to the authority designated by it. As a general rule, this notification shall be given in advance.

3. The competent authorities shall afford assistance and protection to the acting head of post and admit him, while he is in charge of the post, to the benefit of the present articles on the same basis as the head of the consular post concerned.

4. If a member of the diplomatic staff is instructed by the sending state to assume temporarily the direction of a consulate, he shall continue to enjoy diplomatic privileges and immunities while exercising that function.

Commentary

(1) The institution of acting head of post has long since become part of current practice, as witness many national regulations concerning consuls and a very large number of consular conventions. The text proposed therefore merely codifies the existing practice.

(2) The function of acting head of post in the consular service corresponds to that of *chargé d'affaires ad interim* in the diplomatic service. In view of the similarity of the institutions, the text of paragraph 1 follows very closely that of Article 19, paragraph 1, of the Vienna Convention on Diplomatic Relations of 18 April 1961.

(3) It should be noted that the text leaves states quite free to decide the method of designating the acting head of post, who may be chosen from

among the officials of the particular consulate or of another consulate of the sending state, or from among the officials of a diplomatic mission of that state. Where no consular official is available to take charge, one of the consular employees may be chosen as acting head of post (see the Havana Convention of 1928 regarding consular agents, Article 9). Since the function of acting head of post is, of necessity, temporary, and in order that the work of the consulate should not suffer any interruption, the appointment of the acting head of post is not subject to the procedure governing admission. However, the sending state has the duty to notify the name of the acting head of post to the receiving state in advance in all cases where that is possible.

(4) The word "provisionally" emphasizes that the function of acting head of post may not, except by agreement between the states concerned, be prolonged for so long a period that the acting head would in fact become permanent head.

(5) The question whether the consul should be regarded as unable to carry out his functions is a question of fact to be decided by the sending state. Unduly rigid regulations on this point are not desirable.

(6) The expression "any competent authority of the sending state" used in paragraph 2 means any authority design[at]ed by the law or by the government of the sending state as responsible for consular relations with the state in question. This may be the head of another consular post which under the laws and regulations of the sending state is hierarchically superior to the consulate in question, the sending state's diplomatic mission in the receiving state or the Ministry for Foreign Affairs of the sending state, as the case may be.

(7) While in charge of the consular post the acting head has the same functions and enjoys the same facilities, privileges and immunities as the head of post. The question of the precedence of an acting head of post is dealt with in Article 16, paragraph 4.

(8) Paragraph 4 of Article 15 deals with the case where a member of the diplomatic staff is designated acting head of post. As the secondment of a member of the diplomatic mission is necessarily temporary, the Commission considered, in the light of the practice of states, that the exercise of consular functions does not in this case affect the diplomatic status of the person in question.

ARTICLE 16

Precedence

1. Heads of consular posts shall rank in each class according to the date of the grant of the *exequatur*.

2. If, however, the head of the consular post before obtaining the *exequatur* is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the *exequatur*.

3. The order of precedence as between two or more heads of consular posts who obtained the *exequatur* or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments were presented or of the notice referred to in Article 10, paragraph 3.

4. Acting heads of post rank after all heads of post in the class to which the heads of post whom they replace belong, and, as between themselves, they rank according to the order of precedence of these same heads of post.

5. Honorary consuls who are heads of post shall rank in each class after career heads of post, in the order and according to the rules laid down in the foregoing paragraphs.

6. Heads of post have precedence over consular officials not holding such rank.

Commentary

(1) The question of the precedence of consuls, though undoubtedly of practical importance, has not as yet been regulated by international law. In many places, consuls are members of a consular corps, and the question of precedence arises quite naturally within the consular corps itself, as well as in connexion with official functions and ceremonies. In the absence of international regulations, states have been free to settle the order of precedence of consuls themselves. There would appear to be, as far as the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify.

(2) It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls.

(3) Paragraph 4 of this article establishes the precedence of acting heads of post according to the order of precedence of the heads of post whom they replace. This is justified by the nature of the interim function. It has undoubted practical advantages, in that the order of precedence can be established easily.

(4) This text met with the almost unanimous acceptance of the governments which have sent comments on the 1960 draft articles on consular intercourse and immunities. The Commission therefore retained the wording adopted at its previous session, with a few drafting changes. It transferred to this article the text of Article 62 relating to the precedence of honorary consuls, so that all the provisions dealing with the precedence of consular officials should be grouped together in a single article. The text of former Article 62 has become paragraph 5 of the present article.

ARTICLE 17

Performance of diplomatic acts by the head of a consular post

1. In a state where the sending state has no diplomatic mission, the head of a consular post may, with the consent of the receiving state, be authorized to perform diplomatic acts.

2. A head of consular post or other consular official may act as representative of the sending state to any inter-governmental organization.

Commentary

(1) The Commission's provisional draft, adopted at the twelfth session, contained two articles dealing with the exercise of diplomatic activities by consuls. Article 18 regulated the occasional performance of diplomatic acts in states where the sending state had no diplomatic mission and Article 19 made provision for cases in which the sending state wished to entrust its consul with the performance, not merely of occasional diplomatic acts, but with diplomatic functions generally, a possibility for which the law makes provision in several states.

(2) Article 19 read as follows:

"In a state where the sending state has no diplomatic mission, a consul may, with the consent of the receiving state, be entrusted with diplomatic functions, in which case he shall bear the title of consul-general-*chargé d'affaires* and shall enjoy diplomatic privileges and immunities."

(3) The Commission considered the two articles in the light of the comments of governments and decided to delete Article 19, on the ground that the matter dealt with therein falls within the scope of diplomatic relations regulated by the Vienna Convention on Diplomatic Relations of 1961. There is nothing to prevent a head of consular post from being appointed a diplomatic agent and so acquiring diplomatic status.

(4) Having deleted Article 19, the Commission broadened the provisions of former Article 18 in order to enable the head of a consular post to exercise diplomatic activities to a greater extent than was contemplated by the original text of Article 18.

(5) The present article takes account of the consul's special position in a country where the sending state is not represented by a diplomatic mission and where the head of a consular post is the only official representative of his state. As has been found in practice, a head of consular post in such a case tends to perform acts which are normally within the competence of diplomatic missions and hence are outside the scope of consular functions. For the performance of acts of a diplomatic nature, the consent—express or implied—of the receiving state is, under the article, indispensable.

(6) The performance of diplomatic acts, even if repeated, in no way affects the legal status of the head of a consular post and does not confer upon him any right to diplomatic privileges and immunities.

ARTICLE 18

Appointment of the same person by two or more states as head of a consular post

Two or more states may appoint the same person as head of a consular post in another state, unless this state objects.

Commentary

(1) This article, unlike Article 7 which provides for the exercise of consular functions on behalf of a third state, deals with the case where two or more states appoint the same person as head of consular post in another state, if this state does not object. In the case covered by Article 7, the consulate is an organ of the sending state alone, but is instructed to exercise consular functions on behalf of a third state. In the circumstances contemplated here, on the other hand, the head of consular post is an organ of two or more states at the same time. Accordingly, in this case there are at the same time two or more sending states, but only one receiving state.

(2) Except insofar as honorary consuls are concerned, the article represents rather an innovation in consular law. The Commission realized that the practical application of the article might even give rise to certain difficulties, since the scope of consular functions may vary according to the provisions of consular conventions and in consequence of the operation of the most-favoured-nation clause. Moreover, two states might have different interests in certain matters falling within the scope of consular functions. Nevertheless, the Commission considered that the possibility contemplated in this article might under certain conditions answer a practical need in the future development of consular law and, following the direction laid down in diplomatic law by Article 6 of the 1961 Vienna Convention on Diplomatic Relations, inserted this article in the final draft.

ARTICLE 19

Appointment of the consular staff

1. Subject to the provisions of Articles 20, 22 and 23, the sending state may freely appoint the members of the consular staff.

2. The sending state may, if such is required by its law, request the receiving state to grant the *exequatur* to a consular official appointed to a consulate in conformity with paragraph 1 of this article who is not the head of post.

Commentary

(1) The receiving state's obligation to accept consular officials and employees appointed to a consulate flows from the agreement by which that state gave its consent to the establishment of consular relations, and in particular from its consent to the establishment of the consulate. In most cases, the head of post cannot discharge the many tasks involved in the performance of consular functions without the help of assistants whose qualifications, rank and number will depend on the importance of the consulate.

(2) This article is concerned only with the subordinate staff that assists the head of post in the performance of the consular functions; for the procedure relating to the appointment of the head of post, to his admis-

sion by the receiving state, and to the withdrawal of such admission is dealt with in other articles of the draft.

(3) The consular staff is divided into two categories:

(a) *Consular officials*, i.e., persons who belong to the consular service and exercise a consular function; and

(b) *Consular employees*, i.e., persons who perform administrative or technical work, or belong to the service staff.

(4) The sending state is free to choose the members of the consular staff. But there are exceptions to this rule, as appears from the proviso in paragraph 1:

(a) As stipulated in Article 22, consular officials may not be appointed from among the nationals of the receiving state except with the consent of that state. The same rule may apply, if the receiving state so wishes, to the appointment of nationals of a third state.

(b) Article 20, which gives the receiving state the possibility of limiting the size of the consular staff in certain circumstances, is another exception.

(c) A third exception to the rule laid down in Article 19 consists in the power given the receiving state, under Article 23, at any time to declare a member of the consular staff not acceptable, or, if necessary, to refuse to consider him as a member of the consular staff.

(5) The right to appoint consular officials and employees to a consulate is expressly provided for in certain recent consular conventions, in particular the conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (Article 6), with France on 31 December 1951 (Article 3, paragraph 6), with Sweden on 14 March 1952 (Article 6), with Greece on 17 April 1953 (Article 6), with Italy on 1 June 1954 (Article 4), with Mexico on 20 March 1954 (Article 4, paragraph 1) and with the Federal Republic of Germany on 30 July 1956 (Article 4, paragraph 1).

(6) The free choice of consular staff provided for in this article naturally does not in any way imply exemption from visa formalities in the receiving state in cases where a visa is necessary for admission to that state's territory.

(7) The whole structure of this draft is based on the principle that only the head of consular post needs an *exequatur* or a provisional admission to enter upon his functions. According to this principle, which is well established in practice, the consent to the establishment of a consulate and the *exequatur* granted to the head of consular post cover the consular activities of all the members of the consular staff, as is explained in the commentary to Article 11. Nevertheless, the sending state may see fit also to request an *exequatur* for consular officials other than the head of post. Such cases arise, in particular, if, under the law of the sending state, it is a condition of the validity of acts performed by the consular official that he must have obtained the *exequatur*. In order to take these special needs into account, the Commission inserted a new provision, which constitutes paragraph 2 of this article. This paragraph provides that the sending

state may, if such is required by its law, request the receiving state to grant the *exequatur* to a consular official who is not the head of post and who is appointed to a consulate in that state. This is an optional and supplementary measure, which is not required by international law.

ARTICLE 20

Size of the staff

In the absence of an express agreement as to the size of the consular staff, the receiving state may require that the size of the staff be kept within reasonable and normal limits, having regard to circumstances and conditions in the consular district and to the needs of the particular consulate.

Commentary

(1) This article deals with the case where the sending state would increase the size of the consular staff disproportionately.

(2) The Commission considered that the receiving state's right to raise the question of the size of the staff should be recognized.

(3) If the receiving state considers that the consular staff is too large, it should first try to reach an agreement with the sending state. If these efforts fail, then, in the opinion of the majority of the members of the Commission, it should have the right to limit the size of the sending state's consular staff.

(4) This right of the receiving state is not, however, absolute, for this state is obliged to take into account not only the conditions prevailing in the consular district, but also the needs of the consulate concerned, *i.e.*, it must apply objective criteria, one of the most decisive being the consulate's needs. Any decision by the receiving state tending to limit the size of the consular staff should, in the light of the two criteria mentioned in the present article, remain within the limits of what is reasonable and normal. The Commission, recognizing that in this respect there are practical differences between diplomatic missions and consulates, preferred this formulation to that used in Article 11, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, considering that it would better provide objective criteria for settling possible divergences of views between the two states concerned. In addition, it had to take into account the fact that several governments wanted the article to be deleted, and for that reason also it did not consider it advisable to broaden the scope of the obligation stipulated in the article.

ARTICLE 21

Order of precedence as between the officials of a consulate

The order of precedence as between the officials of a consulate shall be notified by the head of post to the Ministry for Foreign Affairs of the receiving state or to the authority designated by the said ministry.

Commentary

As has been explained in the commentary to Article 16, the question of precedence is of undoubted practical interest. In some cases, it may arise not only with regard to heads of consular posts, but also with regard to other consular officials. In that case it will be important to know the order of precedence of the officials of a particular consulate *inter se*, particularly since the rank and titles may differ from one consulate to another. Accordingly, the Commission thought it advisable to insert this article, which corresponds to Article 17 of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 22

Appointment of nationals of the receiving state

1. Consular officials should in principle have the nationality of the sending state.

2. Consular officials may not be appointed from among persons having the nationality of the receiving state except with the consent of that state which may be withdrawn at any time.

3. The receiving state may reserve the same right with regard to nationals of a third state who are not also nationals of the sending state.

Commentary

(1) This article as adopted at the Commission's twelfth session read as follows (Article 11):

“Consular officials may be appointed from amongst the nationals of the receiving state only with the express consent of that state.”

(2) This text, by stipulating that consular officials may not be chosen from amongst the nationals of the receiving state except with its express consent, implied that consular officials should, as a rule, have the nationality of the sending state.

(3) At the present session, the Commission decided to draft the article in more explicit terms and to follow Article 8 of the 1961 Vienna Convention on Diplomatic Relations, although several members of the Commission would have preferred to keep the wording adopted in 1960. In conformity with the Commission's decision, the article states explicitly that consular officials should in principle have the nationality of the sending state. Paragraph 2 reproduces the terms of the article as it appears in the 1960 draft, with the difference that, in order to bring the text into line with paragraph 2 of Article 8 of the Vienna Convention, the word “express” was omitted and the phrase “which may be withdrawn at any time” added. Lastly, paragraph 3 of this article, consistent with Article 8, paragraph 3, of the Vienna Convention on Diplomatic Relations, recognizes the receiving state's right to make the appointment of consular officials who are nationals of a third state and not also nationals of the sending state conditional on its consent.

ARTICLE 23

*Withdrawal of exequatur
Persons deemed unacceptable*

1. If the conduct of the head of a consular post or of a member of the consular staff gives serious grounds for complaint, the receiving state may notify the sending state that the person concerned is no longer acceptable. In that event, the sending state shall, as the case may be, either recall the person concerned or terminate his functions with the consulate.

2. If the sending state refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this article, the receiving state may, as the case may be, either withdraw the *exequatur* from the person concerned or cease to consider him as a member of the consular staff.

3. A person may be declared unacceptable before arriving in the territory of the receiving state. In any such case, the sending state shall withdraw his appointment.

Commentary

(1) This article combines the provisions contained in two separate articles in the draft adopted at the previous session, namely Article 20 concerning the withdrawal of the *exequatur* and Article 23 specifying the conditions under which the receiving state may declare a member of the consular staff not acceptable. This article therefore defines what are the rights of the receiving state if the conduct of the head of a consular post or a member of the consular staff gives rise to serious grounds for complaint.

(2) The right of the receiving state to declare the head of post or a member of the consular staff unacceptable is limited to the case where the conduct of the persons in question has given serious grounds for complaint. Consequently, it is an individual measure which may only be taken in consequence of such conduct. This constitutes some safeguard for the sending state against arbitrary measures. This safeguard is all the more necessary since the arbitrary withdrawal of the *exequatur* of the head of a consular post or the fact that in the absence of serious grounds a member of the consular staff is declared unacceptable might cause grave prejudice to the sending state by abruptly or unjustifiably interrupting the performance of consular functions in matters where more or less daily action by the consul is absolutely essential (*e.g.*, various trade and shipping matters, the issue of visas, the attestation of signatures, translation of documents, and the like). Such an interruption might also cause great harm to the receiving state.

(3) The expression "not acceptable" used in this article corresponds to the phrase "*persona non grata*" which is customarily used where diplomatic personnel are concerned.

(4) If the head of post or a member of the consular staff has been declared unacceptable by the receiving state, the sending state is bound

to recall the person in question or to terminate his functions at the consulate, as the case may be.

(5) The expression "terminate his functions" applies above all to the case where the person concerned is a national of the receiving state or to a case where the person in question, although a national of the sending state or of a third state, was permanently resident in the territory of the receiving state before his appointment to the consulate of the sending state.

(6) If the sending state refuses to carry out the obligation specified in paragraph 1, or fails to carry it out within a reasonable time, the receiving state may, in the case of the head of post, withdraw the *exequatur* and, in the case of a member of the consular staff, cease to regard him as a member of the consular staff.

(7) As the text of the article implies, the sending state is entitled to ask the receiving state for the reasons for its complaint of the conduct of the consular official or employee affected.

(8) In the case of the withdrawal of the *exequatur*, the head of post affected ceases to be allowed to exercise consular functions.

(9) If the receiving state ceases to regard a person as a member of the consular staff, that means that the person in question loses the right to participate to any extent whatsoever in the exercise of consular functions.

(10) Nevertheless, the head of a consular post whose *exequatur* has been withdrawn and the member of the consular staff whom the receiving state has ceased to consider as a member of the consulate continue to enjoy consular privileges and immunities under Article 53 until they leave the country or until the expiry of a reasonable time limit granted to them for that purpose.

(11) As is clear from paragraph 3 of this article, the receiving state may declare a person unacceptable before his arrival in its territory. In that case, the receiving state is not obliged to communicate the reasons for its decision.

ARTICLE 24

Notification of the appointment, arrival and departure of members of the consulate, members of their families and members of the private staff

1. The Ministry for Foreign Affairs of the receiving state, or the authority designated by that ministry, shall be notified of:

(a) The appointment of members of the consulate, their arrival after appointment to the consulate, as well as their final departure or the termination of their functions with the consulate;

(b) The arrival and final departure of a person belonging to the family of a member of the consulate forming part of his household and, where appropriate, the fact that the person becomes or ceases to be a member of the family of a member of the consulate;

(c) The arrival and final departure of members of the private staff in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;

(d) The engagement and discharge of persons resident in the receiving state as members of the consulate or as members of the private staff entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Commentary

(1) This article imposes on the sending state the obligation to notify the receiving state of:

(a) The appointment of members of the consulate;

(b) The arrival of members of the consulate after their appointment to the consulate;

(c) Their final departure or the termination of their functions with the consulate;

(d) The arrival of members of the families of members of the consulate;

(e) The fact that a person has become a member of the family of a member of the consulate and forms part of his household;

(f) The final departure of a person belonging to the family of a member of the consulate, forming part of his household, and, if the case should arise, the fact that that person has ceased to be a member of the family of a member of the consulate;

(g) The arrival of members of the private staff of members of the consulate;

(h) The final departure of members of the private staff and, where applicable, the fact that they have left the service of the persons concerned;

(i) The engagement or dismissal of persons residing in the receiving state either as members of the consulate or as members of the private staff.

(2) The notification is in the interest both of the receiving and of the sending state. The former has a great interest in knowing at any particular time the names of the persons belonging to the sending state's consulate, since these persons may, though in differing degrees, claim the benefit of consular privileges and immunities. And so far as the sending state is concerned, the notification is a practical measure enabling the members of its consulate, the members of their families and their private staff to become eligible as quickly as possible for the benefit of the privileges and immunities accorded to them by these articles or by other applicable international agreements.

(3) It should be noted that the enjoyment of consular privileges and immunities is not conditional on notification, except in the case of persons who were in the territory of the receiving state at the time of their appointment or at the time when they entered the household of a member of the consulate (Article 53 of this draft). In this case, the notification marks the commencement of the privileges and immunities of the person in question.

(4) Save as otherwise provided by the law of the receiving state, the notification is addressed to the Ministry for Foreign Affairs, which may

however, designate some other authority to which the notifications referred to in Article 24 are to be addressed.

(5) The present article corresponds to Article 10 of the 1961 Vienna Convention on Diplomatic Relations.

SECTION II: END OF CONSULAR FUNCTIONS

ARTICLE 25

Modes of termination of the functions of a member of the consulate

The functions of a member of the consulate come to an end in particular:

(a) On notification by the sending state to the receiving state that the functions of the member of the consulate have come to an end;

(b) On the withdrawal of the *exequatur* or, as the case may be, the notification by the receiving state to the sending state that the receiving state refuses to consider him as a member of the consular staff.

Commentary

This article deals with the modes of termination of the functions of the members of the consulate. The enumeration is not exhaustive, and it contains only the most common causes. The functions may also be terminated by other events, *e.g.*, the death of the consular official or employee, the closure of the consulate or the severance of consular relations, the extinction of the sending state, the incorporation of the consular district into another state. The events terminating the functions of a member of the consulate are sometimes set out in consular conventions.

ARTICLE 26

Right to leave the territory of the receiving state and facilitation of departure

The receiving state must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving state, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Commentary

(1) This article lays down the obligation of the receiving state to allow members of the consulate, members of their families and members of the private staff in their service to leave its territory. With the exception of members of the family, this article does not apply to persons who are nationals of the receiving state.

(2) The article corresponds to and is modelled on Article 44 of the Vienna Convention on Diplomatic Relations. The expression "at the earliest possible moment" should be construed as meaning, first, that the receiving state should allow the persons covered by this article to leave its territory as soon as they are ready to leave and, secondly, that it should allow them the necessary time for preparing their departure and arranging for the transport of their property.

ARTICLE 27

Protection of consular premises and archives and of the interests of the sending state in exceptional circumstances

1. In the event of the severance of consular relations between two states:

(a) The receiving state shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consulate and its archives;

(b) The sending state may entrust the custody of the consular premises, together with the property it contains and its archives, to a third state acceptable to the receiving state;

(c) The sending state may entrust the protection of its interests and those of its nationals to a third state acceptable to the receiving state.

2. In the event also of the temporary or permanent closure of a consulate, the provisions of paragraph 1 of the present article shall apply if the sending state has no diplomatic mission and no other consulate in the receiving state.

3. If the sending state, although not represented in the receiving state by a diplomatic mission, has another consulate in the territory of that state, that consulate may be entrusted with the custody of the archives of the consulate which has been closed and, with the consent of the receiving state, with the exercise of consular functions in the district of that consulate.

Commentary

(1) In the case referred to in paragraph 2 of this article, the sending state may entrust the custody of the consular archives to a third state acceptable to the receiving state, unless it decides to evacuate the archives. The third state having the custody of the consular premises and archives may entrust this task to its diplomatic mission or to one of its consulates.

(2) If a consulate has been temporarily or permanently closed in the receiving state, a fresh agreement between the receiving state and the sending state is necessary for the purpose of the provisional or permanent transfer of the consular functions of the closed consulate to another consulate of the sending state in the receiving state.

(3) This article corresponds to Article 45 of the 1961 Vienna Convention on Diplomatic Relations.

CHAPTER II. FACILITIES, PRIVILEGES AND IMMUNITIES OF CAREER CONSULAR
OFFICIALS AND CONSULAR EMPLOYEES

SECTION I. FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO A CONSULATE

ARTICLE 28

Use of the national flag and of the state coat-of-arms

The consulate and its head shall have the right to use the national flag and coat-of-arms of the sending state on the building occupied by the consulate and at the entrance door and on the means of transport of the head of post.

Commentary

(1) The rule set forth in this article states in the first place the right to display the national flag and the state coat-of-arms on the building in which the consulate is housed and at the entrance door of that building. This right, which is vested in the sending state, is confirmed by numerous consular conventions and must be regarded as being based on a rule of customary international law. It is commonly admitted that the inscription appearing on the coat-of-arms of the sending state may also be in the official language, or one of the official languages, of that state.

(2) In the case where the whole of the building is used for the purposes of the consulate, the national flag may be flown not only on the building but also within its precincts. The right to use the national flag is embodied in many national regulations.

(3) A study of the consular conventions shows that the right of the consulate to fly the national flag on the means of transport of the head of post is recognized by a large number of states. The means of transport in question must be individual ones, such as motor vehicles, vessels of all kinds used exclusively by the head of consular post, aircraft belonging to the consulate, etc. Accordingly, this right is not exercisable when the head of consular post uses public means of transport (trains, ships and boats, commercial aircraft).

(4) Besides the head of post who has received the *exequatur* (Article 11) or been admitted on a provisional basis to the exercise of his functions (Article 13), an acting head of post (Article 15) may also exercise the privilege referred to in paragraph 3 of this commentary.

(5) The consular regulations applied by some states provide for the use of a consular flag (*fanion*) by their consuls. Article 28 should be interpreted as applying to these cases also.

(6) The duty of the receiving state to permit the use of the national flag of the sending state implies the duty to provide for the protection of that flag. Some conventions stipulate that consular flags are inviolable (*e.g.*, the Convention of Caracas of 1911, Article III, paragraph 1).

(7) This article corresponds to Article 20 of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 29

Accommodation

1. The receiving state shall either facilitate the acquisition in its territory, in accordance with its municipal law, by the sending state of premises necessary for its consulate or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist in obtaining suitable accommodation for the members of the consulate.

Commentary

(1) The right to procure on the territory of the receiving state the premises necessary for a consulate derives from the agreement by which that state gives its consent to the establishment of the consulate. The reference in the text of the article to the municipal law of the receiving state signifies that the sending state may procure premises only in the manner laid down by the law of the receiving state. That municipal law may however contain provisions prohibiting the acquisition of the ownership of premises by aliens or by foreign states, so that the sending state may be obliged to rent premises. Even in this case, the sending state may encounter legal or practical difficulties. Hence, the Commission decided to include in the draft an article making it obligatory for the receiving state to facilitate, as far as possible, the procuring of suitable premises for the consulate of the sending state.

(2) This article corresponds to Article 21 of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 30

Inviolability of the consular premises

1. The consular premises shall be inviolable. The agents of the receiving state may not enter them, save with the consent of the head of post.

2. The receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consulate or impairment of its dignity.

3. The consular premises, their furnishings, the property of the consulate and its means of transport shall be immune from any search, requisition, attachment or execution.

Commentary

(1) The consular premises comprise the buildings or parts of buildings and the appurtenant land which, whoever the owner may be, are used for the purposes of the consulate (Article 1 (j)). If the consulate uses an entire building for its purposes, the consular premises also comprise the

surrounding land and the appurtenances, including the garden, if any; for the appurtenances are an integral part of the building and are governed by the same rules. It is hardly conceivable that the appurtenances should be governed by rules different from those applicable to the building to which they are attached.

(2) The inviolability of the consular premises is a prerogative granted to the sending state by reason of the fact that the premises in question are used as the seat of its consulate.

(3) The article places two obligations on the receiving state. In the first place, that state must prevent its agents from entering the consular premises unless they have previously obtained the consent of the head of post (paragraph 1). Secondly, the receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage, and to prevent any disturbance of the peace of the consulate or impairment of its dignity (paragraph 2). The expression "special duty" is used to emphasize that the receiving state is required to take steps going beyond those normally taken in the discharge of its general duty to maintain public order.

(4) Paragraph 3 extends the inviolability also to the property of the consulate and in particular to the means of transport of the consulate. The paragraph provides that the consular premises must not be entered even in pursuance of an order made by a judicial or administrative authority. It confers immunity from any search, requisition, attachment or execution upon the consular premises, their furnishings and other objects therein and also on the property of the consulate, in particular the assets of the consulate and its means of transport. This immunity naturally includes immunity from military requisitioning and billeting.

(5) If the consulate uses leased premises, measures of execution which would involve a breach of the rule of inviolability confirmed by this article must not be resorted to against the owner of the premises.

(6) By reason of Article 27 of the present draft, the inviolability of the consular premises will subsist even in the event of the severance of consular relations or of the permanent or temporary closure of the consulate.

(7) This article reproduces, *mutatis mutandis*, the text of Article 22 of the 1961 Vienna Convention on Diplomatic Relations.

(8) The principle of the inviolability of the consular premises is recognized in numerous consular conventions, including the following: Cuba-Netherlands, 31 December 1913 (Article 5); Albania-France, 5 February 1920 (Article 6); Czechoslovakia-Italy, 1 March 1924 (Article 9); Greece-Spain, 23 September 1926 (Article 9); Poland-Yugoslavia, 6 March 1927 (Article VIII); Germany-Turkey, 28 May 1929 (Article 6); Costa Rica-United States of America, 12 January 1948 (Article VI); Philippines-Spain, 20 May 1948 (Article IX, paragraph 2); the consular conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (Article 10, paragraph 4), with France on 31 December 1951 (Article 11, paragraph 1), with Sweden on 14 March 1952 (Article 10, paragraph 4), with Greece on 17 April 1953 (Article

10, paragraph 3), with Mexico on 20 March 1954 (Article 10, paragraph 3) and with the Federal Republic of Germany on 30 July 1956 (Article 8, paragraph 3); the conventions concluded by the Union of Soviet Socialist Republics with the Hungarian People's Republic on 24 August 1957 (Article 12, paragraph 2), with the Mongolian People's Republic on 28 August 1957 (Article 13, paragraph 2), with the Romanian People's Republic on 4 September 1957 (Article 9, paragraph 2), with the People's Republic of Albania on 18 September 1957 (Article 3, paragraph 2), with the People's Republic of Bulgaria on 16 December 1957 (Article 13, paragraph 2), with the Federal Republic of Germany on 25 April 1958 (Article 14, paragraph 3), with Austria on 28 February 1959 (Article 13, paragraph 2), with the Democratic Republic of Viet-Nam on 5 June 1959 (Article 13, paragraph 2) and with the People's Republic of China on 23 June 1959 (Article 13, paragraph 2); the consular convention of 23 May 1957 between Czechoslovakia and the German Democratic Republic (Article 5, paragraph 2); and the Havana Convention of 1928 regarding consular agents (Article 18). Although some of these conventions allow certain exceptions to the rule of inviolability, in that they allow the police or other territorial authorities to enter the consular premises in pursuance of an order of the courts under certain conditions, even without the consent of the head of post or in cases where his consent is presumed, as in the case of fire or other disasters or where a crime is committed on the consular premises, nevertheless many conventions lay down the rule of inviolability and admit of no exception whatsoever. As the inviolability of consular premises has the same importance for the exercise of consular functions as the inviolability of the premises of a diplomatic mission for that of diplomatic functions, the majority of the Commission was of the opinion that, in this matter, the text adopted at the Vienna Conference should be followed.

(9) Some bilateral consular conventions even recognize the inviolability of the consul's residence. The municipal law of some (though of very few) countries also recognizes the inviolability of the consul's residence.

ARTICLE 31

Exemption from taxation of consular premises

1. The sending state and the head of post shall be exempt from all national, regional or municipal dues and taxes whatsoever in respect of the consular premises, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this article shall not apply to such dues and taxes if, under the law of the receiving state, they are payable by the person who contracted with the sending state or the head of the consular post.

Commentary

(1) The exemption provided for in Article 31 relates to the dues and taxes which, but for the exemption, would, under the law of the receiving

state, be leviable on the consular premises owned or leased by the sending state or by the head of a consular post. The exemption covers the dues and taxes charged on the contract of sale, or on the lease, and also those charged on the building and rents.

(2) The expression "all national, regional or municipal dues and taxes whatsoever" should be construed as meaning those charged by the receiving state or by any of its territorial or political sub-divisions such as: the state (in a federal state), *canton*, autonomous republic, province, county, region, department, district, *arrondissement*, commune or municipality.

(3) This exemption is subject to an exception indicated in the final phrase of paragraph 1 in respect of dues and taxes which represent payment for specific services, *e.g.*, the tax on radio and television sets, taxes on water, electricity, gas consumption, etc.

(4) This article reproduces *mutatis mutandis* the text of Article 23 of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 32

Inviolability of the consular archives and documents

The consular archives and documents shall be inviolable at any time and wherever they may be.

Commentary

(1) This article lays down one of the essential rules relating to consular privileges and immunities, recognized by customary international law. While it is true that the inviolability of the consular archives and of the documents of the consulate (hereinafter designated as the papers of the consulate) is to some extent guaranteed by the inviolability of the consular premises (Article 30), the papers of the consulate must as such be inviolable wherever they are, even, for example, if a member of the consulate is carrying them on his person, or if they have to be taken away from the consulate owing to its closure or on the occasion of a removal. For the reasons given, and because of the importance of this rule for the exercise of the consular functions, the Commission considered it necessary that it should form the subject of a separate article.

(2) The expression "consular archives" means the papers, documents, correspondence, books and registers of the consulate and the ciphers and codes together with the card-indexes and furniture intended for their protection or safekeeping (Article 1, paragraph 1(*k*)).

(3) The term "documents" means any papers which do not come under the heading of "official correspondence," *e.g.*, memoranda drawn up by the consulate. It is clear that "civil status" documents, such as certificates of birth, marriage or death issued by the consul, and documents such as manifests, drawn up by the consul in the exercise of his functions, cannot be described for the purposes of this article as documents entitled to inviolability, for these certificates, manifests, etc., are issued to the persons concerned or to their representatives as evidence of certain legal acts or events.

(4) The protection of the official correspondence is also ensured by paragraph 2 of Article 35.

(5) This article corresponds to Article 24 of the 1961 Vienna Convention on Diplomatic Relations.

(6) The papers of the consulate enjoy inviolability even before the *exequatur* or special authorization is issued to the consul, for the inviolability is an immunity granted to the sending state and not to the consular official personally.

ARTICLE 33

Facilities for the work of the consulate

The receiving state shall accord full facilities for the performance of the functions of the consulate.

Commentary

(1) This article, which follows the terms of Article 25 of the 1961 Vienna Convention on Diplomatic Relations was inserted because the consulate needs the assistance of the government and authorities of the receiving state, both during its installation and in the exercise of its functions. Consuls could not successfully carry out any of the functions enumerated by way of example in Article 5 without the assistance of the authorities of the receiving state. The obligation which this article imposes on the receiving state is moreover in its own interests, for the smooth functioning of the consulate helps to develop consular intercourse between the two states concerned.

(2) It is difficult to define the facilities which this article has in view, for this depends on the circumstances of each particular case. It should, however, be emphasized that the obligation to provide facilities is confined to what is reasonable, having regard to the given circumstances.

ARTICLE 34

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving state shall ensure to all members of the consulate freedom of movement and travel in its territory.

Commentary

This article corresponds to Article 26 of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 35

Freedom of communication

1. The receiving state shall permit and protect free communication on the part of the consulate for all official purposes. In communicating

with the government, the diplomatic missions and the other consulates of the sending state, wherever situated, the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag and messages in code or cipher. However, the consulate may install and use a wireless transmitter only with the consent of the receiving state.

2. The official correspondence of the consulate shall be inviolable. Official correspondence means all correspondence relating to the consulate and its functions.

3. The consular bag, like the diplomatic bag, shall not be opened or detained.

4. The packages constituting the consular bag must bear visible external marks of their character and may contain only official correspondence and documents or articles intended for official use.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. In the performance of his functions he shall be protected by the receiving state. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft.

Commentary

(1) This article predicates a freedom essential for the discharge of consular functions; and, together with the inviolability of consular premises and that of the consulate's official archives, documents and correspondence, it forms the foundation of all consular law.

(2) By the terms of paragraph 1, freedom of communication is to be accorded "for all official purposes." This expression relates to communication with the government of the sending state; with the authorities of that state, and, more particularly, with its diplomatic missions and other consulates, wherever situated; with the diplomatic missions and consulates of other states; and, lastly with international organizations.

(3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag, and messages in code or cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service, *i.e.*, of the couriers dispatched by the Ministry for Foreign Affairs of the sending state or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending state, or with an intermediate post acting as a collecting and distributing center for diplomatic mail; with the authorities of the

sending state; or even with the sending state's diplomatic missions and consulates in third states. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status are applicable. The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's way-bill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

(4) However, by reason of its geographical position, a consulate may have to send a consular courier to the seat of the diplomatic mission or even to the sending state, particularly if the latter has no diplomatic mission in the receiving state. The text proposed by the Commission provides for this contingency. The consular courier shall be provided with an official document certifying his status and indicating the number of packages constituting the consular bag. The consular courier must enjoy the same protection in the receiving state as the diplomatic courier. He enjoys inviolability of person and is not liable to any form of arrest or detention.

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing the official correspondence, documents or articles intended for official purposes or all these together. The consular bag must not be opened or detained. This rule, set forth in paragraph 3, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents, which is the subject of Article 32 and of paragraph 2 of Article 35 of the draft. As is specified in paragraph 4, consular bags must bear visible external marks of their character, *i.e.*, they must bear an inscription or other external mark so that they can be identified as consular bags.

(6) Freedom of communication also covers messages in cipher, *i.e.*, messages in secret language, and, of course, also messages in code, *i.e.*, messages in a conventional language which is not secret and is employed for reasons of practical utility and, more particularly, in order to save time and money.

(7) Following the example of Article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, the Commission has added a rule concerning the installation and use of a wireless transmitter by a consulate and stated in the text of the article the opinion which it had expressed at its previous session in paragraph (7) of the commentary to Article 36. According to paragraph 1 of the present article, the consulate may not install or use a wireless transmitter except with the consent of the receiving state.

(8) The Commission, being of the opinion that the consular bag may be entrusted by a consulate to the captain of a commercial aircraft, has inserted a rule to that effect by adapting the text of Article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.

(9) Correspondence and other communications in transit, including messages in cipher, enjoy protection in third states also, in conformity

with the provisions of Article 54, paragraph 3, of the present draft. The same protection is enjoyed by consular couriers in third states.

(10) Independently of the fact that the expression "consular archives" includes the official correspondence (Article 1, paragraph 1(*k*)), the Commission considered it indispensable—and in this respect it followed Article 27, paragraph 2, of the Vienna Convention on Diplomatic Relations—to insert in this draft a special provision affirming the inviolability of the official correspondence. In this way it meant to stress—as is, incidentally, explained in the commentary to Article 1—that the official correspondence is inviolable at all times and wherever it may be, and consequently even before it actually becomes part of the consular archives.

ARTICLE 36

Communication and contact with nationals of the sending state

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

(a) Nationals of the sending state shall be free to communicate with and to have access to the competent consulate, and the consular officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;

(b) The competent authorities shall, without undue delay, inform the competent consulate of the sending state if, within its district, a national of that state is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay;

(c) Consular officials shall have the right to visit a national of the sending state who is in prison, custody or detention, for the purpose of conversing with him and arranging for his legal representation. They shall also have the right to visit any national of the sending state who is in prison, custody or detention in their district in pursuance of a judgement.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must not nullify these rights.

Commentary

(1) This article defines the rights granted to consular officials with the object of facilitating the exercise of the consular functions relating to nationals of the sending state.

(2) First, in paragraph 1 (*a*), the article establishes the freedom of nationals of the sending state to communicate with and have access to the competent consular official. The expression "competent consular official" means the consular official in the consular district in which the national of the sending state is physically present.

(3) The same provision also establishes the right of the consular official to communicate with and, if the exercise of his consular functions so requires, to visit nationals of the sending state.

(4) In addition, this article establishes the consular rights that are applicable in those cases where a national of the sending state is in custody pending trial, or imprisoned in the execution of a judicial decision. In any such case, the receiving state would assume three obligations under the article proposed:

(a) First, the receiving state must, without undue delay, inform the consul of the sending state in whose district the event occurs, that a national of that state is committed to custody pending trial or to prison. The consular official competent to receive the communication regarding the detention or imprisonment of a national of the sending state may, therefore, in some cases, be different from the one who would normally be competent to exercise the function of providing consular protection for the national in question on the basis of his normal residence;

(b) Secondly, the receiving state must forward to the consular official without undue delay any communications addressed to him by the person in custody, prison or detention;

(c) Lastly, the receiving state must permit the consular official to visit a national of the sending state who is in custody, prison or detention in his consular district, to converse with him, and to arrange for his legal representation. This provision is designed to cover cases where a national of the sending state has been placed in custody pending trial, and criminal proceedings have been instituted against him; cases where the national has been sentenced, but the judgement is still open to appeal or cassation; and also cases where the judgement convicting the national has become final. This provision applies also to other forms of detention (quarantine, detention in a mental institution).

(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving state. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody, against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending state.

(6) The expression "without undue delay" used in paragraph 1 (b) allows for cases where it is necessary to hold a person *incomunicado* for a certain period for the purposes of the criminal investigation.

(7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving state, this

does not mean that these laws and regulations can nullify the rights in question.

ARTICLE 37

Obligations of the receiving state

The receiving state shall have the duty:

(a) In the case of the death of a national of the sending state, to inform the consulate in whose district the death occurred;

(b) To inform the competent consulate without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending state;

(c) If a vessel used for maritime or inland navigation, having the nationality of the sending state, is wrecked or runs aground in the territorial sea or internal waters of the receiving state, or if an aircraft registered in the sending state suffers an accident on the territory of the receiving state, to inform without delay the consulate nearest to the scene of the occurrence.

Commentary

(1) This article is designed to ensure co-operation between the authorities of the receiving state and consulates in three types of cases coming within the scope of the consular functions. The duty to report to the consulate the events referred to in this article is often included in consular conventions. If this duty could be made general by means of a multilateral convention, the work of all consulates would be greatly facilitated.

(2) In case of the death of a national of the sending state, the obligation to inform the consulate of the sending state exists, of course, only in those cases in which the authorities of the receiving state are aware that the deceased was a national of the sending state. If this fact is not established until later (*e.g.*, during the administration of the estate) the obligation to inform the consulate of the sending state arises only as from that moment.

(3) The obligation laid down in paragraph (c) has been extended to include not only the case where a sea-going vessel or a boat is wrecked or runs aground on the coast in the territorial sea but also the case where a vessel is wrecked or runs aground in the internal waters of the receiving state.

ARTICLE 38

Communication with the authorities of the receiving state

1. In the exercise of the functions specified in Article 5, consular officials may address the authorities which are competent under the law of the receiving state.

2. The procedure to be observed by consular officials in communicating with the authorities of the receiving state shall be determined by the relevant international agreements and by the municipal law and usage of the receiving state.

Commentary

(1) It is a well-established principle of international law that consular officials, in the exercise of their functions as set out in Article 5, may address only the local authorities. The Commission was divided on the question of what these authorities are.

(2) Some members of the Commission, pointing out that the exercise of the competence of the consulate with respect to the receiving state is restricted to the consular district—as is apparent, also, from Article 1 (b) of the present draft—considered that the only cases in which consular officials could address authorities outside the consular district were those where a particular service constituted the central service for the entire territory of the state, or for one of the state's territorial or political subdivisions (*e.g.*, the emigration or immigration services, the chambers of commerce or the Patent Office in many states). They held that if the consular official's applications to the local authorities or to the centralized services were not given due consideration, he could address the government through the diplomatic mission of the sending state, direct communication with a ministry of the receiving state being permissible only if the sending state had no diplomatic mission in the receiving state.

(3) Other members of the Commission took the view that consular officials might, in the case of matters within their consular district, address any authority of the receiving state direct, including the central authorities. In their opinion, any restrictions in this sense imposed upon consular officials by the regulations of the sending state are internal measures without relevance for international law.

(4) The text of the article represents a compromise between the two points of view. It leaves it for each receiving state to determine what are the competent authorities which may be addressed by consular officials in the exercise of their functions, and yet it does not exclude recourse to central authorities. The text gives consular officials the right to apply to the authority which, in accordance with the law of the receiving state, is competent in a specific case. Nevertheless, at the same time it reserves under paragraph 2 of this article the right to regulate the procedure of this communication, in the absence of an international agreement, in accordance with the municipal law and usage of the receiving state.

(5) Paragraph 2 of the article provides, in conformity with the practice of states, that the procedure to be observed by consular officials in communicating with the authorities of the receiving state shall be determined by the relevant international agreements and by the law and usage of the receiving state. For example, the law of some countries requires consular officials who wish to address the government of the receiving state to communicate through their diplomatic mission; or it provides that consular

officials of countries which have no diplomatic representation in the receiving state may address only certain officials of the Ministry for Foreign Affairs in well-defined cases. The receiving state may also prescribe other procedures to be observed by foreign consular officials.

(6) It should be noted that the communications of consular officials with the authorities of the receiving state are often governed by consular conventions. For example, the consular convention of 1913 between Cuba and The Netherlands (Article 6) and the consular convention of 1924 between Czechoslovakia and Italy (Article 11, paragraph 4) provide that consular officials may not address the central authorities except through the diplomatic channel. The consular convention of 1923 between Germany and the United States of America (Article 21) gives only the consul-general or consular official stationed in the capital the right to address the government. Other conventions authorize the consular official to communicate not only with the competent authorities of his district but also with the competent departments of the central government; however, he may do so only in cases where there is no diplomatic mission of the sending state in the receiving state. (See in particular the consular conventions concluded by the United Kingdom with Norway on 22 February 1951 (Article 19, paragraph 2) and with France on 31 December 1951 (Article 24, paragraph 2). Other conventions authorize the consular official to correspond with the ministries of the central government, but stipulate that he may not communicate directly with the Ministry for Foreign Affairs except in the absence of a diplomatic mission of the sending state. (See the consular convention of 17 April 1953 between Greece and the United Kingdom (Article 18, paragraph 1 (d)).

ARTICLE 39

Levying of fees and charges and exemption of such fees and charges from dues and taxes

1. The consulate may levy in the territory of the receiving state the fees and charges provided by the laws and regulations of the sending state for consular acts.

2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees or charges, shall be exempt from all dues and taxes in the receiving state.

Commentary

(1) This article states a rule of customary international law. Since the earliest times consuls have levied fees for services rendered to their nationals, originally fixed as a percentage of the quantity or of the value of goods imported through the ports by the nationals concerned. At the present time, every state levies fees provided by law for official acts performed by its consulates. It must be borne in mind that since the levying of consular fees and charges is bound up with the exercise of consular functions it is subject to the general limitation laid down in the introductory sentence of paragraph 1 of Article 55. For this reason, a con-

sulate would not be entitled to levy charges on consular acts which are not recognized by the present articles or by other relevant international agreements in force, and which would be a breach of the law of the receiving state.

(2) Paragraph 2 of this article stipulates that the revenue obtained from the fees and charges levied by a consulate for consular acts shall be exempt from all dues and taxes levied either by the receiving state or by any of its territorial or local authorities. In addition, this paragraph recognizes that the receipts issued by a consulate for the payment of consular fees or charges are likewise exempt from dues or taxes levied by the receiving state. These dues include, amongst others, the stamp duty charged in many countries on the issuance of receipts.

(3) The exemption referred to in paragraph 2 of this article should be interpreted as including exemption from all dues or taxes charged by the receiving state or by a territorial or local authority: state (in a federal state), *canton*, autonomous republic, province, county, region, department, district, *arrondissement*, commune, municipality.

(4) This article leaves aside the question of the extent to which acts performed at a consulate between private persons are exempt from the dues and taxes levied by the law of the receiving state. The opinion was expressed that such acts should be subject to the said dues or taxes only if intended to produce effects in the receiving state. It was contended that it would be unjustifiable for the receiving state to levy dues and taxes on acts performed, for example, between the nationals of two foreign states and intended to produce legal effects in one or more foreign states. Several governments have declared themselves in agreement with this point of view. Nevertheless, as the Commission had not sufficient information at its disposal concerning the practice of states, it contented itself with bringing the matter to the attention of governments.

(5) The exemption of the members of the consulate and members of their families forming part of their households from taxation is dealt with in Article 48.

SECTION II: FACILITIES, PRIVILEGES AND IMMUNITIES REGARDING CONSULAR OFFICIALS AND EMPLOYEES

ARTICLE 40

Special protection and respect due to consular officials

1 The receiving state shall be under a duty to accord special protection to consular officials by reason of their official position and to treat them with due respect. It shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.)

Commentary

(1) (The rule that the receiving state is under a legal obligation to accord special protection to consular officials and to treat them with respect must be regarded as forming part of customary international law.) (Its

basis lies in the fact that, according to the view generally accepted today, the consular official represents the sending state in the consular district, and by reason of his position is entitled to greater protection than is enjoyed in the territory of the receiving state by resident aliens. He is also entitled to be treated with the respect due to agents of foreign states.)

(2) The rule laid down tends in the direction of assuring to the consular official a protection that may go beyond the benefits provided by the various articles of the present draft. It applies in particular to all situations not actually provided for, and even assures to the consular official a right of special protection where he is subjected to annoyances not constituting attacks on his person, freedom or dignity as mentioned in the second sentence of this article.

(3) The fact of receiving the consul places the receiving state under an obligation to ensure his personal safety, particularly in the event of tension between that state and the sending state. The receiving state must therefore take all reasonable steps to prevent attacks on the consular official's person, freedom, or dignity.

(4) Under the provisions of Article 53, a consular official starts to enjoy the special protection provided for in Article 40 as soon as he enters the territory of the receiving state on proceeding to take up his post, or, if already in that territory, as soon as his appointment is notified to the Ministry for Foreign Affairs or to the authority designated by that ministry.

(5) The protection of the consul after the termination of his functions is dealt with in Article 26 of the draft.

(6) The expression "appropriate steps" must be interpreted in the light of the circumstances of the case. It includes all steps which the receiving state is in a position to take, having regard to the actual state of affairs at the place where the consular official's residence or the consulate is situated, and to the physical means at its disposal.

(7) The rule codified in this article is embodied in many consular conventions, including, amongst recent ones, the conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (Article 5, paragraph 2), with Greece on 17 April 1953 (Article 5, paragraph 2), with Mexico on 20 March 1954 (Article 5, paragraph 2) and with Italy on 1 June 1954 (Article 5, paragraph 2); and the conventions concluded by the Soviet Union with the Federal Republic of Germany on 25 April 1958 (Article 7), and with the People's Republic of China on 23 June 1959 (Article 5).

ARTICLE 41

Personal inviolability of consular officials

1(Consular officials may not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.)

2. (Except in the case specified in paragraph 1 of this article, consular officials shall not be committed to prison or liable to any other form of

restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular official, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible.)

Commentary

(1) (The purpose of this article is to settle the question of the personal inviolability of consular officials, which has been controversial both as a matter of doctrine, and in the practice of states, since the time when consular officials, having ceased to be public ministers, became subject to the jurisdiction of the state in which they discharge their functions.) Since the *Barbuit* case in 1737, when an English court refused to recognize the immunity from jurisdiction of a consul (agent for commerce) of the King of Prussia, the personal inviolability of consular officials has not been recognized by the case law of the national courts of many countries of Europe and America.

(2) (Reacting against this practice, states have attempted to provide for the personal inviolability of their consular officials through conventions, by including personal immunity clauses in consular conventions.) The practice of including a personal immunity clause has become very widespread since the Convention of Pardo, signed on 13 March 1769 between France and Spain, which provided that the consular officials of the two contracting parties should enjoy personal immunity so as not to be liable to arrest or imprisonment except for crimes of an atrocious character, or in cases where the consuls were merchants (Article II).

(3) (The personal immunity clause was for a long time interpreted in fundamentally different ways. Some writers claimed that it conferred virtual exemption from civil and criminal jurisdiction, except in cases where the consular official was accused of a felony. Others have interpreted the immunity as conferring exemption from arrest and from detention pending trial, except in case of felony, and exemption from attachment of the person in a civil matter. Courts which were at first divided as to the meaning to be given to the expression "personal immunity" have interpreted the expression as meaning personal inviolability and not immunity from jurisdiction.)

(4) (From an analysis of recent consular conventions, it is evident that states, while asserting the subjection of consular officials to the jurisdiction of the receiving state, recognize their personal inviolability except in cases where they have committed a grave crime.) While some conventions exempt consular officials not only from arrest, but also from prosecution save in cases of felony (e.g., the convention of 12 January 1948 between Costa Rica and the United States of America, Article II), a very great number of recent conventions do no more than exempt consular officials simply

from arrest or detention or, in general, from any restriction on their personal freedom, except in cases where they have committed an offence the degree of seriousness of which is usually defined in the convention.

(5) Some conventions provide simply for exemption from arrest and detention pending trial, while others are general in scope and cover all forms of detention and imprisonment.

(6) Apart from this difference in scope, the conventions differ only in the manner in which they determine the nature of the offences in respect of which personal inviolability is not admitted. Some conventions which recognize personal inviolability make an exception in the case of "serious criminal offences," while others (much more numerous) permit the arrest of consular officials only when they are charged with penal offences defined and punished as felonies by the criminal law of the receiving state. Sometimes the offences in respect of which inviolability is not recognized are defined by reference to the type of penalty applicable (death penalty or penal servitude). In other cases the crimes in respect of which inviolability does not apply are enumerated. Lastly, a large group of bilateral conventions uses as the criterion for determining the cases in which the arrest of consular officials is permitted the length of the sentence which is imposed by the law of the receiving state for the offence committed. Some conventions even contain two different definitions of the offence, or specify two different lengths of sentence, one being applicable in one of the contracting states and the other in the other state.

(7) Some consular conventions allow arrest and detention pending trial only on the double condition that the offence is particularly serious (according to the definition given in the convention concerned) and that the consular official is taken *in flagrante delicto*.

(8) Where conventions do no more than exempt consular officials from arrest pending trial except in the case of felonies, they sometimes contain clauses which provide that career consular officials may not be placed under personal arrest, either pending trial, or as a measure of execution in a civil or commercial case; and equally neither in the case of an alleged offence nor as punishment for an offence subject to prosecution by way of administrative proceedings. Other conventions expressly exclude arrest in civil and commercial cases.

(9) The scope of the provisions designed to ensure personal immunity is restricted *ratione personae* in that:

(a) Conventions generally exclude consular officials who are nationals of the receiving state from the benefit of clauses granting personal inviolability; and

(b) They exclude consular officials engaged in commercial activities from exemption from personal constraint in connexion with such activities.

(10) Conventions determine in various ways what persons shall enjoy inviolability. Some grant personal inviolability to consuls only (consular officers); others grant it also to other consular officials, and some even to certain categories of consulate employees.

(11) The Commission considered that, despite the divergent views on the technical question of the definition of offences for which personal inviolability could not be admitted, there was enough common ground in the practice of states on the substance of the question of the personal inviolability of consular officials to warrant the hope that states may accept the principle of the present article.

(12) The article refers solely to consular officials, *i.e.*, heads of post and the other members of the consulate who are responsible for carrying out consular functions in a consulate (Article 1, paragraph 1 (*d*)). Hence, personal inviolability does not extend to consulate employees. Moreover, only consular officials who are not nationals of the receiving state (Article 69), and who do not carry on a gainful private occupation (Article 56), enjoy the personal inviolability provided for in this article.

(13) Paragraph 1 of this article refers to immunity from arrest and detention pending trial. On this point the Commission proposed two variants in its 1960 draft. Under the first variant the exemption does not apply in the case of an offence punishable by a maximum term of not less than five years' imprisonment. Under the second variant the exemption was not to be granted "in case of a grave crime." As most of the governments which commented on the draft articles on consular intercourse and immunities preferred the second alternative, the Commission has adopted that alternative. Paragraph 1 of the new text confers upon consular officials exemption from arrest and detention pending trial in every case except that of a grave crime. Even in that case, however, in accordance with the terms of paragraph 1 they cannot be placed under arrest or detention pending trial except by virtue of a decision of the competent judicial authority. It should be pointed out that this paragraph by no means excludes the institution of criminal proceedings against a consular official. The privilege under this paragraph is granted to consular officials by reason of their functions. The arrest of a consular official hampers considerably the functioning of the consulate and the discharge of the daily tasks—which is particularly serious inasmuch as many of the matters calling for consular action will not admit of delay (*e.g.*, the issue of visas, passports and other travel documents; the legalization of signatures on commercial documents and invoices; various activities connected with shipping, etc.). Any such step would harm the interests, not only of the sending state, but also of the receiving state, and would seriously affect consular relations between the two states. It would therefore be inadmissible that a consular official should be placed under arrest or detention pending trial in connexion with some minor offence.

(14) Paragraph 2 of the article provides that consular officials, save in cases where, under paragraph 1 of the article, they are liable to arrest or detention pending trial, may not be imprisoned or subjected to any other form of restriction upon their personal freedom except in execution of a judicial decision of final effect. According to the provisions of this paragraph consular officials:

(a) May not be committed to prison in execution of a judgement unless that judgement is final;

(b) May not be committed to prison in execution of a mere decision of a police authority or of an administrative authority;

(c) Are not liable to any other restriction upon their personal freedom, such as, for instance, enforcement measures involving restrictions of personal liberty (imprisonment for debt, imprisonment for the purpose of compelling the debtor to perform an act which he must perform in person, etc.) save and except under a final judicial decision.

(15) Paragraph 3 of this article, which deals with the conduct of criminal proceedings against a consular official, prescribes that an official against whom such proceedings are instituted must appear before the competent authorities. The latter expression means other tribunals as well as ordinary courts. Save where arrest pending trial is admissible under paragraph 1, no coercive measure may be applied against a consular official who refuses to appear before the court. The authority concerned can of course always take the consular official's deposition at his residence or office, if this is permissible under the law of the receiving state and possible in practice.

(16) The inviolability which this article confers is enjoyed from the moment the consular official to whom it applies enters the territory of the receiving state to take up his post. He must, of course, establish his identity and claim status as a consular official. If he is already in the territory of the receiving state at the time of his appointment, inviolability is enjoyed as from the moment when the appointment is notified to the Ministry for Foreign Affairs, or to the authority designated by that ministry (see Article 53 of this draft). A consular official enjoys a like inviolability in third states if he passes through or is in their territory when proceeding to take up or return to his post, or when returning to his own country (Article 54, paragraph 1).

(17) By virtue of Article 69, (this article does not apply to consular officials who are nationals of the receiving state.)

ARTICLE 42

Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings

(In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving state shall promptly notify the head of the consular post. Should the latter be himself the object of the said measures, the receiving state shall notify the sending state through the diplomatic channel.

Commentary

This article applies not only to consular officials but also to all the other members of the consulate. It establishes the obligation of the receiving

state to notify the head of the consular post if a member of the consular staff is arrested or placed in custody pending trial, or if criminal proceedings are instituted against him. The duty to notify the sending state through the diplomatic channel if the head of the consular post is himself the object of the said measures is to be accounted for both by the gravity of the measures that affect the person in charge of a consulate and by practical considerations.

ARTICLE 43

Immunity from jurisdiction

Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions.

Commentary

(1) Unlike members of the diplomatic staff, all the members of the consulate are in principle subject to the jurisdiction of the receiving state, unless exempted by one of the present rules or by a provision of some other applicable international agreement. In particular, they are, like any private person, subject to the jurisdiction of the receiving state in respect of all their private acts, more especially as regards any private gainful activity carried on by them.

(2) The rule that, in respect of acts performed by them in the exercise of their functions (official acts) members of the consulate are not amenable to the jurisdiction of the judicial and administrative authorities of the receiving state, is part of customary international law. This exemption represents an immunity which the sending state is recognized as possessing in respect of acts which are those of a sovereign state. By their very nature such acts are outside the jurisdiction of the receiving state, whether civil, criminal or administrative. Since official acts are outside the jurisdiction of the receiving state, no criminal proceedings may be instituted in respect of them. Consequently, consular officials enjoy complete inviolability in respect of their official acts.

(3) In the opinion of some members of the Commission, the article should have provided that only official acts within the limits of the consular powers enjoy immunity from jurisdiction. The Commission was unable to accept this view. It is in fact often very difficult to draw an exact line between what is still the consular official's official act performed within the scope of the consular functions and what amounts to a private act or communication exceeding those functions. If any qualifying phrase had been added to the provision in question, the exemption from jurisdiction could always be contested, and the phrase might be used at any time to weaken the position of a member of the consulate.

(4) This article does not apply to members of the consulate who are nationals of the receiving state. Their legal status is governed by Article 69 of these draft articles.

ARTICLE 44

Liability to give evidence

1. Members of the consulate may be called upon to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if a consular official should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular official shall avoid interference with the performance of his functions. In particular it shall, where possible, take such testimony at his residence or at the consulate or accept a statement from him in writing.

3. Members of the consulate are under no obligation to give evidence concerning matters connected with the exercise of their functions nor to produce official correspondence and documents relating thereto.

Commentary

(1) In contrast to members of a diplomatic mission, consular officials and other members of the consulate are not exempted by international law from liability to attend as witnesses in courts of law or in the course of administrative proceedings. However, the Commission agreed that if they should decline to attend, no coercive measure or penalty may be applied to them. This privilege is confirmed by a large number of consular conventions. For this reason, the letter of the judicial or administrative authority inviting consular officials to attend should not contain any threat of a penalty for non-appearance.

(2) The Commission noted that consular conventions apply different methods so far as concerns the procedure to be followed in taking the testimony of consular officials. In view of the provisions contained in numerous conventions, the Commission merely inserted two fundamental rules on the subject in paragraph 2 of this article:

(a) The authority requiring the evidence shall avoid interference with the performance by the consular official of his official duties;

(b) The authority requiring the evidence shall, where possible, arrange for the taking of such testimony at the consular official's residence or at the consulate or accept a written declaration from him.

As can be seen from the words "where possible," the testimony of a consular official cannot be taken at his residence or at the consulate unless this is permitted by the legislation of the receiving state. But even in cases where the legislation of that state allows testimony to be taken at the consular official's residence or at the consulate, *e.g.*, through a judge deputed to act for the president of the court (*juge délégué*), there may be exceptional cases in which the consular official's appearance in court is, in the opinion of the court, indispensable. The Commission wished to make allowance for this case by inserting the word "possible." If the testimony of the consular official is to be taken at his residence or at the consulate, the date and hour of the deposition should of course be fixed by agreement

between the court and the consulate to which the official in question belongs. The date of the deposition should be fixed in such a way as not to delay the proceedings unnecessarily. While the second rule may be regarded as an application of the first, the first rule nevertheless expresses a general principle which should be applied both in cases which are covered by the second rule and in cases in which the consular official is to appear before the court.

(3) The right of members of the consulate to decline to give evidence concerning matters connected with the exercise of their functions, and to decline to produce any official correspondence or documents relating thereto, is confirmed by a large number of consular conventions. The right to decline to produce official correspondence and papers in court is a logical corollary of the inviolability of the correspondence and documents of the consulate. However, the consular official or any other member of the consulate should not decline to give evidence concerning events which came to his notice in his capacity as registrar of births, marriages and deaths; and he should not decline to produce the documents relating thereto.

(4) This article applies only to career consular officials and to consular employees. By Article 57, paragraph 2, honorary consular officials enjoy only the immunity conferred by paragraph 3 of this article.

(5) By virtue of Article 69 only paragraph 3 of this article applies to members of the consulate who are nationals of the receiving state.

ARTICLE 45

Waiver of immunities

1. The sending state may waive, with regard to a member of the consulate, the immunities provided for in Articles 41, 43 and 44.

2. The waiver shall in all cases be express.

3. The initiation of proceedings by a member of the consulate in a matter where he might enjoy immunity from jurisdiction under Article 43, shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Commentary

(1) This article, which follows closely Article 32 of the 1961 Vienna Convention on Diplomatic Relations, provides that the sending state may waive the immunities provided for in Articles 41, 43 and 44. The capacity to waive immunity is vested exclusively in the sending state, for that state holds the rights granted under these articles. The consular official himself has not this capacity.

(2) The text of the article does not state through what channel the waiver of immunity should be communicated. If the head of the consular post is the object of the measure in question, the waiver should presumably be made in a statement communicated through the diplomatic channel. If the waiver relates to another member of the consulate, the statement may be made by the head of the consular post concerned.

(3) Inasmuch as members of the consulate are amenable to the jurisdiction of the judicial and administrative authorities of the receiving state in respect of all acts other than acts performed in the course of duty, the rule laid down in paragraph 3 of this article applies only in cases where a member of the consulate appears as plaintiff before the courts of the receiving state in a matter where he might enjoy immunity from jurisdiction.

(4) The waiver of immunity may be made with respect to both judicial and administrative proceedings.

(5) It should be noted that once the immunity has been waived, it cannot be pleaded at a later stage of the proceedings (for example, on appeal).

ARTICLE 46

Exemption from obligations in the matter of registration of aliens and residence and work permits

1. Members of the consulate, members of their families forming part of their households and their private staff shall be exempt from all obligations under the laws and regulations of the receiving state in regard to the registration of aliens and residence permits.

2. The persons referred to in paragraph 1 of this article shall be exempt from any obligations in regard to work permits imposed either on employers or on employees by the laws and regulations of the receiving state concerning the employment of foreign labour.

Commentary

(1) Under Article 24 of this draft, the arrival of members of the consulate and of members of their families forming part of their households, and of their private staff, must be notified to the Ministry for Foreign Affairs or to the authority designated by that ministry. In accordance with the practice of numerous countries, it seemed necessary to exempt these persons from the obligation which the law of the receiving state imposes on them to register as aliens and to apply for a residence permit.

(2) In a great many states, the Ministry for Foreign Affairs issues to members of the consulate and to members of their families special cards to be used as documents of identity certifying their status as members of the consulate, or of the family of a member of the consulate. An obligation to issue such documents of identity is imposed by several consular conventions. Although the Commission considers that this practice should become general and should be accepted by all states, it did not think it necessary to include a provision to that effect in the draft in view of the largely technical character of the point involved.

(3) The extension of the said exemption to private staff is justified on practical grounds. It would in fact be difficult to require a member of the consulate who brings a member of his private staff with him from abroad to comply with the obligations in question in respect of a person belonging to his household, if he and the members of his family are themselves exempt from those obligations.

(4) The exemption from the obligations in the matter of work permits which is provided for in paragraph 2 applies only to cases where the members of a consulate wish to employ in their service a person who has the nationality of the sending state or of a third state. In some countries the legislation concerning the employment of foreign labour requires the employer or the employee to obtain a work permit. The purpose of paragraph 2 of this article is to exempt members of the consulate and members of the private staff from the obligations which the law of the receiving state might impose on them in such a case.

(5) The appointment of the consular staff to a consulate in the receiving state is governed by Article 19 of the present draft. The exemption laid down in paragraph 2 cannot therefore in any case apply to the employment of these persons in the consulate. For this purpose no work permit may be demanded.

(6) By its very nature the exemption can apply to aliens only, since only they could be contemplated by legislation of the receiving state concerning the registration of aliens, and residence and work permits. The exemption in question can accordingly have no application to members of the consulate or to members of their family who are nationals of the receiving state.

(7) There is no article corresponding to this provision in the 1961 Vienna Convention on Diplomatic Relations. The Commission considered that because of the existence of diplomatic privileges and immunities and, more particularly, of the very broad immunity from jurisdiction which the diplomatic draft accords, not only to diplomatic agents and to members of their family who form part of their households but also to members of the administrative and technical staff of the diplomatic mission and to members of their family who form part of their households, such a provision could not have the same importance in the sphere of diplomatic intercourse and immunities as it has for consular intercourse and immunities.

ARTICLE 47

Social security exemption

1. Subject to the provisions of paragraph 3 of this article, the members of the consulate shall with respect to services rendered for the sending state be exempt from social security provisions which may be in force in the receiving state.

2. The exemption provided for in paragraph 1 of this article shall apply also to members of the private staff who are in the sole employ of members of the consulate, on condition:

(a) That they are not nationals of or permanently resident in the receiving state; and

(b) That they are covered by the social security provisions which are in force in the sending state or a third state.

3. Members of the consulate who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving state impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving state, provided that such participation is permitted by that state.

Commentary

(1) This exemption from social security regulations is justified on practical grounds. If whenever in the course of his career a member of the consulate is posted to consulates in different countries he ceased to be subject to the social security legislation of the sending state (health insurance, old age insurance, disability insurance, etc.), and if on each such occasion he were expected to comply with the provisions of legislation different from that of the sending state, considerable difficulties would result for the official or employee concerned. It is thus in the interests of all states to grant the exemption specified in this article, in order that the members of the consulate may continue to be subject to their national social security laws without any break in continuity.

(2) The provisions of this article do not apply to members of the consulate who are nationals of the receiving state (Article 69 of the present draft).

(3) While members of the consulate in their capacity as persons employed in the service of the sending state are exempt from the local social security system, this exemption does not apply to them as employers of any persons who are subject to the social security system of the receiving state. In the latter case they are subject to the obligations imposed by the social security laws on employers and must pay their contributions to the social insurance system.

(4) At its present session the Commission amended the text of paragraph 1 of this article by introducing, in keeping with Article 33 of the 1961 Vienna Convention on Diplomatic Relations, the words "with respect to services rendered for the sending state." As a consequence, members of the consulate who have a private occupation outside the consulate or who carry on private gainful activities and employ staff necessary for that purpose are excluded by this provision from the benefit of this article. The introduction of the words in question made it superfluous to mention the members of the family of a member of the consulate in paragraph 1.

(5) The reasons which justify exemption from the social security system in the case of members of the consulate also justify the exemption of members of the private staff who are in the sole employ of members of the

consular staff. But since those persons may be recruited from among the nationals of the sending state permanently resident in the receiving state, or from among foreign nationals who may not be covered by any social security laws, provision has had to be made for these contingencies in paragraph 2 of the article in order that members of the private staff should have the benefit of the social security system in cases where they are not eligible for the benefit of such a system in their countries of origin.

(6) Different rules from the above can obviously be laid down in bilateral conventions. Since, however, the draft provides in Article 71 for the maintenance in force of previous conventions relating to consular intercourse and immunities, there is no need for a special provision to this effect in Article 47.

(7) It should be noted that this article does not apply to members of the consulate who are nationals of the receiving state (Article 69).

ARTICLE 48

Exemption from taxation

1. Members of the consulate, with the exception of the service staff, and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, save:

(a) Indirect taxes normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the receiving state, unless held by a member of the consulate on behalf of the sending state for the purposes of the consulate;

(c) Estate, succession or inheritance duties, and duties on transfers, levied by the receiving state, subject, however, to the provisions of Article 50 concerning the succession of a member of the consulate or of a member of his family;

(d) Dues and taxes on private income having its source in the receiving state and capital taxes relating to investments made by them in commercial or financial undertakings in the receiving state;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of Article 31.

2. Members of the service staff and members of the private staff who are in the sole employ of members of the consulate shall be exempt from dues and taxes on the wages which they receive for their services.

Commentary

(1) Exemption from taxation is often accorded to consular officials by consular conventions or other bilateral agreements concluded between the receiving state and the sending state. In the absence of treaty provisions, this matter is governed by the law of the receiving state, which always

makes exemption from taxation conditional upon the grant of reciprocal treatment to the consular officials of the receiving state in the sending state. The extent of the exemption from taxation varies greatly from one legal system to another. The Commission considered that members of the consulate should ordinarily enjoy the same exemption from taxation as is enjoyed by the members of diplomatic missions (Vienna Convention, Article 34 in conjunction with Article 37). For that reason, Article 48 repeats, with some changes, Article 34 of the Vienna Convention.

(2) Under sub-paragraph (c), not only estate, succession and inheritance duties, but also duties on transfers are excluded from the exemption provided for in this article. The exclusion of duties on transfers is justified on the same grounds as the exclusion of estate, succession and inheritance duties.

(3) The Commission has retained in the French text of this article and of others in the present draft the expression "*vivant à leur foyer*," which it had introduced at its preceding session in order to specify those members of the family of a member of the consulate who are to enjoy the privileges and immunities conferred by these articles. It considered that these words more correctly express what it wished to convey by the words "*faisant partie de leur ménage*," or similar words, in its Draft Articles on Diplomatic Intercourse and Immunities. (The English text is not affected.)

(4) The following persons are excluded from the benefit of this article:

(a) By virtue of Articles 56 and 63, members of the consulate and members of their families who carry on a gainful private occupation;

(b) By virtue of Article 69 of the present draft, members of the consulate and members of their families who are nationals of the receiving state;

(c) By virtue of Article 63 honorary consular officials.

(5) Bilateral consular conventions usually make the grant of exemption from taxation conditional on reciprocity. If there is to be a condition of this kind, enabling a party to grant limited exemption from taxation where the other party acts likewise, any provision for exemption from taxation becomes a matter for individual settlement between countries. The Commission did not think it necessary to include such a reciprocity clause in a draft multilateral convention, for it considers that reciprocity will be achieved by reason of the fact that the provision in question will be binding on all the contracting parties. It was of the opinion that the purpose which a multilateral convention should seek to achieve, *i.e.*, the unification of the practice of states in this matter, will be more rapidly attained if no reservation regarding reciprocity is included.

(6) Since the consular premises enjoy exemption from taxation under Article 31 of this draft, it was necessary to include in paragraph 1(f) a reservation referring back to that article, in order to cover cases in which it is the consul or a member of the consulate who owns or leases the consular premises for the purposes of the consulate, and who, by reason of Article 31, would in such case not be liable to pay the fees or duties

specified in sub-paragraph (f). Unlike the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations, sub-paragraph (f) does not contain the words "with respect to immovable property," because the Commission considered that in view of the difference between the respective situations of consuls and of diplomatic agents, these words should not be included.

ARTICLE 49

Exemption from customs duties

1. The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the consulate;

(b) Articles for the personal use of a consular official or members of his family forming part of his household, including articles intended for his establishment.

2. Consular employees, except those belonging to the service staff, shall enjoy the immunities specified in the previous paragraph in respect of articles imported at the time of first installation.

Commentary

(1) According to a very widespread practice, articles intended for the use of a consulate are exempt from custom duties, and this practice may be regarded as evidence of an international custom in this particular sphere. By "articles for the official use of the consulate" is meant coats-of-arms, flags, signboards, seals and stamps, books, official printed matter for the service of the consulate, and also furniture, office equipment and supplies (files, typewriters, calculating machines, stationery, etc.), and all other articles for the official use of the consulate.

(2) While the members of the consulate do not enjoy exemption from customs duties under general international law, they are being given an increasingly wide measure of exemption from customs duties under numerous individual agreements, and there is a tendency to extend to members of the consulate advantages similar to those enjoyed by members of diplomatic missions. The Commission therefore decided to reproduce in this article the text of paragraph 1 of Article 36 of the Vienna Convention and to add a paragraph 2 stipulating, for consular employees, with the exception of service staff, exemptions from customs duties similar to those accorded by Article 37 to the administrative and technical staff of diplomatic missions.

(3) Since states determine by domestic regulations the conditions and procedures under which exemption from customs duties is granted, and in particular the period within which articles intended for the establishment must be imported, the period during which the imported articles must not be sold, and the annual quotas for consumer goods, it was neces-

sary to include in the article the expression "in accordance with such laws and regulations as it may adopt." Such regulations are not incompatible with the obligation to grant exemption from customs duties, provided that they are general in character. They must not be directed only to an individual case.

(4) The present article does not apply:

(a) To members of the consulate who carry on a private gainful occupation (Article 56);

(b) To members of the consulate who are nationals of the receiving state (Article 69);

(c) To honorary consular officials (Article 57).

(5) It should be noted that only articles intended for the personal use of the said members of the consulate and members of their families, forming part of their households, enjoy exemption from customs duties. Articles imported by a member of the consulate in order to be sold clearly do not qualify for exemption.

ARTICLE 50

Estate of a member of the consulate or of a member of his family

In the event of the death of a member of the consulate or of a member of his family forming part of his household, the receiving state:

(a) Shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the country the export of which was prohibited at the time of his death;

(b) Shall not levy estate, succession or inheritance duties on movable property the presence of which in the receiving state was due solely to the presence in that state of the deceased as a member of the consulate or as a member of the family of a member of the consulate.

Commentary

As in the case of a member of a diplomatic mission, the exemption of the movable property of a member of the consulate or a member of his family forming part of his household from estate, succession or inheritance duties is fully justified, because the persons in question came to the receiving state to discharge a public function in the interests of the sending state. For the same reason, the free export of the movable property of the deceased, with the exception of any such property which was acquired in the country and the export of which was prohibited at the time of his death, is justified. At the present session the text of this [article] was brought into line with the text of Article 39, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 51

Exemption from personal services and contributions

The receiving state shall exempt members of the consulate, other than the service staff, and members of their families forming part of their

households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

(1) The exemptions afforded by this article cover military service, service in the militia, the functions of juryman or lay judge, and personal labour ordered by a local authority on highways or in connexion with a public disaster, etc.

(2) The exemptions provided for in this article should be regarded as constituting a part of customary international law.

(3) By virtue of Article 69 of this draft, the present article applies to members of the consulate, members of their families forming part of their households, only insofar as they are not nationals of the receiving state.

(4) This article corresponds to Article 35 of the 1961 Vienna Convention on Diplomatic Relations.

(5) The Commission would prefer to use in the French text an expression other than "*tout service public*" which has a special meaning in many legal systems, but it decided eventually to retain the form of words used in Article 35 of the Vienna Convention on Diplomatic Relations. (The English text is not affected.)

ARTICLE 52

Question of the acquisition of the nationality of the receiving state

Members of the consulate and members of their families forming part of their households shall not, solely by the operation of the law of the receiving state, acquire the nationality of that state.

Commentary

(1) This article closely follows the text of Article II of the Optional Protocol concerning acquisition of nationality signed at Vienna on 18 April 1961.* Its primary purpose is to prevent:

(a) The automatic acquisition of the nationality of the receiving state:

(i) By the child of parents who are members of the consulate and who are not nationals of the receiving state, if the child is born in the territory of a state whose nationality law is based on the *jus soli*;

(ii) By a woman who is a member of the consulate at the time when she marries a national of the receiving state;

(b) The reinstatement of a member of the consulate or of a member of his family forming part of his household in his nationality of origin, for example, in cases where, under the law of the receiving state, this reinstatement is the consequence of the more or less prolonged residence in its territory of a person who previously had the nationality of that state.

* Reprinted in 55 A.J.I.L. 1080 (1961).

(2) The present article does not apply if the daughter of a member of the consulate who is not a national of the receiving state marries a national of that state, for by the act of marrying she ceases to be part of the household of the member of the consulate.

(3) In view of the Convention of 20 February 1957 on the Nationality of Married Women, concluded under the auspices of the United Nations, the rule expressed in this article loses a good deal of its importance so far as concerns the acquisition of the nationality of the receiving state by a woman member of the consulate of the sending state through her marriage with a national of the receiving state.

ARTICLE 53

Beginning and end of consular privileges and immunities

1. Every member of the consulate shall enjoy the privileges and immunities provided in the present articles from the moment he enters the territory of the receiving state on proceeding to take up his post, or if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or to the authority designated by that ministry.

2. Members of the family of a member of the consulate, forming part of his household, and members of his private staff shall enjoy their privileges and immunities from the moment they enter the territory of the receiving state. If they are in the territory of the receiving state at the time of joining the household or entering the service of a member of the consulate, privileges and immunities shall be enjoyed from the moment when the name of the person concerned is notified to the Ministry for Foreign Affairs or to the authority designated by that ministry.

3. When the functions of a member of the consulate have come to an end, his privileges and immunities together with those of the persons referred to in paragraph 2 of this article shall normally cease at the moment when the persons in question leave the country, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. The same provision shall apply to the persons referred to in paragraph 2 above, if they cease to belong to the household or to be in the service of a member of the consulate.

4. However, with respect to acts performed by a member of the consulate in the exercise of his functions, his personal inviolability and immunity from jurisdiction shall continue to subsist without limitation of time.

5. In the event of the death of a member of the consulate, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them, until the expiry of a reasonable period enabling them to leave the territory of the receiving state.

Commentary

(1) In substance, this article is modelled on the provisions applicable to persons entitled to diplomatic privileges and immunities, by virtue of

Article 39 of the 1961 Vienna Convention on Diplomatic Relations. In the opinion of the Commission, it is important that the date when consular privileges and immunities begin, and the date on which they come to an end, should be fixed.

(2) As regards the drafting of this article, the Commission preferred to retain the text adopted at its previous session; in its opinion, that text has the advantage of clarity, in that it draws a distinction between the position of members of the consulate on the one hand and that of members of their family and of the private staff on the other.

(3) The Commission considered that consular privileges and immunities should be accorded to members of the consulate even after their functions have come to an end. Privileges and immunities do not cease until the beneficiaries leave the territory of the receiving state, or on the expiry of a reasonable period in which to do so.

(4) The vexatious measures to which consular officials and employees have often been subjected when an armed conflict had broken out between the sending state and the receiving state justify the inclusion of the words "even in case of armed conflict" in the text of the article.

(5) Paragraph 5 of this article is intended to ensure that members of the family of a deceased member of the consulate enjoy for a reasonable period after his death the privileges and immunities to which they are entitled. This paragraph reproduces the text of Article 39, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 54

Obligations of third states

1. If a consular official passes through or is in the territory of a third state, which has granted him a visa if a visa was required while proceeding to take up or return to his post or when returning to his own country, the third state shall accord to him the personal inviolability and such other immunities provided for by these articles as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges and immunities who are accompanying the consular official or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third states shall not hinder the transit through their territory of other members of the consulate or of members of their families.

3. Third states shall accord to correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as are accorded by the receiving state. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving state is bound to accord.

4. The obligations of third states under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those

paragraphs, and to official communications and to consular bags, whose presence in the territory of the third state is due to *force majeure*.

Commentary

(1) This article does not settle the question whether a third state should grant passage through its territory to consular officials, employees and their families. It merely specifies the obligations of third states during the actual course of the passage of such persons through their territory.

(2) The obligations of the third state under the terms of this article relate only to consular officials:

- (a) Who pass through its territory, or
- (b) Who are in its territory in order to
 - (i) Proceed to take up their posts, or
 - (ii) Return to their posts, or
 - (iii) Return to their own country.

(3) The Commission proposes that consular officials should be accorded the personal inviolability which they enjoy by virtue of Article 41 of this draft, and such of the immunities provided for by these articles as are necessary for their passage or return. The Commission considers that these prerogatives should not in any case exceed those accorded to the officials in question in the receiving state.

(4) With regard to the members of the families of consular officials forming part of their households, this article imposes on third states the duty to accord the immunities provided by this draft and the facilities necessary for their transit. As regards the employees of the consulate and the members of their families, third states have a duty not to hinder their passage.

(5) The provisions of paragraph 3 of the article, which guarantee to correspondence and to other official communications in transit the same freedom and protection in third states as in the receiving state, are in keeping with the interest that all states have in the smooth and unimpeded development of consular relations.

(6) Paragraph 4 of this article reproduces *mutatis mutandis* the provisions of Article 40, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

ARTICLE 55

Respect for the laws and regulations of the receiving state

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state.

2. The consular premises must not be used in any manner incompatible with the consular functions as laid down in the present articles or by other rules of international law.

3. The rule laid down in the preceding paragraph shall not exclude the possibility of offices or other institutions or agencies being installed in the consular building or premises, provided that the premises assigned to such offices are separate from those used by the consulate. In that event, the said offices shall not, for the purposes of these articles, be deemed to form part of the consular premises.

Commentary

(1) Paragraph 1 of this article lays down the fundamental rule that it is the duty of any person who enjoys consular privileges and immunities to respect the laws and regulations of the receiving state, save insofar as he is exempted from their application by an express provision of this draft or of some other relevant international agreement. Thus for example, the laws imposing a personal contribution, and the social security laws, are not applicable to members of the consulate who are not nationals of the receiving state.

(2) The clause in the second sentence of paragraph 1 which prohibits interference in the internal affairs of the receiving state should not be interpreted as preventing members of the consulate from making representations, within the scope of their functions, for the purpose of protecting and defending the interests of their country or of its nationals, in conformity with international law.

(3) Paragraph 2 reproduces *mutatis mutandis* the rule contained in Article 41, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. This provision means that the consular premises must not be used for purposes incompatible with the consular functions. A breach of this obligation does not render inoperative the provisions of Article 30 relative to the inviolability of consular premises. But equally, this inviolability does not permit the consular premises to be used for purposes incompatible with these articles or with other rules of international law. For example, consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities. Opinions were divided in the Commission on whether the article should state this particular consequence of the rule laid down in its paragraph 2. Some members favoured the insertion of words to this effect; others, however, thought it would be sufficient to mention the matter in the commentary on the article, and pointed out in support of their view that there is no corresponding provision in the 1961 Vienna Convention on Diplomatic Relations. Moreover, certain members would have preferred to replace the text adopted at the previous session by a more restrictive form of words. After an exchange of views, the Commission decided to retain the text adopted at its previous session, which repeats the rule laid down in Article 40, paragraph 3, of the Draft Articles on Diplomatic Intercourse and Immunities, now Article 41, paragraph 3, of the Vienna Convention.

(4) Paragraph 3 refers to cases, which occur with some frequency in practice, where the offices of other institutions or agencies are installed in the building of the consulate or on the consular premises.

ARTICLE 56

Special provisions applicable to career consular officials who carry on a private gainful occupation

The provisions applicable to career consular officials who carry on a private gainful occupation in the receiving state shall, so far as facilities, privileges and immunities are concerned, be the same as those applicable to honorary consular officials.

Commentary

(1) A study of consular regulations has shown, and the comments of governments have confirmed, that some states permit their career consular officials to carry on a private gainful occupation. If the practice of states is examined, it will be seen that, in the matter of privileges and immunities, states are not prepared to accord to this category of consular official the same treatment as to other career consular officials who are employed full-time in the exercise of their functions. This is understandable, for these consular officials, although belonging to the regular consular service, are in fact in a position analogous to that of honorary consuls, who, at least in the great majority of cases, also carry on a private gainful occupation. In the matter of consular privileges and immunities, the officials in question are mostly assimilated to honorary consuls by municipal law. It was in the light of this practice that the Commission, at its present session, adopted this article, which is intended to regulate the legal status of this category of consular official.

(2) In consequence of the adoption of this article it was possible to delete in certain articles of the draft, *e.g.*, Articles 48 (Exemption from taxation) and 49 (Exemption from customs duties), the clause stipulating that members of the consulate who carry on a gainful private activity should not enjoy the advantages and immunities provided for by these articles.

(3) The expression "private gainful occupation" means commercial, professional or other activities carried on for pecuniary gain. The expression does not, for example, mean occasional activities or activities not mainly intended for pecuniary gain (courses given at a university, editing a learned publication and the like).

CHAPTER III. FACILITIES, PRIVILEGES AND IMMUNITIES
OF HONORARY CONSULAR OFFICIALS

INTRODUCTION

(1) The term "honorary consul" is not used in the same sense in the laws of all countries. In some, the decisive criterion is considered to be the fact that the official in question is not paid for his consular work. Other laws expressly recognize that career consuls may be either paid or unpaid, and base the distinction between career and honorary consuls on the fact that the former are sent abroad and the latter recruited locally. Under

the terms of certain other consular regulations, the term "honorary consul" means an agent who is not a national of the sending state and who, in addition to his official functions, is authorized to carry on a gainful occupation in the receiving state, whether he does in fact carry on such an occupation or not. For the purpose of granting consular immunities, some states regard as honorary consuls any representatives of whatever nationality, who, in addition to their official functions, carry on a gainful occupation or profession in the receiving state. Lastly, many states regard as honorary consuls all consuls who are not career consuls.

(2) At its eleventh session, the Commission provisionally adopted the following decisions:

"A consul may be:

"(i) A 'career consul,' if he is a government official of the sending state, receiving a salary and not exercising in the receiving state any professional activity other than that arising from his consular function;

"(ii) An 'honorary consul,' if he does not receive any regular salary from the sending state and is authorized to engage in commerce or other gainful occupation in the receiving state."

(3) However, in view of the practice of states in this sphere and the considerable differences in national laws with regard to the definition of honorary consul, the Commission decided, at its twelfth session, to omit any definition of honorary consul from the present draft, and merely to provide in Article 1, paragraph 2, that consuls may be either career consuls or honorary consuls, leaving states free to define the latter category.

(4) Some (though not very many) states allow their career consular officials, even though members of the regular consular service, to carry on a private gainful occupation in the receiving state. And there are in fact career consular officials who, on the strength of this permission, engage in commerce or carry on some other gainful occupation outside their consular functions. The Commission considered that, so long as this category of official exists, their legal status ought to be settled in this draft. In the light of the practice of states, the Commission decided that, so far as consular privileges and immunities are concerned, these persons should be placed on the same footing as honorary consuls (Article 56).

ARTICLE 57

Regime applicable to honorary consular officials

1. Articles 28, 29, 33, 34, 35, 36, 37, 38, 39, 41, paragraph 3, Articles 42, 43, 44, paragraph 3, Articles 45, 49, with the exception of paragraph 1 (b), and Article 53 of Chapter II concerning the facilities, privileges and immunities of career consular officials and consular employees shall likewise apply to honorary consular officials.

2. In addition, the facilities, privileges and immunities of honorary consular officials shall be governed by the subsequent articles of this chapter.

Commentary

(1) The Commission reviewed all the articles concerning the privileges and immunities of career consuls and decided that certain of these articles are also applicable to honorary consuls. These articles are listed in paragraph 1 of the present article.

(2) Special attention should be drawn to Article 69 of the draft, which is also applicable to honorary consuls. Consequently, honorary consuls who are nationals of the receiving state do not, under the terms of this draft, enjoy any consular immunities other than immunity from jurisdiction in respect of official acts performed in the exercise of their functions and the privilege conferred by Article 44, paragraph 3.

(3) As regards the other articles of Chapter II which are not enumerated in paragraph 1 of this article, the Commission was of the opinion that they cannot apply in full to honorary consuls. However, it acknowledged that some of the rights accorded in these articles to career consuls should also be granted to honorary consuls. The privileges and immunities which should be granted to honorary consuls are defined in the succeeding articles.

ARTICLE 58

Inviolability of the consular premises

The premises of a consulate headed by an honorary consul shall be inviolable, provided that they are used exclusively for the exercise of consular functions. In this case, the agents of the receiving state may not enter the premises except with the consent of the head of post.

Commentary

At its previous session, the Commission decided to defer its decision as to whether Article 31 of the 1960 draft concerning the inviolability of consular premises is applicable to the premises of a consulate headed by an honorary consul, and it asked governments for information on the question. In the light of the information obtained, the Commission has decided to supplement the draft by this article, under which the premises of a consulate headed by an honorary consul are inviolable provided that they are used exclusively for the exercise of consular functions. The reason for this condition, as also for that laid down in Article 60, is that in most instances honorary consular officials carry on a private gainful occupation in the receiving state.

ARTICLE 59

Exemption from taxation of consular premises

1. The sending state and the head of post shall be exempt from all national, regional or municipal dues and taxes whatsoever in respect of consular premises used exclusively for the exercise of consular functions, whether the premises are owned or leased by them, except in the

case of dues or taxes representing payment for specific services rendered.

2. The exemption from taxation provided for in paragraph 1 of this article shall not apply to such dues and taxes if, under the law of the receiving state, they are payable by the person who contracted with the sending state or with the head of the consular post.

Commentary

(1) Consular premises owned or leased by the sending state or by an honorary consular official are exempt from all dues and taxes in the same way as the premises of a consulate headed by a career consular official, if they are used exclusively for the exercise of consular functions.

(2) The Commission considered that the exemption provided for in this article is justified.

(3) It should be noted that by Article 69 the present article does not apply to honorary consular officials who are nationals of the receiving state.

ARTICLE 60

Inviolability of consular archives and documents

The consular archives and documents of a consulate headed by an honorary consul shall be inviolable at any time and wherever they may be, provided that they are kept separate from the private correspondence of the head of post and of any person working with him, and also from the materials, books or documents relating to their profession or trade.

Commentary

The consular archives and documents of a consulate headed by an honorary consul enjoy inviolability provided that they are kept separate from the private correspondence of the honorary consul and of persons working with him, from the goods which may be in his possession and from the books and documents relating to the profession or trade which he may carry on. This last condition is necessary, because honorary consular officials very often carry on a private gainful occupation.

ARTICLE 61

Special protection

The receiving state is under a duty to accord to an honorary consular official special protection by reason of his official position.

Commentary

As in Article 40, so in this context the expression "special protection" means a protection greater than that enjoyed by foreign residents in the territory of the receiving state. It comprises above all the obligation for

the receiving state to provide for the personal safety of the honorary consular official, particularly in the event of tension between the receiving state and the sending state when his dignity or life may be threatened by reason of his official functions.

ARTICLE 62

Exemption from obligations in the matter of registration of aliens and residence permits

Honorary consular officials, with the exception of those who carry on a gainful private occupation, shall be exempt from all obligations imposed by the laws and regulations of the receiving state in the matter of registration of aliens and residence permits.

Commentary

(1) This article does not apply to honorary consuls who carry on a gainful private occupation outside the consulate. Unlike Article 46 this article does not apply to the members of the family of an honorary consular official.

(2) It should be noted that by Article 69 this article does not apply to honorary consular officials who are nationals of the receiving state.

ARTICLE 63

Exemption from taxation

An honorary consular official shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending state in respect of the exercise of consular functions.

Commentary

The majority of the members of the Commission considered that the provision contained in this article, though it goes beyond the general practice of states, should be included so as to avoid the difficulties which would be raised by the taxation of income derived from a foreign state, and because the remuneration and emoluments in question are paid by a foreign state. Nevertheless, it should be noted that by Article 69 this provision does not apply to honorary consular officials who are nationals of the receiving state.

ARTICLE 64

Exemption from personal services and contributions

The receiving state shall exempt honorary consular officials from all personal services and from all public services of any kind and also from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

(1) The text of this article as adopted at the twelfth session tended to confer the exemption laid down in this article on consular officials and members of their families. As some of the governments urged that the scope of this article should be restricted, the Commission redrafted the text so as to make it applicable solely to consular officials.

(2) It should be noted that by Article 69 this article does not apply to honorary consular officials who are nationals of the receiving state.

ARTICLE 65

Obligations of third states

Third states shall accord to the correspondence and other official communications of consulates headed by honorary consular officials the same freedom and protection as are accorded to them by the receiving state.

Commentary

At its twelfth session the Commission included Article 52 respecting the obligations of third states among the articles which are applicable to honorary consular officials. As certain governments expressed doubt concerning the application of that article in full to honorary consular officials, the Commission decided to insert in the draft a special article specifying that the obligations of third states are limited to according to the correspondence and other official communications the same freedom and protection as are accorded to them by the receiving state.

ARTICLE 66

Respect for the laws and regulations of the receiving state

Without prejudice to their privileges and immunities, it is the duty of honorary consular officials to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state and not to misuse their official position for the purpose of securing advantages in any private activities in which they may engage.

Commentary

(1) Honorary consular officials, like career consular officials, are under a duty to respect the laws and regulations of the receiving state. They have also the duty not to interfere in the internal affairs of that state. With regard to honorary consular officials who are nationals of the receiving state, this duty means that they must not use their official position for purposes of internal politics.

(2) By reason of the fact that most honorary consuls are engaged in a private occupation for purposes of gain, it was found necessary to add the

further obligation that they must not use their official position to secure advantages in their private gainful activities, if any.

ARTICLE 67

Optional character of the institution of honorary consular officials

Each state is free to decide whether it will appoint or receive honorary consular officials.

Commentary

This article, taking into consideration the practice of those states which neither appoint nor accept honorary consular officials, confirms the rule that each state is free to decide whether it will appoint or receive honorary consular officials.

CHAPTER IV. GENERAL PROVISIONS

ARTICLE 68

Exercise of consular functions by diplomatic missions

1. The provisions of Articles 5, 7, 36, 37 and 39 of the present articles apply also to the exercise of consular functions by a diplomatic mission.

2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving state.

3. In the exercise of consular functions a diplomatic mission may address authorities in the receiving state other than the Ministry for Foreign Affairs only if the local law and usages so permit.

4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 shall continue to be governed by the rules of international law concerning diplomatic relations.

Commentary

(1) As is stated in Article 3 of this draft, consular functions are exercised not only by consulates but also by diplomatic missions. Accordingly, it is necessary to make provision in this draft for the exercise of the consular functions by a diplomatic mission.

(2) The expression "otherwise charged with the exercise of the consular functions" in paragraph 2 relates principally to the case where the diplomatic mission has no consular section but where one or more members of the mission are responsible for exercising both consular and diplomatic functions.

(3) Paragraph 3 of this article corresponds to Article 41, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, under which all official business with the receiving state which is entrusted to the diplomatic mission is to be conducted with or through that state's Ministry

for Foreign Affairs or such other ministry as may be agreed. Paragraph 3 admits the possibility of direct communication in consular matters with authorities other than the Ministry for Foreign Affairs in those cases only where the local law or usages so permit.

(4) The members of the mission who are responsible for the exercise of consular functions continue, as is expressly stated in paragraph 4 of this article, to enjoy the benefit of diplomatic privileges and immunities.

ARTICLE 69

Members of the consulate, members of their families and members of the private staff who are nationals of the receiving state

1. Except insofar as additional privileges and immunities may be granted by the receiving state, consular officials who are nationals of the receiving state shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided for in Article 44, paragraph 3, of these articles. So far as these officials are concerned, the receiving state shall likewise be bound by the obligation laid down in Article 42.

2. Other members of the consulate, members of their families and members of the private staff who are nationals of the receiving state shall enjoy privileges and immunities only insofar as these are granted to them by the receiving state. The receiving state shall, however, exercise its jurisdiction over these persons in such a way as not to hinder unduly the performance of the functions of the consulate.

Commentary

(1) The present draft recognizes that the sending state may appoint consular officials and employees of the consulate from among the nationals of the receiving state. In the case of consular officials, it may do so only with the consent of the receiving state (Article 22). The Commission had therefore to define the legal status of the members of the consulate who are nationals of the receiving state.

(2) In addition, as the present draft accords certain immunities also to members of the private staff in the employ of members of the consulate, it was necessary to specify whether members of the private staff who are nationals of the receiving state enjoy these immunities.

(3) As regards consular officials who are nationals of the receiving state, the present article, following the solution given to a similar problem which arose with respect to diplomatic immunities (see Article 38 of the Vienna Convention) grants to such officials immunity from jurisdiction and inviolability solely in respect of official acts performed in the exercise of their functions, and the privilege to decline to give evidence concerning matters connected with the exercise of their functions and to produce official correspondence and documents relating thereto (Article 44, paragraph 3). The receiving state is also under the obligation, stipulated in

the present article, to inform the sending state if a member of the consulate who is a national of the receiving state is placed under arrest or in custody pending trial, or if criminal proceedings are instituted against him. The difference as compared with the text of Article 38 of the Vienna Convention is explained by the difference in the legal status of consular officials and employees as compared with that of members of diplomatic missions.

(4) Since the present article applies to the nationals of the receiving state, it uses, unlike Article 43, the expression "official acts," the scope of which is more restricted than the expression used in Article 43: "acts performed in the exercise of consular functions."

(5) The grant of this immunity from jurisdiction to consular officials who are nationals of the receiving state can be justified on two grounds. First, the official acts performed by officials in the exercise of their functions are acts of the sending state. It can therefore be stated that the immunity in question is not a simple personal immunity of the consular official, but rather an immunity attaching to the foreign state as such. Secondly, as the consent of the receiving state is required for the appointment of a national of that state as a consular official (Article 22), it can be argued that the receiving state's consent implies consent to the official in question having the minimum immunity he needs in order to be able to exercise his functions. That minimum is the immunity from jurisdiction granted in respect of official acts. The receiving state may, of course, of its own accord grant the consular officials in question any other privileges and immunities.

(6) As regards the other members of the consulate, members of the private staff and members of families of members of the consulate, these persons enjoy only such privileges and immunities as may be granted to them by the receiving state. Nevertheless, the receiving state, under paragraph 2 of the present article, has the duty to exercise its jurisdiction over these persons in such a manner as not to hamper unduly the performance of the functions of the consulate.

ARTICLE 70

Non-discrimination

1. In the application of the present articles, the receiving state shall not discriminate as between the states parties to this convention.

2. However, discrimination shall not be regarded as taking place where the receiving state, on a basis of reciprocity, grants privileges and immunities more extensive than those provided for in the present articles.

Commentary

(1) Paragraph 1 sets forth a general rule inherent in the sovereign equality of states.

(2) Paragraph 2 relates to the case where the receiving state grants privileges and immunities more extensive than those provided for in the

present articles. The receiving state is, of course, free to grant such greater advantages on the basis of reciprocity.

(3) The Commission decided to retain this article in the form in which it had been adopted at the previous session and which differs from the text proposed earlier in its Draft Articles on Diplomatic Intercourse and Immunities (Article 44, which has since become Article 47 of the Vienna Convention), for it considered that the reasons which had caused it to change its view still remained valid.

ARTICLE 71

Relationship between the present articles and conventions or other international agreements

The provisions of the present articles shall not affect conventions or other international agreements in force as between states parties to them.

Commentary

(1) The purpose of this article is to specify that the convention shall not affect international conventions or other agreements concluded between the contracting parties on the subject of consular relations and immunities. It is evident that in that case the multilateral convention will apply solely to questions which are not governed by pre-existing conventions or agreements concluded between the parties.

(2) The Commission hopes that the Draft Articles on Consular Relations will also provide a basis for any particular conventions on consular relations and immunities which states may see fit to conclude.

CHAPTER III

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

I. LAW OF TREATIES

38. The Commission decided to take up the subject of the law of treaties at its fourteenth session.

39. At its 597th meeting the Commission appointed Sir Humphrey Waldock to succeed Sir Gerald Fitzmaurice as Special Rapporteur for the Law of Treaties. With a view to giving the new Special Rapporteur guidance for his work, the Commission, at its 620th and 621st meetings, held a debate of a general character on the subject. At the conclusion of the debate the Commission decided:

(i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;

(ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its Special Rapporteurs;

(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years.

II. PLANNING OF THE FUTURE WORK OF THE COMMISSION

40. The Commission had before it a note (A/CN.4/138) submitted by the Secretariat containing the text of General Assembly Resolution 1505 (XV) of 12 December 1960 by which the General Assembly decided to place an item entitled "Future work in the field of the codification and progressive development of international law" on the provisional agenda of its sixteenth session in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law. By the same resolution, the General Assembly invited Member States to submit any views or suggestions they might have on this question.

41. Although it had not been requested to submit its views on the matter, the Commission considered that it would be desirable for its members to place their opinions on record for the use of the Sixth Committee of the General Assembly. The records of the discussions held in the Sixth Committee on the subject at the fifteenth session of the General Assembly were available to the members of the Commission. A general discussion of the matter was accordingly held at the 614th, 615th and 616th meetings. Attention is invited to the summary records of the Commission containing the full discussion on this question.

III. CO-OPERATION WITH OTHER BODIES

42. The Asian African Legal Consultative Committee was represented at the session by Mr. H. Sabek, who, at the 605th meeting, made a statement on behalf of the Committee.

43. The Commission's observer to the fourth session of the Committee, Mr. F. V. García Amador, at the 621st meeting, presented his report (A/CN.4/139) and the Commission took note of it.

44. At its 621st meeting, the Commission further decided to request its Chairman to act as its observer at the fifth session of the Asian African Legal Consultative Committee to be held at Rangoon, Burma, in the beginning of 1962, or, if he should be unable to attend, to appoint another member of the Commission, or its Secretary, to represent the Commission at that meeting.

45. The Inter-American Juridical Committee was represented at the session by Mr. J. J. Caicedo Castilla, who, on behalf of the Committee, addressed the Commission at the 597th meeting.

46. The Commission, at the 613th meeting, heard a statement by Professor Louis B. Sohn of the Harvard Law School on the draft convention on the international responsibility of states for injury to aliens, prepared as part of the programme of international studies of the Law School.

IV. DATE AND PLACE OF THE NEXT SESSION

47. The Commission decided to hold its next (fourteenth) session in Geneva for ten weeks from 24 April until 29 June 1962.

V. REPRESENTATION AT THE SIXTEENTH SESSION OF THE
GENERAL ASSEMBLY

48. The Commission decided that it should be represented at the next (sixteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Grigory I. Tunkin.



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BULGARIA INVOKES THE CONNALLY AMENDMENT

BY LEO GROSS

Of the Board of Editors

I

One of the most persuasive arguments advanced by the advocates of the repeal of the Connally Amendment has been its "boomerang effect." While it was intended to protect the vital interests of the United States as a respondent, it also protected, on the basis of reciprocity and perhaps less intentionally, the respondent state in a case instituted before the International Court of Justice by the United States as the applicant.¹ Judge Lauterpacht called it the sanction involved in giving effect to the condition on which a state accepted the obligatory jurisdiction of the Court pursuant to Article 36, paragraph 2, of its Statute:

. . . The United States cannot avail itself of its—legally ineffective—Declaration of Acceptance in order to bring an action before the Court against another State; but for the very reason that the Declaration is legally ineffective no State can invoke it against the United States. Such indirect sanction as there is—and it is one with which the Court cannot be concerned—is of a different nature. While it unfailingly protects the declarant Government from the jurisdiction of the Court, it deprives it, with equal certainty, of the benefits of that jurisdiction in cases in which the declarant Government is the plaintiff.²

Since accepting the jurisdiction of the Court as compulsory on August 14, 1946,³ the United States has been cited as respondent in two cases, and has instituted or attempted to institute action in seven cases. In one of the former cases, the *Interhandel* Case, it invoked the protection of the Connally Amendment.⁴ The cases in which the United States appeared

¹ See Preuss, "The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction," 40 A.J.I.L. 720-736, at 733 (1946). Preuss noted that, in the Senate debate on the Connally Amendment, "Perhaps this legal situation was insufficiently comprehended for none of the proponents of the Amendment appeared to envisage the possibility that the United States would ever appear before the Court as a 'plaintiff' seeking judicial recognition of its legal claims." In his defense of the Amendment, Francis O. Wilcox was not unaware of this possibility as well as of the reciprocity impact, but concluded optimistically that "it should not be forgotten that the United States can now sue any other declaring state. Since we have always been an important claimant state this should prove a very real advantage." See "The United States Accepts Compulsory Jurisdiction," *ibid.* 699-719, at 712 and 718 f. For a discussion of the arguments for and against repeal, see Arthur Larson, *When Nations Disagree* 119 ff. and 186 ff. (1961).

² *Interhandel* Case, Judgment of March 23, 1959, [1959] I.C.J. Rep. 6, at 119 (dissenting opinion of Sir Hersch Lauterpacht).

³ 1959-1960 I.C.J. Yearbook 256.

⁴ For a discussion of the relevant issues, see Briggs, "Reservations to the Acceptance of the Compulsory Jurisdiction of the International Court of Justice," 93 Hague

as applicant arose out of aerial incidents and were directed against the Soviet Union, Hungary, and Czechoslovakia, none of which has accepted the compulsory jurisdiction of the Court. In all these cases the offer made by the United States to adjudicate was rejected. In one case, the *Aerial Incident of 27 July 1955*, the United States on October 28, 1957, instituted action against Bulgaria on the basis of Bulgaria's declaration of acceptance of the Optional Clause of the Permanent Court of International Justice, dated July 29, 1921. And it was in this case that the sanction was invoked against the United States, as it was invoked and applied in the *Norwegian Loans Case* against France. Bulgaria, the respondent, invoked the Connally Amendment reservation as a shield against the applicant United States, while also contesting the jurisdiction of the Court on other grounds. One of them, the invalidity of the Bulgarian declaration, had already been tested and firmly established by the Court in its judgment of May 26, 1959, in the parent case arising out of the same incident between Israel and Bulgaria.⁵ Following this, the United Kingdom withdrew its application against Bulgaria in a parallel action arising out of the same incident.⁶ The United States, however, continued the proceedings, and the Agents of the parties were informed on March 18, 1960, that the Court had decided to open oral hearings on June 1, 1960.⁷ However, a few days prior to the date fixed for oral hearings, in a communication addressed to the Registrar of the Court on May 13, 1960, the United States requested the discontinuance of the proceedings and the removal of the case from the Court's list. The Court granted the request by order of May 30, 1960.⁸ As will be shown presently, the ground for this latter action was the acceptance by the United States of the Bulgarian preliminary objection based on the Connally Amendment. This case appears unique in that here, for the first time, the applicant government accepted as justified the respondent's preliminary objection to the jurisdiction of the Court.⁹

II

In order the better to appreciate the position taken from time to time by the United States with respect to the legal scope and effect of the Connally Amendment, it may be appropriate to set out some relevant data:

1. The Court gave judgment in the *Norwegian Loans Case* on July 6, 1957. It held that it lacked jurisdiction to adjudicate upon the dispute brought before it by France on the ground:

Academy Recueil des Cours 223-367, at 344 ff. (1958, I). The other case in which the United States was the respondent is the Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.), [1952] I.C.J. Rep. 22, 176.

⁵ [1959] I.C.J. Rep. 127.

⁶ 1959-1960 I.C.J. Yearbook 77; [1959] I.C.J. Rep. 264. The order of the Court removing the case from the General List issued on Aug. 3, 1959.

⁷ [1960] I.C.J. Rep. 146, 147.

⁸ *Ibid.* 146.

⁹ Rosenne, "La Cour Internationale de Justice en 1960," 65 Revue Gén. de Droit Int., Public 1-54, at 3 (1961).

that the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French Declaration of March 1st, 1949; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the Application of the French Government; that consequently the Court is without jurisdiction to entertain the Application.¹⁰

It will be recalled that the French reservation in question followed substantially the Connally Amendment and that Judge Lauterpacht, in an individual opinion in that case, delivered a trenchant critique of the "automatic" French reservation and, by implication, of the American reservation, which culminated in the proposition that the entire French declaration was legally invalid.¹¹

2. On October 11, 1957, the United States filed preliminary objections to the Swiss request, dated October 3, 1957, for the indication by the Court of interim measures of protection in the *Interhandel* Case. Specifically, Switzerland asked the Court to request the United States "not to sell the shares of the General Aniline and Film Corporation claimed by the Swiss Federal Government as the property of its nationals." Referring to this part of the Swiss request, the United States, invoking the Connally Amendment, declared that it

has determined that such sale or disposition of the shares in the American corporation . . . is a matter essentially within its domestic jurisdiction. Accordingly, pursuant to paragraph (b) of the conditions attached to this country's acceptance of the Court's compulsory jurisdiction, dated August 14, 1946, this country respectfully declines . . . to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court.¹²

In his oral argument, the Agent for the United States, Mr. Loftus Becker, elaborated the legal effects of the above objection. He stated first, relying on the judgment in the *Norwegian Loans* Case:

. . . This determination by the United States of America is not subject to review or approval by any tribunal. It operates to remove definitively from the jurisdiction of the Court the matter which it determines. After the United States of America has made such a determination . . . the subject-matter of the determination is not justiciable.

He stated secondly, relying on the Court's judgment in the *Anglo-Iranian Oil Company* Case, that, in order to be able to indicate provisional measures, the Court must be satisfied that the claim does not fall completely outside the scope of international jurisdiction or, in other words, that *prima facie* the Court had jurisdiction. And he concluded by saying that:

by virtue of the Preliminary Objection filed by the United States of America, the matter of the sale or disposition of the shares . . . falls

¹⁰ [1957] I.C.J. Rep. 9, at 27.

¹¹ *Ibid.* 61. For an analysis of the case and the views of other members of the Court, see Briggs, *loc. cit.* 336-344.

¹² I.C.J. Pleadings, *Interhandel* Case 72, 76, 77.

completely outside the scope of international jurisdiction, including the jurisdiction of the Court.

In fact, he argued, that determination destroys the *prima facie* jurisdiction and, therefore, the legal basis for indicating provisional measures.¹³

The Court, without considering the legal effect of the Connally Amendment reservation, declined to accede to the Swiss request on the basis of the finding "that there is no need to indicate interim measures of protection."¹⁴ In its reasoning the Court referred to the challenge to the American objection by the Co-Agent of the Swiss Government, Professor Paul Guggenheim, and to his statement:

il paraît difficile d'imaginer que sur une question aussi complexe et délicate que la validité de la réserve américaine, la Cour veuille se prononcer, même d'une manière sommaire, dans le cadre de la procédure en vue de l'indication de mesures conservatoires.¹⁵

3. On October 28, 1957, the United States filed with the Registry of the Court an application dated October 24, 1957, instituting proceedings against Bulgaria in the matter of the *Aerial Incident of July 27, 1955*.

4. In a speech delivered on April 26, 1958, before the American Society of International Law, the then Legal Adviser of the Department of State, Mr. Loftus Becker, explained and defended the United States Government's reliance on the Connally Amendment in the interlocutory proceedings in connection with the Swiss request of October 3, 1957, for an Indication of Interim Measures of Protection in the *Interhandel Case*.¹⁶

5. In the written preliminary objections in the *Interhandel Case* (Preliminary Objections), dated simply "June 1958," and in the oral hearings before the Court held in November, 1958, the United States maintained its view regarding the legal effect of the Connally Amendment.¹⁷

6. The Court gave judgment in the *Interhandel Case* (Preliminary Objections) on March 21, 1959, declaring the Swiss application inadmissible on the ground of non-exhaustion of local remedies.¹⁸ The Court also held that the preliminary objection based on the Connally Amendment, having been declared, during the oral argument of the American Agent, as "somewhat moot," "is without object at the present stage of the

¹³ Public Hearing of Oct. 12, 1957, *ibid.* 452 f., and Public Hearing of Oct. 14, 1957, *ibid.* 466. See Briggs, *loc. cit.* 347 f.

¹⁴ *Interhandel Case* (Interim Measures of Protection), Order of Oct. 24, 1957, [1957] I.C.J. Rep. 105, at 112. The Court took note of the statement by the United States that it "is not taking action at the present time to fix a time schedule for the sale of such shares." *Ibid.*

¹⁵ "It seems difficult to imagine that the Court should wish to express an opinion, even in summary fashion, upon so complex and delicate a question as the validity of the American reservation in the context of the procedure for the indication of interim measures of protection." (Author's translation.) Pleadings 462 f., Oral Hearing of Oct. 14, 1957. The Court quoted part of this statement in its Order, [1957] I.C.J. Rep. at 111.

¹⁶ 1958 Proceedings, American Society of International Law 267-269.

¹⁷ Public Hearing of Nov. 6, 1958, Pleadings 320, 507; Public Hearing of Nov. 14, 1958, *ibid.* 610.

¹⁸ [1959] I.C.J. Rep. 6, at 30.

proceedings."¹⁹ In a dissenting opinion, Judge Lauterpacht maintained the views he had expressed earlier in the *Norwegian Loans* Case and argued strongly the invalidity, from a legal point of view, of the Connally Amendment.²⁰

7. The Bulgarian Government on September 3, 1959, filed four preliminary objections to the jurisdiction of the Court, in the second of which it availed itself of the "made in America" reservation. The United States submitted written observations, dated simply "February 1960," in which it contended, among other things, that Bulgaria was not entitled to determine that the dispute was a matter essentially within the domestic jurisdiction of Bulgaria. This position was reversed by the United States in a communication of May 13, 1960, referred to above, and discontinuance of the proceedings was requested.

III

In its application of October 24, 1957, instituting proceedings against Bulgaria on account of certain acts committed on July 27, 1955, by the Bulgarian Air Force in the Bulgarian airspace against American nationals on board an "El Al Israel Airlines Ltd." civil airplane, the United States placed the dispute as falling within the categories of legal disputes enumerated in subparagraphs (a) to (d) of Article 36 (2) of the Statute. The dispute involved

among other questions of international law, the scope and application of international obligations relating to the overflight of international civil aircraft; particularly, the duties of the government, and military defense authorities of the government, in whose territory the intrusion is alleged to have taken place, with respect to interception, identification signals between intercepting and intruding civil aircraft and the use of force as against passengers of intruding civil aircraft; together with issues of fact which, if resolved in favor of the United States Government, would prove breaches of international obligation by the Bulgarian Government; and the nature and extent of the reparations to be made by the Bulgarian Government to the United States Government for all these breaches.²¹

It was further stated that the El Al Israel airplane was driven off its course by strong local winds, that the weather was poor, that the aircraft, while flying innocently over Bulgarian territory and trying to return to its course, was fired upon by Bulgarian military fighter aircraft, that all passengers, including six American nationals, were killed and their property on board the aircraft was destroyed. The United States, for these breaches of international law, demanded monetary reparation in the

¹⁹ *Ibid.* at 26. For a discussion of this aspect of the *Interhandel* Case, see Briggs, *loc. cit.* 359 ff., and in 53 A.J.I.L. 547 at 557 ff. (1959).

²⁰ [1959] I.O.J. Rep. at 118.

²¹ I.C.J. Pleadings, Aerial Incident of July 27, 1955 (*Israel v. Bulgaria*; *United States of America v. Bulgaria*; *United Kingdom v. Bulgaria*), p. 22 f. This volume will be cited hereinafter as "I.C.J. Pleadings, Aerial Incident,"

amount of \$257,875 with interest, and such other reparations as the Court might deem to be fit and proper.²²

The legal basis for instituting proceedings by means of a unilateral application was described in these terms:

The United States Government, in filing this application with the Court, submits to the Court's jurisdiction for the purposes of this case. The Bulgarian Government accepted the compulsory jurisdiction of this Court by virtue of the signature of its representative to the Protocol of Signature of the Statute of the Permanent Court of International Justice, and his acceptance was completely unconditional; acceptance became effective as to the jurisdiction of the International Court of Justice by virtue of Article 36 (5) of the Statute of the Court upon the date of admission of Bulgaria into the United Nations.²³

It will be noted that the United States refrained from specifying the basis of the Court's jurisdiction insofar as it was concerned and, while stressing the unconditional acceptance of the jurisdiction of the Permanent Court by Bulgaria of July 29, 1921, it omitted reference to the conditions which it attached to its own declaration of acceptance of 1946, including the Connally Amendment reservation.

The application was followed in due course by a memorial, filed on December 2, 1958, the contents of which are here immaterial, as are all issues of fact and law except those relating to jurisdiction. However, it is difficult to suppress a feeling of regret that all those beautiful issues relating to the rights and duties of states in the event of aerial intrusion and involuntary overflight could not have been adjudicated. Be that as it may, the proceedings on the merits were suspended when Bulgaria filed preliminary objections, dated September 3, 1959, to the jurisdiction of the Court.

Bulgaria presented four objections and a protest, which, out of deference to the Court, it did not formally designate as such:

contre les expressions outrageuses dont l'agent du Gouvernement des Etats-Unis a cru pouvoir se servir dans sa requête, laissant aux Membres de la Cour l'appréciation de cette conduite sans précédent dans la pratique judiciaire internationale.²⁴

A. FIRST BULGARIAN PRELIMINARY OBJECTION

Bulgaria contested, first of all, the American proposition that the Bulgarian declaration of July 29, 1921, had, by virtue of Article 36, paragraph 5, of the Statute, been transferred to the present Court on December 14, 1955, when Bulgaria was admitted to membership of the United Nations.

²² *Ibid.* at 24.

²³ *Ibid.* at 23.

²⁴ "against the outrageous terms which the agent of the United States Government has seen fit to use in his application, leaving to the Members of the Court the evaluation of such unprecedented conduct in international judicial practice." (Translation.) *Exceptions Préliminaires du Gouvernement de la République Populaire de Bulgarie (Déclinatoire de Compétence)*. *Ibid.* at 278 f.

The line of argument on this point is identical with that developed by Bulgaria in the parent case (*Israel v. Bulgaria*), and Bulgaria relied on the judgment of the Court in that case, which upheld its contention.²⁵ The United States observations took issue with this argument for several reasons. In the first place, the United States correctly considered that the Court was not bound by its ruling in the case of *Israel v. Bulgaria*, and appealed to the Court for a re-examination of this point.²⁶ The question must remain moot whether the arguments submitted by the United States were of such strength and novelty as to induce the Court to change its decision. The Court was divided, twelve to four, in the *Israel v. Bulgaria* Case, and the dissenting opinions were of great cogency. A different holding in *United States v. Bulgaria* could not have been excluded *a priori*, although the chances of a reversal must have appeared nil to the British Government when it requested discontinuance of its case against Bulgaria.

It is not necessary to discuss all the reasons for the validity of the Bulgarian declaration, on which the United States elaborated in its observations. One point, however, deserves mention. In considering other states to which the transitional clause in Article 36, paragraph 5, might have applied, the United States appeared to single out Thailand for special consideration:

Although Thailand had not become a United Nations Member and party to the Statute of the Court until a number of months after April 18, 1946,²⁷ Thailand considered that its declaration accepting the jurisdiction of the Permanent Court was carried over to the new Court upon Thailand's becoming a party to the present Statute.²⁸

This support of the United States thesis was knocked down by the Court in its judgment of May 26, 1961, in the Case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)*. In her preliminary objections, Thailand claimed that her declaration of acceptance of May 26, 1950, had been rendered meaningless and without effect by the Court's judgment of May 26, 1959, in the Case of *Israel v. Bulgaria*, on the ground that all declarations, which on April 19, 1946, had not already been "transformed" by the operation of Article 36, paragraph 5, into acceptances of the compulsory jurisdiction of the present Court, had lapsed and ceased to be in force. The Court conceded that Thailand's old declaration of 1940 lapsed in any event on May 6, 1950, by its own terms, but held that Thailand's declaration of May 20, 1950, constituted a new and independent instrument whereby Thailand fully intended to submit herself to the compulsory jurisdiction of the Court.²⁹

²⁵ See note 5 above.

²⁶ Observations and Submissions of the Government of the United States on the Preliminary Objections of the Government of the People's Republic of Bulgaria, I.C.J. Pleadings, Aerial Incident at 310.

²⁷ The date of the liquidation of the Permanent Court of International Justice.

²⁸ I.C.J. Pleadings, Aerial Incident at 320; see also pp. 307, 315, 316.

²⁹ [1961] I.C.J. Rep. 17, at 29.

B. FOURTH BULGARIAN PRELIMINARY OBJECTION

The fourth Bulgarian objection related to local remedies. It was contended that the United States application was inadmissible because the American nationals on whose behalf the United States filed the complaint had failed to exhaust the local remedies available to them under Bulgarian law.³⁰ This point need not be considered here.

C. THIRD BULGARIAN PRELIMINARY OBJECTION

The third Bulgarian objection is of substantial interest from the procedural point of view. Did the United States application constitute a proper seising of the Court? The Bulgarian Government contended that it did not. It will be recalled that the United States refrained from referring to its own declaration of acceptance in its application instituting proceedings against Bulgaria, while invoking the 1921 Bulgarian declaration. The Bulgarian Government construed this as an attempt to seise the Court by means of a unilateral application on the basis of the obligatory jurisdiction provided for in Article 36, paragraph 2, of the Statute. In order to avail itself of this method of seising, the United States should have indicated in its application the provisions in force between the parties conferring such jurisdiction upon the Court. This, claimed the Bulgarian Government, is required by Article 32, paragraph 2, of the Rules of Court which reads:

When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the subject of the dispute. It must also, as far as possible, specify the provisions on which the applicant founds the jurisdiction of the Court, state the precise nature of the claim and give a succinct statement of the facts and grounds on which the claim is based . . .

This the United States had failed to do and this failure might have placed Bulgarian in an unfavorable position; for, according to Article 62, paragraph 1, of the Rules of Court,

A preliminary objection must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading.

The purpose of the requirement of Article 32, paragraph 2, of the Rules becomes clear in the context of the above clause: it is to inform the respondent fully of the provisions on which the compulsory jurisdiction is alleged to rest, and to enable it to avail itself of any reservations made by the applicant government. As stated by the Bulgarian Government:

Autoriser la Partie requérante de passer d'abord sous silence, dans la requête, sa déclaration d'acceptation de la clause facultative pour pouvoir l'invoquer valablement, serait donc lui permettre d'induire sciemment en erreur, quant à ses intentions, le défendeur afin de

³⁰ Exceptions Préliminaires at 276 ff.

mettre celui-ci dans l'impossibilité de tirer parti des réserves figurant dans la dite déclaration.⁸¹

There is no evidence, of course, that the United States had any such intentions nor is it necessary to assume that the Court would have admitted such an attempt. In any event, the Bulgarian Government concluded that there was no basis in the American application for invoking the compulsory jurisdiction of the Court.

The Bulgarian Government also argued that this jurisdiction must be based on a contractual bond previously established between the parties. In so doing it referred to Article 36, paragraph 4, of the Statute,⁸² and to the judgments of the Court in the *Right of Passage* Case and the *Nottebohm* Case. In the former case the Court said:

. . . The Court considers that, by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. *The contractual relation* between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, "*ipso facto* and without special agreement", by the fact of the making of the Declaration . . . it is on that very day that the *consensual bond, which is the basis* of the Optional Clause, comes into being. . . .⁸³

In the latter case, the Court declared:

. . . The characteristic of this compulsory jurisdiction is that it results from *a previous agreement* which makes it possible to seise the Court of a dispute without a Special Agreement, and that in respect of disputes subject to it, the Court may be seised by means of an Application by one of the parties. . . . The purpose of Article 36, paragraph 2, and of the Declarations relating thereto, is to regulate the seising of the Court: under the system of the Statute *the seising of the Court by means of an Application is not ipso facto open* to all States parties to the Statute, it is only open to *the extent defined in the applicable Declarations*.⁸⁴

Having concluded that the United States application failed to conform to the requirements of seising under the Optional Clause of Article 36,

⁸¹ "If the applicant party were permitted in its application to pass over in silence its declaration of acceptance of the optional clause in order to invoke it validly [at a later stage of the proceedings], then this would be tantamount to allowing it deliberately to mislead the respondent as to its intentions for the purpose of rendering it impossible for the latter to take advantage of the reservations included in that declaration." (Author's translation.) I.C.J. Pleadings, Aerial Incident at 276.

⁸² "Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

⁸³ Case concerning Right of Passage over Indian Territory (Preliminary Objections), Judgment of Nov. 26, 1957, [1957] I.C.J. Rep. 125, at 146. Italics in the original of the Bulgarian Exceptions Préliminaires at 274.

⁸⁴ Nottebohm Case (Preliminary Objection), Judgment of Nov. 18, 1953, [1953] I.C.J. Rep. 111, at 122. Italics in the original Bulgarian Exceptions Préliminaires at 274.

paragraph 2, of the Statute, the Bulgarian Government finally construed the statement quoted above³⁵ as an acceptance of the jurisdiction of the Court *ad hoc*, that is, solely for the purpose of this dispute. Viewed from this angle, it constituted at best an offer to conclude a special agreement and this offer the Bulgarian Government declined on the ground that the dispute related to matters essentially within the domestic jurisdiction of Bulgaria.

The United States accepted the validity of this preliminary objection, stating:

The United States Government agrees that apart from the United States Declaration of August 26, 1946, there is not a basis for compulsory jurisdiction,

and stating further with reference to the above-quoted passage in its application:

The United States does not contend that this statement constituted a declaration under Article 36, paragraph 2 of the Statute, providing a basis for compulsory jurisdiction. For this reason it is not necessary to consider further the third Bulgarian preliminary objection.³⁶

The motive that prompted the United States to formulate its application in a manner which gave the Bulgarian Government an opening for a strong and well-reasoned objection is immaterial. It may well be that the United States, considering the preceding diplomatic negotiations and the avowed willingness of Bulgaria to make reparation to the American victims of the incident,³⁷ deliberately chose the method of an offer of *forum prorogatum*. It was, of course, open to the Bulgarian Government to decline this offer, but it certainly was not improper for the United States to extend it. Article 32, paragraph 2, of the Rules of Court, referred to by the Bulgarian Government, clearly and deliberately distinguishes between the mandatory and the optional contents of an application, and this distinction is intended to preserve the institution of the *forum prorogatum*.³⁸ The mandatory requirement is set out in Article 40 of the Statute, and the United States application complied with it. Had the United States selected this method of establishing jurisdiction, through the institution of *forum prorogatum*, it would have been not only proper but indeed necessary to refrain from invoking the Bulgarian declaration of acceptance. The United States must have been aware that it was not dealing with a friendly government with which procedural shortcomings could be ironed out.³⁹

D. SECOND BULGARIAN PRELIMINARY OBJECTION

The second Bulgarian preliminary objection was based on two assumptions: one, that the American application was based on the declaration

³⁵ See p. 362 above.

³⁶ Written Observations, I.C.J. Pleadings, Aerial Incident at 306 and 322.

³⁷ *Ibid.* at 303.

³⁸ Rosenne, *The International Court of Justice* 289-291, 368. (1957).

³⁹ *Ibid.* 371 f.

of acceptance of August 26, 1946, and, secondly, that the United States might at a later stage of the proceedings modify this declaration, and thus attempt to deprive the Bulgarian Government of the possibility of invoking the Connally Amendment reservation. In the first hypothesis the Bulgarian Government invoked the reservation. This was formally justified on the ground of reciprocity and the essential consensual basis of the jurisdiction of the Court. With reference to the substance of the dispute, the Bulgarian Government claimed that the defense of its territory, the security in the airspace above the Southwestern frontier region, and the disposition of its anti-aircraft defense, fall under its domestic jurisdiction, which is not limited by any conventional arrangement with the United States.⁴⁰ With respect to the second hypothesis, the Bulgarian Government argued that any unilateral modification of the declaration of 1946 would deprive Bulgaria of its rights under Article 36 of the Statute. Moreover, the Bulgarian Government insisted that the United States must not be allowed to escape the "sanction," that is, the consequences of its own declaration, and declared:

Toute renonciation éventuelle de la part des Etats-Unis, pour une affaire concrète et à l'égard d'un Etat donné, aux éléments restrictifs de leur déclaration de 1946, est contraire au Statut et ne pourrait avoir aucune influence sur l'instance en cours. *Par une pareille renonciation ad hoc, motivée uniquement par des considérations d'opportunité pratique le Gouvernement des Etats-Unis entendrait garder pour l'avenir et dans tous les cas où il serait défendeur, le bénéfice des avantages que lui procureraient ses propres réserves sans avoir à en subir les inconvénients dans les cas où il serait demandeur.*⁴¹

Finally, the Bulgarian Government declared that it

ne saurait admettre que soient examinées devant la Cour, de façon directe ou indirecte, des questions qu'il qualifie en bon droit comme relevant essentiellement de la compétence nationale de l'Etat bulgare. Il demande, en conséquence, à la Cour de se déclarer incompétente pour examiner la requête du Gouvernement des Etats-Unis.⁴²

The United States reacted to this second preliminary objection in two stages: first, in its written observations, and second, in its communication

⁴⁰ Exceptions Préliminaires, I.C.J. Pleadings, Aerial Incident at 271 f.

⁴¹ "A subsequent renunciation by the United States of the restrictive clauses of its Declaration of 1946, in any concrete case and with respect to a particular State, is contrary to the Statute and could have no influence in the pending proceedings. For by dint of such an *ad hoc* renunciation, motivated solely by opportunistic considerations, the Government of the United States would aim to preserve for the future and in all cases in which it would be the respondent the benefit of its own reservation without being exposed to its drawbacks in cases in which it was the plaintiff." (Author's translation.) *Ibid.* at 273. Italics in the original.

⁴² "[The Bulgarian Government] cannot admit that matters which it rightfully determines as being essentially within its domestic jurisdiction should be considered, directly or indirectly, before the Court. It requests, accordingly, that the Court declare itself without competence to adjudicate upon the application of the Government of the United States." (Author's translation.) *Ibid.* at 272.

of May 13, 1960, to the Registrar of the Court. In the first stage, the argument of the United States that Bulgaria was not entitled to determine the dispute as falling essentially within its domestic jurisdiction was summarized as follows:

1. While Bulgaria is entitled to invoke, reciprocally, any of the reservations contained in the United States declaration of 1946, Bulgaria cannot exceed their proper scope in making its defense. Bulgaria cannot determine that the United States claim based on the incident of 1955 is essentially within Bulgaria's domestic jurisdiction, since any such determination would fly in the face of actuality and would ignore the international character accorded the claim by the parties in their previous negotiations. United States reservation (b)⁴³ does not permit the United States or any other State to make an arbitrary determination, in bad faith.

2. In the view of the United States, Bulgaria has failed to make a showing of any valid considerations of security which would form the basis for a conclusion that the present claim lies "essentially within the domestic jurisdiction of the People's Republic of Bulgaria." The United States is prepared to show, by evidence and argument on the merits, that the facts of the incident belie any threat to Bulgarian national security.⁴⁴

It would appear from this that, as construed by the United States, the Connally Amendment is neither automatic nor peremptory nor self-judging, but subject to the judgment of the Court. More specifically, the United States, in support of its contention that the dispute was impregnated with "international character," referred to the facts of the aerial incident, the alleged liability of Bulgaria for the acts of its Air Force, the diplomatic correspondence relating to the incident, and concluded:

After taking these steps and entering into the international engagements referred to above, the Government of Bulgaria is not entitled now to determine that these matters are "essentially within the domestic jurisdiction of the People's Republic of Bulgaria."⁴⁵

Whether the international character of the subject matter of the dispute is "perfectly clear" as contended by the United States is immaterial; but if Bulgaria is denied the unilateral right to hold otherwise, is it for the United States to make such a determination unilaterally and with binding effect on Bulgaria? Such a position would be contrary to common sense and basic principles of international law, including that of the sovereign equality of states.⁴⁶ Is it not then an inevitable consequence of the United States contention that this question can only be decided by the Court, and by the Court alone, in spite of the Connally Amendment?

The United States also rejected the Bulgarian assertion that the subject matter was essentially within its domestic jurisdiction because its security was involved. Here again the United States submitted

⁴³ The Connally Amendment reservation. ⁴⁴ Written Observations at 308.

⁴⁵ *Ibid.* at 324 f.

⁴⁶ In this connection cf. the Judgment of the Court of Nov. 20, 1950, in the Asylum Case (Colombia/Peru), [1950] I.C.J. Rep. 266 at 275 f.

that, in all the circumstances of the 1955 incident, the present claim based upon it could not properly be characterized as lying essentially within Bulgaria's domestic jurisdiction.⁴⁷

It may well be correct, as argued by the United States, that, even if it were established that Bulgarian security was involved, "it does not automatically follow" that the dispute would enter the reserved domain and that the question of which matters fall into this domain is a "relative question."⁴⁸ But who can settle these questions? Certainly not the United States; and if they cannot be settled by Bulgaria with binding effect upon the United States, then they must be settled by the Court, and this, in spite of Bulgaria's invoking the Connally Amendment reservation. That this was the burden of the United States argument appears clearly from the offer "to make an extended presentation in connection with hearing of the case on the merits."⁴⁹ Thus the Connally Amendment was not construed by the United States as an absolute bar to the jurisdiction of the Court.

In arguing against the Bulgarian plea of domestic jurisdiction on the basis of the Connally reservation, the United States relied chiefly upon its intimate knowledge of the reservation in its capacity as "the author of the reservation." As presented by the United States it was a question of the scope of the reservation. On this point the United States made two important statements. First:

The United States does not consider that reservation (b)⁵⁰ authorizes or empowers this Government, or any other government on a basis of reciprocity, to make an arbitrary determination that a particular matter is domestic, when it is evidently one of international concern and has been so treated by the parties.⁵¹

In support of this proposition the United States quoted from a speech by Senator Connally, the author of the reservation, on the floor of the Senate in August, 1946.⁵² Senator Connally's remarks fitted perfectly the position of the United States taken so far. For if the Senator meant what he said, the reservation would not be used as a bar against jurisdiction but as a ground, to be used sparingly, for non-execution of a judgment of the Court, if that judgment involved a matter of domestic law rather than of international law. The system of compulsory jurisdiction to which

⁴⁷ Written Observations at 325.

⁴⁸ At this point the United States referred to the Case of the Tunis-Morocco Nationality Decrees, P.C.I.J. Pub., Ser. B, No. 4 (1923), but without a citation.

⁴⁹ Written Observations at 325.

⁵⁰ The Connally Amendment reservation.

⁵¹ Written Observations at 323.

⁵² The passage as quoted from 92 Cong. Rec. 10,695 (1946) is as follows:

"Several Senators have argued that by this amendment the United States would put itself in the position of corruptly and improperly claiming that a question is domestic in nature when it is not, thereby taking advantage of an international dispute and saying that since the question is domestic, we will not abide by the decision of the Court. Mr. President, I have more faith in my Government than that. I do not believe the United States would adopt a subterfuge, a pretext, or a pretense in order to block the judgment of the Court on any such grounds."

the United States subscribed relates solely to legal disputes on questions of international law. As stated in Article 38, paragraph 1, of the Statute, it is the function of the Court "to decide in accordance with international law such disputes as are submitted to it."

In the second statement the United States referred to the *Interhandel* Case as evidence of "a practical construction to reservation (b)." In that case the United States invoked the Connally reservation with respect to some issues, while agreeing that other issues were not essentially a matter of domestic jurisdiction, and concluded:

The United States considers that the practice followed by a State with respect to its own reservation is entitled to great weight in the construction of that reservation when it is invoked by another State.⁵³

In this connection it appears that the Court alone has the authority to determine what weight should be given to a state's subsequent conduct in construing an instrument to which it is a party. The United States cannot by itself legally impose its construction upon Bulgaria any more than Bulgaria can impose its interpretation upon the United States.

The last stand taken by the United States calls for a brief comment. In the *Interhandel* Case on October 12, 1957, the United States took the position that its determination was "not subject to review or approval by any tribunal," and that "the subject matter of the determination is not justiciable."⁵⁴ This attitude seems to be in complete contradiction with the position taken some two years later vis-à-vis Bulgaria, which, far from contradicting, precisely followed the construction adopted by the United States in a case in which it was, like Bulgaria, the defendant party. Furthermore, even in the *Interhandel* Case, the Swiss Co-Agent, Professor Guggenheim, questioned the propriety of invoking the automatic reservation with respect only to some aspects of the dispute, and he contested the position that such aspects were properly within the reserved domain.⁵⁵ The United States, in the second statement referred to above, after quoting Senator Connally, claimed that in fact it "has given a practical construction to reservation (b) which is altogether consistent with the statement just quoted."⁵⁶ It may be possible to read Senator Connally's statement with different results. If it is understood as reserving the right of the United States to decline to execute a judgment which involves its reserved domain, then clearly the "practical construction" is not altogether in Senator Connally's speech, because in the *Interhandel* Case, like Bulgaria in the *Aerial Incident* Case, the United States invoked the reservation as a plea to the jurisdiction of the Court. How a government reads Senator Connally's speech and how it interprets the reservation which bears his name may well depend upon whether it argues as applicant or respondent government in a case.

⁵³ Written Observations at 323.

⁵⁴ Pleadings, *Interhandel* Case 452-453.

⁵⁵ Pleadings 410 ff., 580. See also the oral argument of the Swiss Agent, Professor Sauser-Hall, *ibid.* 582 ff., 597 f.

⁵⁶ Written Observations, I.C.J. Pleadings, *Aerial Incident* at 323.

The contradiction apparent between the United States position in the *Interhandel* Case and its later position in the *Aerial Incident* Case was eliminated by the letter, dated May 13, 1960, of the Legal Adviser of the Department of State to the Registrar of the Court. The relevant part of this letter, which confirms the construction placed here on the United States position in the written observations, reads as follows:

In that part of the Written Observations which relates to the second preliminary objection of Bulgaria, a contention was advanced on behalf of the United States with respect to reservation (b) attached to the acceptance by the United States of the jurisdiction of the Court. That contention was to the effect that reservation (b) did not authorize or empower Bulgaria to make an arbitrary determination that a particular matter was essentially within its domestic jurisdiction. The necessary premise of the argument was that the Court must have jurisdiction for the limited purpose of deciding whether a determination under reservation (b) is arbitrary and without foundation. On the basis of further study and consideration of the history and background of reservation (b) and the position heretofore taken by the United States with respect to reservation (b) in litigation before the Court, it has been concluded that the premise of the argument is not valid and that the argument must therefore be withdrawn. As it was declared by the United States to this Court in the *Interhandel* Case (*Switzerland v. United States*), when the United States has made a determination under reservation (b) that a particular matter is essentially within its domestic jurisdiction, that determination is not subject to review or approval by any tribunal, and it operates to remove definitively from the jurisdiction of the Court the matter which it determines. A determination under reservation (b) that a matter is essentially domestic constitutes an absolute bar to jurisdiction irrespective of the propriety or arbitrariness of the determination. Although the United States has adhered to the policy of not making any arbitrary determination under reservation (b), the pursuit of that policy does not affect the legal scope of the reservation. Under the rule of reciprocity applied by the Court in the case concerning *Certain Norwegian Loans* (*France v. Norway*), Bulgaria is accorded the same rights and powers with respect to reservation (b) as the United States. Accordingly, the Government of the United States withdraws that part of its Written Observations and Submissions which relates to the second preliminary objection of Bulgaria.⁵⁷

The United States consequently requested the discontinuation of the proceedings, which was granted by order of the Court of May 30, 1960.⁵⁸

In thus reversing itself completely, the United States has reverted to the construction of the Connally Amendment which it deemed proper in the *Interhandel* Case, but which has not yet been the subject of a determination by the Court. This reversal is remarkable. It is based on a "further study and consideration of the history and background of reservation (b)" and of the United States position in the *Interhandel* Case. It is always possible, of course, to rake over the identical debate

⁵⁷ This letter, as well as the written observations, was signed by Mr. Eric H. Hager, Agent of the U. S. A. I.C.J. Pleadings, *Aerial Incident* at 677.

⁵⁸ [1960] I.C.J. Rep. 146.

in the Senate and come up with different results, although one would have assumed that both the history of the Connally Amendment and the position of the United States in the *Interhandel* Case were well known to all concerned in the Department of State. In his address, already referred to, Mr. Loftus Becker, the Legal Adviser of the Department, said, on the one hand, that the Connally Amendment

is clearly more restrictive than a reservation of the right not to submit matters essentially within the domestic jurisdiction of the United States, *as determined by the principles of international law*, and, on the other, he admitted of a

serious question whether "as determined by the United States of America," if fairly applied, would mean any more in the way of excluding the International Court from passing upon truly domestic issues than the words "as determined by the principles of international law."⁵⁹

This appears, indeed, to be the nub of the problem, and it is most regrettable that the United States not merely reversed its position, but also denied the Court and itself the benefit of a judicial determination of the scope and character of the Connally Amendment.

IV

In the *Aerial Incident* Case between the United States and Bulgaria the issue was squarely joined. Bulgaria clearly invoked the benefit of the Connally Amendment reservation, and the United States in its submissions requested the Court to adjudge and declare:

1. That the Court has jurisdiction in the present case concerning the *Aerial Incident* of July 27, 1955;

2. That the first, second and fourth preliminary objections of the Government of the People's Republic of Bulgaria are overruled, and that the third preliminary objection, stated as an alternative to the second preliminary objection, need not be considered; or

3. That, as an alternative to the foregoing, the consideration of such preliminary objections as are not now disposed of be joined to the hearing of the present case upon the merits, in case the Court considers there are issues with respect to jurisdiction which require trial and hearing.⁶⁰

Such was not the situation in earlier cases in which a Connally-type reservation was involved. The *Norwegian Loans* Case is not necessarily an indication of what the Court might have held in the *Aerial Incident* Case. The former case is sometimes cited as authority for the proposition that when a party to a dispute invokes the Connally-type reservation, the Court can do nothing but register this fact and declare itself incompetent. It is true that in that case the Court found that it was without jurisdiction to entertain the French application because Norway was entitled, by virtue of reciprocity, to invoke the Connally-type reservation contained

⁵⁹ *Loc. cit.* at 267. Italics in the original.

⁶⁰ Written Observations, I.C.J. Pleadings, *Aerial Incident* at 330.

in the French declaration of acceptance of March 1, 1949, and this reservation excluded from the jurisdiction of the Court the dispute referred to it by France. However, the Court also considered that it did not have to examine whether the French reservation was consistent with the undertaking of a legal obligation and was compatible with paragraph 6 of Article 36 of the Statute.⁶¹ This attitude of the Court is probably best explained in the Court's own words:

. . . The validity of the reservation has not been questioned by the Parties. It is clear that France fully maintains its Declaration, including the reservation, and that Norway relies upon the reservation.

In consequence the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it.⁶²

These findings of the Court are, it is submitted, highly significant. First of all, it will be noted that the Court fully reserved the right to reconsider its position with respect to the Connally-type reservation by saying that it was giving effect to it "without prejudging the question." Secondly, decisive weight will probably have to be given to the finding that the validity of the reservation was not questioned by either party; that, in particular, France fully maintained her reservation; and that, finally, the reservation was considered by both parties "as constituting an expression of their common will." In all these respects the *Aerial Incident* Case differed from the *Norwegian Loans* Case. To be sure, Bulgaria invoked the United States reservation and endeavored to guard itself against a possible change of the American position with reference to this reservation.⁶³ Considering the significance attributed by the Court to the fact that France fully maintained her declaration, including the reservation, Bulgaria had every reason to be concerned about a possible change. Moreover, in the *Norwegian Loans* Case, both parties paid what must be regarded as remarkably perfunctory attention to the reservation. The Court was able to summarize in a couple of pages their positions in both oral and written pleadings.⁶⁴ In the *Aerial Incident* Case the United States reservation was invoked by one party and effectively contested by the other, and no doubt further arguments would have been

⁶¹ "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." ⁶² [1957] I.C.J. Rep. 9, at 27.

⁶³ This, it is suggested, may have been the meaning of the Bulgarian contention that the United States, having failed to indicate unequivocally the basis of referring the dispute to the Court, was precluded from invoking the reservation contained in its declaration of acceptance at a later stage of the proceedings. Page 364 f. above. The Bulgarian Government might have been more concerned with the possibility that the United States might place upon the reservation an interpretation disadvantageous to Bulgaria, as it actually did, and thereby place Bulgaria in an unfavorable situation.

⁶⁴ *Ibid.* 25-26.

presented in oral hearings, had not the United States abandoned the case. This is not to suggest that the Court would not have sustained the Bulgarian reliance on the Connally Amendment reservation. It is suggested, however, that the Court had reserved the right to hold otherwise, and it might have held otherwise precisely in view of the construction placed on the amendment by the United States, and of the intrinsic importance of the substantive issues presented to it for adjudication. In this case it could not have been said that the amendment constituted as between Bulgaria and the United States "an expression of their common will relating to the competence of the Court."

The position taken by the United States in the *Interhandel* Case, abandoned or substantially modified as it was in its written observations in the *Aerial Incident* Case, was certainly not a serious obstacle. The Court had no occasion to rule on the validity or scope or rôle of the Connally Amendment either in the phase of the *Interhandel* Case relating to interim measures or in that relating to preliminary objections. In connection with the Swiss request for interim measures, the United States invoked the Connally Amendment in its preliminary objection, and maintained it in the course of the proceedings, but the Court based its negative decision on other grounds, namely, that, following information submitted by the United States and accepted by Switzerland, there was "no need to indicate interim measures of protection."⁶⁵ It will be recalled that, although Switzerland challenged the reservation on a number of grounds, its Co-Agent, for all practical purposes, invited the Court to disregard this challenge, saying that, in connection with a relatively minor matter, i.e., the request for interim measures, the Court would not wish to adjudicate "upon so complex and delicate a question as the validity of the American reservation."⁶⁶

In the phase of the *Interhandel* Case relating to preliminary objections, the United States, while maintaining the reservation in part (a) of the fourth preliminary objection, qualified it through its Agent, as "somewhat academic" and "somewhat moot." The Court took official notice of this qualification, which was in the nature of a reservation to the reservation, and having found the Swiss claim inadmissible on other grounds, namely, non-exhaustion of local remedies, declared that "part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings."⁶⁷ Thus, the United States succeeded in avoiding an adjudication by the Court of the validity or invalidity, in whole or in part, of its declaration of acceptance of 1946.

In the *Aerial Incident* Case the Court would most likely have sustained the first Bulgarian preliminary objection and declared itself incompetent. There was, therefore, no reason for the United States to fear that its arguments in the *Interhandel* Case would necessarily or decisively influence the Court's construction of the Connally Amendment reservation. Nor was there any reason to assume that the Court would consider the

⁶⁵ [1957] I.O.J. Rep. 105, at 112.

⁶⁶ *Ibid.* at 111.

⁶⁷ [1959] I.O.J. Rep. 6, at 26 and 29.

opposite construction of the Connally Amendment presented by the United States in the *Aerial Incident* Case. However, by maintaining this construction and the request to give judgment in accordance with its submissions, the United States might have been precluded from changing its position again in possible future proceedings in the *Interhandel* Case. Bearing in mind the great significance of the issues in the *Aerial Incident* Case, whose essentially international character is scarcely open to doubt, it may appear that the United States, by submitting that the Connally Amendment reservation can be used and abused with equal ease, paid too high a price in order to achieve a problematical and contingent gain in the future.

Insofar as the Court is concerned, the question of the validity or the invalidity, in whole or in part, of the Connally Amendment and other reservations for which it furnished the model, is still open.⁶⁸ Judge Lauterpacht's stand, formulated most elaborately in two opinions, represents the most intransigent alternative: the complete invalidity of the United States declaration of 1946. Guggenheim is probably quite right in suggesting that the Court is unlikely to accept it.⁶⁹ It must be noted that the Court could not adopt it without reversing itself. For in the *Norwegian Loans* Case the Court very clearly assumed the validity of the French declaration, including the so-called automatic reservation.⁷⁰ The Norwegian Government could not very well have availed itself of an invalid reservation embedded in an invalid declaration. By holding that Norway was entitled to invoke the reservation in the French declaration and that, consequently, the Court was without jurisdiction to adjudicate upon the dispute brought before it in virtue of that declaration, the Court implied necessarily the validity of the French declaration.

Guggenheim is probably also quite sound in suggesting that the Court is not likely to rally to Judge Guerrero's view that such reservations "must be regarded as devoid of all legal validity" because they conflict with paragraphs 2 and 6 of the Statute.⁷¹ The Court has not shown any penchant for radical and sweeping propositions. To be sure, Judge Guerrero's view is less uncompromising than Judge Lauterpacht's, but still the Court could not adopt it without reversing itself or, at the very least, casting a shadow on its judgment in the *Norwegian Loans* Case for the reason stated above. It must be admitted, though, that the Court's judgment in that case was sufficiently circumscribed, so much so that it might be distinguished from a future case in which the issue of the validity of the reservation was fully joined. In such a case the Court might find it difficult to hold, as it did in the *Norwegian Loans* Case, that it did not have to examine whether the reservation "is consistent with

⁶⁸ Guggenheim, "Der sogenannte automatische Vorbehalt der inneren Angelegenheiten gegenüber der Anerkennung der obligatorischen Gerichtsbarkeit des Internationalen Gerichtshofes in seiner neuesten Gerichtspraxis," in K. Zemanek (ed.), *Völkerrecht und Rechtliches Weltbild* 116-132, at 131 (Festschrift für Alfred Verdross, 1960).

⁶⁹ *Ibid.* at 127.

⁷⁰ [1957] I.C.J. Rep. 9, at 25 ff.

⁷¹ *Ibid.* at 69; and Guggenheim, *loc. cit.* at 128.

the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute."⁷² The Court might, of course, find, upon such examination, that the reservation was compatible with both the undertaking of a legal obligation and paragraph 6 of Article 36. Such a holding would be diametrically opposed to the construction of both Judge Lauterpacht and Judge Guerrero and might seriously impair the system of compulsory jurisdiction of which the Court is the guardian.

There is an intermediate alternative. It was developed by Bourquin and adopted by Guggenheim, and is substantially based on the notion that a reservation of the Connally type can only be invoked in good faith and that to do otherwise would constitute an abuse which the Court would have the power to reject. In the first preliminary objection in the *Norwegian Loans* Case the Norwegian Government contended that the dispute brought before the Court by France related to municipal and not to international law, and was therefore outside Article 36, paragraph 2, of the Statute, as well as outside the Norwegian and French declarations of acceptance. Referring in the written argument to the French reservation, Norway declared:

... Il est certain que pareille réserve doit être interprétée de bonne foi et qu'un gouvernement qui se retrancherait derrière elle pour dénier compétence à la Cour dans un cas où il ne s'agirait manifestement pas d'une "affaire relevant essentiellement de la compétence nationale" commettrait un abus de droit, devant laquelle la Cour ne dénier serait pas désarmée.

Mais, dans ces limites, on sera d'accord pour reconnaître que la caractère de l'affaire litigieuse. Cette liberté d'appréciation est même d'autant plus large que la formule vise les affaires qui relèvent *essentiellement* de la compétence nationale—et non celles qui en relèvent *exclusivement* (comme le faisait l'article 15, par. 8 du Pacte de la Société des Nations).⁷³

Professor Guggenheim, in his capacity of Co-Agent in the *Interhandel* Case, after an analysis of the preparatory work relating to the Connally Amendment and of the doctrine of abuse of right, referred to the above-quoted statement in the *Norwegian Loans* Case and declared in the oral hearing of November 12, 1958:

⁷² [1957] I.C.J. Rep. at 26.

⁷³ "... It is certain that a reservation of this kind should be interpreted in good faith and that a Government would commit an abuse of right if it sought the protection of the reservation in order to deny the jurisdiction of the Court in a case which manifestly did not relate to 'matters which are essentially within its domestic jurisdiction.' The Court would know how to defend itself against such an abuse.

"It is possible, however, to agree that within these limits the declarant State, under this reservation, has the right to evaluate freely the nature of the matter at issue. This freedom of appreciation is all the more comprehensive as the formula relates to matters which are *essentially*, and not merely *solely*, within the domestic jurisdiction (as was the case in Article 15, par. 8 of the Covenant of the League of Nations).'" (Author's translation.) I.C.J. Pleadings, Case of Certain Norwegian Loans (France v. Norway), Vol. I, p. 131.

Les limites d'une application normale de la réserve dite automatique sont certes dépassées lorsqu'un Etat l'invoque dans un domaine qui est totalement étranger au domaine réservé. En affirmant que la réserve dite automatique des Etats-Unis ne peut pas être opposée à la Suisse dans le cas d'espèce, nous restons dans le cadre d'une sage application de la doctrine qui s'oppose à un exercice arbitraire du pouvoir discrétionnaire qu'une convention internationale confère à un Etat.⁷⁴

An approach somewhat similar to that of Bourquin and Guggenheim is developed by Briggs. An application on the basis of the United States declaration constitutes a proper seisin, which gives the Court jurisdiction to adjudicate upon a plea to its jurisdiction; and no unilateral attempt on the part of the United States can deprive the Court of such jurisdiction already validly established.⁷⁵ A plea of domestic jurisdiction by the United States or by the adverse party would be subject to scrutiny and binding determination by the Court in virtue of Article 36, paragraph 6, of the Statute. In the view of Briggs,

The net effect of such a decision would be that the good faith of the United States in accepting the Court's compulsory jurisdiction would

⁷⁴ "The permissible limits of a normal application of the so-called automatic reservation are certainly transgressed if a State invokes it in a matter which is totally foreign to the reserved domain. In maintaining that the so-called automatic reservation of the United States cannot be invoked validly against Switzerland in the pending case, we remain within the four corners of a prudent application of the doctrine. The doctrine does not allow for an arbitrary exercise of the discretionary powers which an international convention confers upon a State." (Author's translation.) I.C.J. Pleadings, *Interhandel Case (Switzerland v. U. S. A.)* 579. See also Guggenheim, *loc. cit.* at 129.

⁷⁵ Briggs, *loc. cit.* 362-363. Briggs relies here on the following passage in the judgment in the *Nottebohm Case*:

"When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court—which was the case between Guatemala and Liechtenstein on December 17th, 1951—the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." [1953] I.C.J. Rep. 111 at 123.

The essential point in Briggs' argument, as elaborated elsewhere, is that a proper seisin empowers the Court to exercise incidental jurisdiction, and this includes the power to adjudicate upon a plea to its jurisdiction pursuant to Art. 36, par. 6, of the Statute. This is so, he maintains, because the states parties to a dispute have consented to the Statute as part of the Charter, and this consent cannot be set aside by subsequent declarations of acceptance. See his "The Incidental Jurisdiction of the International Court of Justice as Compulsory Jurisdiction," in Zemanek (ed.), *Völkerrecht und Rechtliches Weltbild* 87-95 (Festschrift für Alfred Verdross, 1960); for a more recent and slightly modified version, see his "La Compétence Incidente de la Cour Internationale de Justice en tant que Compétence Obligatoire," 64 *Revue Gén. de Droit Int. Pub.* 217-229 (1960). This line of reasoning, in a somewhat modified form, is developed below.

not be questioned. Its Declaration would be regarded as valid although the Court would refuse effect to possible invalid determinations of matters of domestic jurisdiction. It would not be necessary for the Court to decide specifically whether the United States domestic jurisdiction reservation was valid with or without the words "as determined by the United States". Even in the absence of a domestic jurisdiction reservation, a State can always raise the plea of domestic jurisdiction before the Court both as a jurisdictional plea and as a defense on the merits.⁷⁶

Briggs therefore concludes his thoughtful analysis by saying:

To the extent that the United States peremptory type domestic jurisdiction reservation merely reserves disputes as to matters which by international law are within the domestic jurisdiction, the reservation is unnecessary. To the extent that it purports to substitute declarant State for the Court in determining aspects of the Court's jurisdiction it is ineffectual and invalid since, by its Statute, the Court has jurisdiction to decide disputes as to its jurisdiction in cases pending before it.⁷⁷

Attractive as appears to be the moderate construction of the so-called automatic reservation, there are reasons which militate against it. The judgment of the Court in the *Norwegian Loans* Case was considered as precluding the Court, unless it chooses to reverse itself, from reviewing the propriety of invoking the reservation.⁷⁸ The United States, in its pleadings in the *Interhandel* Case and in its final communication in the *Aerial Incident* Case, expressed the same view. The fact that under the reservation the matters need to be essentially and not exclusively within the domestic jurisdiction of the invoking state makes a judicial review, as noted above, particularly difficult and delicate.⁷⁹

The compatibility of the so-called automatic reservation with Article 36, paragraph 6, of the Statute is, of course, the crux of the matter, and the essential arguments for holding the reservation, if not the entire declaration of which it is a part, invalid, are based on whatever view one takes with respect to this conflict. There is a good deal of force in the proposition that the argument, according to which, even when a government avails itself of the reservation, it is the Court which makes the decision pursuant to Article 36, paragraph 6, is of a purely "verbal" or "dialectical character," for in substance it is the government and not the Court which makes the decision; the Court merely registers it.⁸⁰

It is true, of course, that in the *Nottebohm* Case the Court did not allow an "extrinsic fact," such as the lapse of the declaration subsequent to a seising of the Court, to deprive it of jurisdiction. However, the so-called automatic reservation is not an "extrinsic" but rather an "in-

⁷⁶ Briggs, 93 Hague Academy Recueil des Cours at 363 (1953).

⁷⁷ *Ibid.*

⁷⁸ Thus Judge Lauterpacht in his dissenting opinion in the *Interhandel* Case, [1959] I.C.J. Rep. 6, at 115. But see pp. 372 ff. above.

⁷⁹ Judge Lauterpacht, *ibid.* at 113; and see also Judge Lauterpacht's individual opinion in the *Norwegian Loans* Case, [1957] I.C.J. Rep. 9, at 42, 52.

⁸⁰ Judge Lauterpacht in the *Norwegian Loans* Case, at 47 f. But see p. 373 above.

trinsic" fact, for the reservation is built into and forms an integral part of the declaration of acceptance on which the jurisdiction rests. It cannot, therefore, be dismissed *a limine*. Moreover, while emphatically affirming its power to adjudicate on its own jurisdiction both by virtue of Article 36, paragraph 6, and of a rule of customary international law which would suffice even in the absence of the specific clause in its Statute, the Court also declared in the *Nottebohm* Case:

Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, *in the absence of any agreement to the contrary*, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. . . .

This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations.⁸¹

It is clear that the Court is a jealous guardian of its jurisdiction as established by the Statute and customary international law. However, the disturbing element is the restrictive clause: "in the absence of any agreement to the contrary," which may indicate that the power of the Court to decide on its own jurisdiction can be derogated by the will of the parties manifested, for instance, in the instruments conferring jurisdiction upon the Court. Now, the Court exercises compulsory jurisdiction in virtue of unilateral declarations made by states parties to the Statute pursuant to Article 36, paragraph 2. In any given dispute referred to the Court, the unilateral declarations of the parties constitute the conventional bond, the *vinculum juris*, on the basis and within the scope of which the Court exercises its judicial function in that dispute. In the event that the declarations are not identical in terms, the conventional or consensual basis is established at the level common to both declarations. This is so, as the Court repeatedly declared, by reason of the principle of reciprocity. Insofar as the Connally type of reservation is concerned, the Court applied this principle explicitly in the *Norwegian Loans* Case.

The question then must be faced, it is submitted, whether an agreement incorporating the Connally-type reservation in the juridical bond established between the parties to the dispute and conferring, within its limits, jurisdiction upon an arbitral tribunal or upon the Court is the sort of agreement the Court contemplated when it declared that, "in the absence of any agreement to the contrary," an international tribunal had the right

⁸¹ *Nottebohm Case* (Preliminary Objection), Judgment of Nov. 18, 1953, [1953] I.C.J. Rep. 111 at 119. Italics supplied.

to decide as to its own jurisdiction. In accordance with the Court's own statement, two hypotheses must be distinguished: in one, an ordinary tribunal of arbitration would be involved, whereas in the other, the Court itself. In the former case the powers of the tribunal, including the power to adjudicate pleas to its jurisdiction, would be governed by principles of general or customary international law. As stated by the Court and developed by doctrine,⁸² there is little doubt that under those principles the tribunal has that power. The parties may, however, stipulate to the contrary in the instrument establishing the tribunal, and if they did, there would be little doubt that the will of the parties would prevail over customary international law, since under that law the tribunal derives its powers from the consent of the parties. The opposite conclusion, that is, that the power of the tribunal to adjudicate its own competence must prevail over the will of the parties, could only be based on the notion of a hierarchy of norms. According to this, norms of a higher rank cannot be modified or set aside by the will of the parties. It must be conceded, however, that, attractive as it may appear, the theory of the hierarchy of norms, pursuant to which norms of a lower rank in the legal order cannot derogate from norms of a hierarchically superior rank is not, or at any rate is not yet, solidly established in state practice or accepted in doctrine. Any implicit or explicit proposition based on that theory would at this time appear to be debatable.

In the second hypothesis we confront the Court and a fundamental principle of the Statute, *i.e.*, of conventional international law rather than of customary international law. The question thus becomes one of the relationship between one conventional instrument, namely, the Charter of which the Statute is an integral part, and another but conflicting conventional instrument, namely, that resulting from unilateral declarations of acceptance of the compulsory jurisdiction of the Court. Conflicts between undertakings of a conventional character on the same plane or of the same order of rank are usually resolved by resort to generally accepted rules of construction, such as the rule of *lex specialis* or the rule of *lex posterior*. The application of either maxim would yield the result that the agreement resulting from the conflicting declarations of acceptance and the principle of reciprocity must prevail. At this point, however, there arises the further question, which must be considered, namely, whether the Statute is hierarchically superior to the will of the parties and therefore beyond their juridical capacity to stipulate clauses in contradiction with it, except, of course, in matters for which such faculty is explicitly provided, as in Article 36, paragraph 3. In this context Article 103 of the Charter is relevant,⁸³ and this provision, it is submitted, may well constitute the missing link in the juristic effort to remove the

⁸² See Georges Berlia, "Jurisprudence des Tribunaux Internationaux en ce qui concerne leur compétence," 88 Hague Academy Recueil des Cours 105-157 (1955, II).

⁸³ "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

road-block posed by the Connally-type reservation. Article 92 formally declares not merely that the Court "shall function in accordance with the annexed Statute,"⁸⁴ but also that the Statute "forms an integral part of the present Charter." The international agreement resulting from unilateral declarations of acceptance, one of which includes the Connally type of reservation, creates the obligation for one party to accept as valid the exercise of the unilateral right by the other to determine the subject matter of the dispute as falling essentially within its domestic jurisdiction. Such an obligation, pursuant to Article 103, cannot prevail over the obligation of Members resulting from Article 36, paragraph 6, which is to be regarded as one of "their obligations under the present Charter." On the contrary, the obligation under the present Charter, that is, the obligation to let the Court decide upon its jurisdiction with binding effect for the parties, must be deemed superior to the conflicting obligation to accept the adverse party's determination "under any other agreement." Article 103 does not speak of the validity or invalidity of obligations in conflict with the Charter; it merely provides a practical rule of thumb for choosing the obligations which shall prevail in a given situation, those under the Charter, including the Statute of the Court, or those stipulated by the parties.

It must be admitted that the legal import and range of Article 103 of the Charter has never been judicially tested, and although it may offer a practical and convenient solution of the intractable problem posed by the Connally type of reservation, the line of reasoning developed above may not commend itself to the Court. The Court has usually shown respect for the sovereignty of states, but the Court has also considered itself as guardian of the system of compulsory jurisdiction.

Reliance on Article 103 of the Charter in order to safeguard the integrity of Article 36 would require an acknowledgment of the hierarchy of norms, at least for Members of the United Nations, and the resultant limitation upon their sovereignty. The Connally type of reservation, it is submitted, could hardly stand up to the test of Article 103. It may be neither surprising nor improper to suggest that states assumed certain limitations upon their sovereignty by joining the United Nations on condition of accepting, under Article 4, paragraph 1, "the obligations contained in the present Charter." One of these obligations, and a very elementary one at that, is to let the Court decide controversies relating to its jurisdiction. As indicated above, the Court would and should be spared the invidious task of having to declare the Connally type of reservation invalid. By invoking Article 103 of the Charter, the Court would need only to find that there existed a conflict and that the prior and superior principle of Article 36, paragraph 6, of the Statute shall prevail.

In conclusion one might observe that, if it is undesirable to introduce a veto into the Security Council of the United Nations, one of its principal

⁸⁴ The resulting duty of the Court, under Article 92, was noted by Judge Lauterpacht in the *Norwegian Loans Case*, 1954, I.C.J. 4, and Judge Klaestad in the *Interhandel Case*, loc. cit. 1959, I.C.J. 9.

organs, which the Soviet Union attempted to do by means of its "troika" proposal, it would appear even more undesirable for the United States to insist upon introducing a veto into the application of the system of compulsory jurisdiction administered by the Court, which is another principal organ of the United Nations.⁸⁵

⁸⁵ Said Judge Lauterpacht: "If thus practically every matter can be plausibly, though not necessarily accurately, described as a matter essentially within the domestic jurisdiction of the State concerned and if that State is the sole judge of the question, it is clear that, as the result, the element of legal obligation is reduced to a vanishing point." Case of Certain Norwegian Loans, Judgment of July 6, 1957, [1957] I.C.J. Rep. 9, at 52. Preuss, *loc. cit.* at 729, had already observed: "The effect of the Connally Amendment is to give the United States a veto upon the jurisdiction of the Court after a dispute has been referred to it by an applicant state."

RÔLE OF THE "NEW" ASIAN-AFRICAN COUNTRIES IN THE PRESENT INTERNATIONAL LEGAL ORDER *

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The establishment of an effective rule of law in the international society, we have been told time and again, is the only way to save the world from the danger of its plunging into the holocaust of an atomic-missile war which, if it ever comes, will mean an over-all destruction. But while the ideal is admitted, the difficulties of its achievement must not be underestimated. The road toward the sort of world legal order to which we all aspire is seriously blocked. Among the many problems that lie ahead, two are of unusual importance: first, the problem of building an acceptable legal order in the absence of a true universal community having similar political and social values and interests; and secondly, the problem of making greater use of legal methods in the settlement of international disputes.

I

The present body of international rules applicable between states, so-called international law, was developed among the Western European countries during the last four centuries and is basically the outcome of, or is dominated by, their influence. Though in the beginning these rules, derived from the principles of *Jus Naturale* and *Jus Gentium* of the Roman legal system, were thought to be applicable between all the countries of the world, during the nineteenth century there developed a spirit of provincialism in Europe. Thus, while the fathers of modern international law, Vitoria, Suárez, Gentili, Grotius, Pufendorf, Bynkershoek, Wolff and Vattel, conceived of it as a universal system, leading writers of the last century and the early years of the present century, such as Wheaton, Phillimore, Hall, Oppenheim, Fauchille, Westlake and others, declared it to be applicable only between the European Powers.¹ In order to bring other countries under its sway, they were required to be formally admitted to this closed group. Thus Hall said:

. . . as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized, such states only can be presumed to be subject to it as are inheritors of that civilization. They had lived,

* The author gratefully acknowledges the assistance of the Rockefeller Foundation, which granted him a fellowship in 1960-1961 for doing research on the International Court of Justice and confidence among states.

¹ C. W. Jenks, *Common Law of Mankind* 66-74 (1958).

and are living, under law, and a positive act of withdrawal would be required to free them from its restraints. But states outside European civilization must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconception.²

The views of other writers are also more or less the same and there is difference only in degree of emphasis. Professor (now Judge) Jessup has rightly defined this earlier international society as "a selective community with a provincial outlook" into which "the Islamic, much less the Hindu and Buddhist, worlds were not admitted. The Western Hemisphere (including what is now the United States) had only colonial membership."³

After 1776 the American countries one by one attained their independence, and, being of the same kith and kin as their former masters, eventually took their place in the community of nations, despite the Holy Alliance.⁴ It was in 1856 that an oriental country, Turkey, was for the first time formally admitted to the club by the Treaty of Paris; and later China and Japan were forced in against their wills. At the First Hague Peace Conference in 1899 five Asian states, with age-old traditions, Turkey, China, Japan, Persia and Siam, took part in a major international conference for the first time. At the Second Hague Conference in 1907, Latin American Republics, which had thrown off the yoke of colonialism, played a significant rôle on the international stage. After the First World War, the Covenant of the League of Nations represented the first attempt to organize on a constitutional basis a universal family of nations. But though the League gave the first opportunity to countries such as Iraq and Egypt of appearing on the modern international stage, and was increasingly concerned with some extra-European issues, its center of gravity throughout its existence continued to remain in Western Europe.⁵

After the Second World War, in 1945, when a second effort was made to establish a universal world order, the whole balance of forces had changed. The United Nations reflects this revolutionary change on the international scene. We have, for the first time in history, a general international organization which, for all practical purposes, is of a world-wide character. With the emergence and participation of Asian-African countries, international society has become a true world society with already more than a hundred members, and some more coming in.

As we have said earlier, the present international law was developed during the last four centuries and specially consolidated and systematized during the last part of the nineteenth and the beginning of the present century. Asian and African countries had very little to do with it because

² W. E. Hall, *A Treatise on International Law* 40 (7th ed., 1917).

³ P. C. Jessup, *The Use of International Law* (The Thomas M. Cooley Lectures at the University of Michigan Law School) 20 (1959).

⁴ P. C. Jessup, *ibid.* 21.

⁵ Jenks, *op. cit.* note 1, pp. 62-63.

they were conquered and colonized and made to serve merely the interests of the metropolitan states and their masters. Though it can hardly be denied that there were certain well-developed principles of inter-state conduct in ancient countries, such as India, China, Egypt and Assyria,⁶ which had quite advanced forms of civilization, there does not seem to be any connection between those principles and the international law now in force. There is, it is true, a certain degree of parallelism between certain institutions familiar to the earlier world and corresponding institutions of our own times, such as diplomatic envoys and their immunities, certain treaty relationships, distinction between combatants and non-combatants in a war, and so on, but they have left no trace of continuity in history. Perhaps it might be approaching the truth to say that the necessities of intercourse between nations provoked a somewhat similar response, however widely the concomitant circumstances differed.⁷ Therefore, though as a science international law can be traced back several centuries, it was only the sixteenth century which witnessed the birth of modern international law, and the Asian countries, in spite of their rich heritage, were unable to contribute anything to its development because of their subordinate positions.

But even in Europe the small countries existing at that time did not participate very actively in this process. It is only natural that the participation of the smaller and less developed countries in international affairs should be less active. Accordingly, their contribution to the formulation of general practice, and hence customary law, is considerably more limited. Apart from this, the political mechanics of the nineteenth century and the methods of creating international law based on the order resulting from the Congress of Vienna, on the doctrine of the balance of power, and on the recognized supremacy of the states that formed the European Concert, naturally resulted in according a comparatively minor rôle to the smaller states. Sometimes, when the interests of the great Powers did not fully coincide, as, for instance, in the case of the law of the sea, the principles that came to be formulated did not run directly counter to the aspirations of the small states, but neither did they reflect their future needs fully.⁸

In some other fields, however, the rules appear to have been conceived and formulated specifically to suit the interests of the great Powers. Such is, for instance, the system of capitulations, under which certain states were compelled to accord to aliens privileges that put them beyond the realm of law and outside the jurisdiction of the territorial state, a position which was no longer tolerable when it became the ambition of the state's own nationals to enjoy equality of rights with aliens.¹ So also in

⁶ G. S. Pathak, Welcome Address, 1 Indian Journal of Int. Law 4 (1960); Jawaharlal Nehru, *ibid.* 6.

⁷ J. H. W. Verzijl, "Western European Influence on the Foundation of International Law," 1 Int. Relations 41 (1955).

⁸ Jorge Castañeda, "The Underdeveloped Nations and the Development of International Law," 15 Int. Organization 38 (Winter, 1961).

the vast body of law relating to the responsibility of states, the rules now in force

were established, not merely without reference to small states but against them, and were based almost entirely on the unequal relations between great Powers and small states.⁹

Dr. Luis Padilla Nervo, Mexican member of the International Law Commission, commented in this connection:

Such inequality of strength was reflected in an inequality of rights, the vital principle of international law, *par in parem non habet imperium*, being completely disregarded.

Continuing, he said:

As a corollary to that state of affairs . . . in international law an unbridled positivism had reigned supreme, whose sole criterion was the practice of states, and in the nineteenth century that meant the practice of great Powers. Once international lawyers had abandoned the criterion of justice in assessing the conduct of states and reduced the systematization of law to a catalogue of the practice of states, it was hardly surprising that the doctrine of state responsibility became a legal cloak for the imperialist interests of the international oligarchy during the nineteenth century and the beginning of the twentieth.¹⁰

Many actions of the European imperialistic Powers and many of their acquired rights which, in the opinion of numerous European authors, are still valid, have come to be challenged according to the law as it was in force even at the time when those actions were committed and those rights acquired. Thus it has been argued that

Despite the fact, then, that the extension of colonial rule proceeded by force of arms, or more often by treaties of cession with native chiefs, the international lawyers were compelled to conclude that all the relevant legal acts were nullities.¹¹

When the European Powers arrived in India, for instance, they had to deal with organized political bodies whose legal conceptions facilitated the immediate establishment of mutual relations. They did not find themselves in an area of lawlessness, but rather were confronted with a *sui generis* family of nations extending all over Asia. Its public and private law might differ from that prevailing in Europe, but it was based on the same principles of justice. International law applied to the relations between the East and West in the sixteenth century and later was a law of reciprocity which accepted the sovereignty of Indian and Asian rulers and communities. Not only Grotius but also Pufendorf, Vattel and other classical writers testified to this state of affairs. It was only after the establishment of Western colonial rule in Asia that writers on inter-

⁹ Luis Padilla Nervo, 1957 I.L.C. Yearbook (I) 155.

¹⁰ *Ibid.*

¹¹ D. P. O'Connell, "International Law and Boundary Disputes," 1960 Proceedings, American Society of International Law 81.

national law began to deny sovereignty to these rulers and communities. Following the views of the positivists as opposed to naturalists, the late nineteenth-century English authors argued that uncivilized peoples had no capacity in international law. This led to the characterization of their territories as *terrae nullius*. But these views, even if accepted, could not have any retroactive effect. The classic law on the matter had been clear beyond doubt.¹²

The English doctrine of act of state was also perhaps inspired by the view that the Crown's legal transactions with "uncivilized" peoples were above and beyond the law. According to Professor O'Connell,

It is not only a typical piece of the late 19th-century arrogance, this denial of juristic capacity in native chiefs, but it leads to the absurd and morally reprehensible conclusion that the colonial authorities, having gone through the motions of good faith, could then without a pang of conscience tear up their solemn legal acts as being void.¹³

These acts of the colonizing Powers came to be recognized on the basis of actual physical control and the rule of effectiveness.¹⁴

The trend described above does not, of course, manifest itself throughout the entire field of international law. But there are still numerous instances that reflect such an unequal state of affairs. It is not, therefore, surprising to find that states that were victims of such an unequal position, and were passive objects of these rules of international law, often give the impression that they rebel against their application. Sometimes this rebelliousness is direct and quite apparent, as in the case of populations that aspire to full international personality and resort to force to liquidate an ancient protectorate, a situation, though sanctioned by international law, that is not in consonance with present political, social and economic conditions. In other cases the resistance may assume indirect forms, such as the refusal of a country to accept the jurisdiction of the International Court of Justice.

But though some rules of international law have come to be challenged in a few places by the "new" states, they are only those which are not consistent with the new international order. What is stressed is the need for international law to be responsive to the needs of the new factual situations to which it is being applied. It is pointed out that international law should reflect a consensus of the entire world community, including the new emerging states. If this is not the case, the rules of law would necessarily appear antiquated, and would furnish an insufficient basis upon which to apply legal principles to the solution of international problems.¹⁵ It is, therefore, said that unjustified and harmful political considerations should be eliminated and the law should be modified so as to

¹² C. H. Alexandrowicz-Alexander, "Grotius and India," 3 *Indian Year Book of Int. Affairs* 363-367 (1954); "The Discriminatory Clause in South East Asian Treaties in Seventeenth and Eighteenth Centuries," 6 *ibid.* 126 ff. (1957).

¹³ D. P. O'Connell, *loc. cit.* 81.

¹⁴ *Ibid.* 82.

¹⁵ George M. Abi-Saab, "The Newly Independent States and the Scope of Domestic Jurisdiction," 1960 *Proceedings, American Society of International Law* 84-90, 99-101.

reflect the essential principles of the United Nations Charter.)) As Mr. C. W. Jenks has said in his recent most informative and thought-provoking book, *The Common Law of Mankind*:

It is not the primary function of international law in the second half of the twentieth century to protect vested interests arising out of an international distribution of political and economic power which has irrevocably changed, but to adjust conflicting interests on a basis which contemporary opinion regards as sufficiently reasonable to be entitled to the organized support of a universal community.¹⁶

There is, it is pointed out, a need to "replace the cold and naked positivism that had presided over the formulation of existing rules by an imaginative innovation based on the new values and needs of the contemporary world."¹⁷

Referring to this very problem, Dr. R. B. Pal, the Indian member of the International Law Commission, said that

... international law was no longer the almost exclusive preserve of the peoples of European blood, "by whose consent it exists and for the settlement of whose differences it is applied or at least invoked." Now that international law must be regarded as embracing other peoples, it clearly required their consent no less.¹⁸

✓ This does not, however, mean that the "new" Asian-African countries are not prepared to accept the whole body of present international law. International law has in fact come to be accepted by these countries except where it is still found to support past colonial rights or is clearly inequitable by the present standards of civilization. The occasional outbursts against the present system of international law and demand for its adaptation to present-day conditions reflect only protests against these inequities.¹⁹ There is never any plea for its over-all rejection.²⁰ The "new" countries have come to accept international law as such and they always plead their cases according to its rules.²¹ They in fact claim to be "scrupulous" adherents to it.²² They believe it acts as a protection for them because they are the weaker members of international society.

✓ It is perhaps not correct to say that the Oriental countries do not

¹⁶ C. W. Jenks, *Common Law of Mankind* 85 (London, 1958).

¹⁷ Padilla Nervo, *loc. cit.* note 9, p. 155; El Erian, *ibid.* 161; Faris Bey El Khouri, *ibid.* 169.

¹⁸ 1957 I.L.C. Yearbook (I) 158.

¹⁹ Raj Krishna, "Crisis in International Law," *National Herald* (Lucknow), April 29, 1957, quoted by Quincy Wright, "The Influence of the New Nations of Asia and Africa upon International Law," 7 *Foreign Affairs Reports* 39, footnote (1958).

²⁰ Hafez Ghaneim, "The Asian-African Legal Consultative Committee—1958," 14 *Revue Egyptienne de Droit International* 63 ff. (1958).

²¹ P. C. Jessup, *op. cit.* note 3, p. 27. One may argue that once they commit themselves to these rules of international law by interpreting the rules in their own favor, the principle of estoppel applies. They cannot later claim not to be equally bound by these rules.

²² V. K. Krishna Menon, "Statement in Lok Sabha on Withdrawal of Kashmir Case from U. N.," 4 *Foreign Affairs Record* 100 (1960).

accept the present system of international law because it was developed by Western Christian civilization and is not in accord with their cultures and philosophies.²³ Having achieved independence and emerged as members of the international community in this modern age, these countries cannot afford to live on the ideas of the past. Their problems had already been determined for them. In today's shrunken world the peoples of Asia and Africa cannot regard themselves as separate or distinct from the rest of the world. Their problems, their fortunes, and their destinies are inevitably bound up with the rest of the world. Being rightly proud of their rich heritages and glorious cultures, these peoples are already engaged in fashioning a mode of life which should be a synthesis of Western civilization, with all its progress and advancement, and their own cultural heritages.²⁴ There have already been such revolutionary changes in their social lives as to "make the period before the Second World War look like a forgotten *ancien régime*."²⁵

Moreover, the protest against some rules of international law is not confined to Asian and African states. We find that even the Latin American countries, which have the same cultural, social and religious heritage as the European countries—in other words, which are part of the same Western Christian civilization, have challenged the present system of international law in a number of places. Thus we have seen earlier a statement by the Mexican member of the International Law Commission. The Calvo and Drago doctrines that emerged from the Latin American countries are also challenges to the traditional international law which is against the interests of debtor states. Even today we find some of these countries trying hard to change international law in order to make it more equitable.²⁶ It is not strange to find that some of the smaller European countries, which find the traditional law inimical to their interests,

²³ At least it requires a lot of further research to prove that the basic principles underlying the legal systems of the Eastern countries are different from those of the Western countries. So far, the studies carried on in this field show that the fundamental principles underlying different legal systems are all in harmony with each other. Speaking about Hindu law, for example, Professor Harrop A. Freeman of Cornell University says: "Hindu jurisprudence is not 'ideologically different' from our own." He further asserts: "... there is no eastern or western philosophy and no eastern or western law." 8 Indian Year Book of Int. Affairs 182, 213-214 (1959); see also Arthur Larson, "World Rule of Law: An Idea Whose Time Has Come," Danforth Foundation Project Lectures, 1959-1960, Lecture No. 3, pp. 1-11; "Arms Control Through World Law," *Daedalus* 10, 44-45 (1960); Jenks, *op. cit.* note 1, Ch. 2.

²⁴ You Chan Yang (Korean Ambassador to the U. S. A.), "Possible Permanent Cleavages in Asia," 318 *Annals of the American Academy of Political and Social Science* 97 ff. (1958); Mohammad Ali (Pakistan Ambassador to the U. S. A.), "Factors Looking to Eastern World Leadership," *ibid.* 132 ff.

²⁵ K. M. Panikkar, "The Afro-Asian States and Their Problems 12-14 (New York, 1959).

²⁶ Thus in a long-standing dispute between Great Britain and Guatemala over the territory of Belize, the former wants to take it before the International Court so that the controversy might be resolved according to international law. Guatemala rejects the offer but is prepared to submit the dispute to the Court to be decided *ex aequo et bono*, which Britain is not in a mood to accept. J. Castañeda, *loc. cit.* note 8, pp. 41-42.

have also not failed to challenge it and demand its modification. Such, for instance, is the case of the English fisheries off the coast of Iceland.²⁷

II

The whole attitude of the "new" countries could be summarized in the liquidation of imperialism in its widest meaning, with all its political, military, economic and psychological implications. They want to change the *status quo*, and are striving to restructure their societies and the international society to reach a more equitable situation in which they can share the blessings of modern civilization on an equal footing. They want to modify some of the nineteenth-century conceptions of international law to bring them into conformity with the principles of the United Nations Charter.²⁸

There is no doubt that the wave of nationalism in the new and under-developed states has led them sometimes to take excessive and perhaps unreasonable positions against the colonial Powers. The present division of the world into two power blocs, when even limited use of force as a matter of self-help is prohibited and has become very difficult in view of the danger of its developing into general and atomic war, helps them to maintain their positions without much fear from the power of big states.²⁹ But we find that older Powers have also failed to give adequate even-handed support to international law. The Suez affair is a case in point.³⁰ The latter case shows that the present international atmosphere has created a situation in which there is a balance of conflicting interests favorable to the development of international law. After all, the problem

²⁷ In 1948 Iceland put into effect a system of straight base lines around the island, from which the breadth of its territorial waters was to be measured. In 1958 it extended its exclusive fisheries jurisdiction out to a distance of twelve miles from the above-mentioned base lines. Great Britain, not recognizing Iceland's right to take these measures, proposed that the matter be taken before the International Court of Justice. Iceland did not agree to take the dispute to the Court and resolve it in accordance with the international law in force, and was trying, in its turn, to achieve in international conferences the recognition of a new general rule that would vindicate its stand in the dispute. See Castañeda, *ibid.* 42. Recently the dispute has been settled through an agreement whereby the United Kingdom, recognizing the dependence of Iceland's economy on fish and fish products, has agreed not to object to the twelve-mile fishing zone around Iceland, to be measured from new base lines redrawn in Iceland's favor, running from headland to headland instead of following the indentions of the coast. In return, Iceland, for a transitional period of three years, has agreed to admit British vessels in certain parts of a six- to twelve-mile zone at certain times of the year. It is interesting to note that Iceland is resolved to extend her fisheries jurisdiction still further, but has agreed to give six months' notice before claiming any such extension and has also agreed, in case of a dispute in relation to such extension, to refer the matter to the International Court of Justice. New York Times, Feb. 28, 1961, p. 10; see also D. H. N. Johnson, "The Anglo-Icelandic Agreement of March 11, 1961," 10 Int. and Comp. Law Q. 592-594 (1961).

²⁸ George M. Abi-Saab, *loc. cit.* note 15, p. 90.

²⁹ Julius Stone, "The Rule of Law in the Relations of States," Unpublished John Field Simms Memorial Lecture delivered at the University of New Mexico, April, 1959.

³⁰ Jessup, *The Use of International Law* 15, 28, 183-184 (1959).

is no longer a new one. International law has never remained static.³¹ As is well known, the problem's first important manifestation was when the new Latin American states challenged much of the then existing legal order at the Hague Conference of 1907. It is clear that the Latin American contribution to international law has added greatly to its strength, vigor and authority.³² There is every reason to hope that the more recent challenges to existing international law will have a similar effect, and that adjustments registered in agreed law will result.

This, however, does not mean that there is a need for any radical change in international law. This, by its very nature, is bound to be a slow process. Fundamentally, the interests of the smaller states are equally tied to international law, even though for a time they may be able to benefit by rivalries in the "cold war." They will have to check their surging nationalism by a sense of responsibility and self-restraint. Similarly, strong states will have to look into the future and forego "the imagined momentary advantage of employing a superior force to safeguard investments, to suppress ineradicable yearning for freedom, to vindicate rights, to bolster waning prestige." As it has rightly been said, "lost causes cannot be won by obsolete political weapons."³³ They will have to be prepared to see modifications of some of the old orthodoxies. Development of the law may first seem to make it less, rather than more, certain, for it is not unlike metal being reshaped for a new purpose, and may have to be softened before it can be reshaped and hardened.³⁴ But that, it is felt, is the first step to make the present legal order more acceptable.

III

Now we come to the second problem of making greater use of legal methods in the settlement of international disputes. One of the basic foundations of a civilized order is a system of courts with jurisdiction to decide any disputes that might arise. In fact the rule of law parallels the growth of civilization. But law today stops short at international disputes. As is well recognized, no state can, without its consent, be compelled to submit its disputes with other states either to mediation, to arbitration or to any other kind of pacific settlement.³⁵ States have all along been extremely reluctant to end this habit of being their own judges. Thus, after centuries of protracted struggle, when a permanent court came to be established in the international field in 1920, compulsory jurisdiction could not be conferred on it. Both in 1920, when the Statute of the Permanent Court of International Justice was drafted, and again in 1945 when it came to be revised and changed by the Statute of the International Court of Justice, the great Powers blocked the way to the ideal of a powerful Court. Instead, the conferment of such a jurisdiction was

³¹ Quincy Wright, *loc. cit.* note 19, pp. 33-39.

³² R. Y. Jennings, *The Progress of International Law* 44-45 (Cambridge, 1960).

³³ Jessup, *op. cit.* note 30, pp. 153-154. ³⁴ Jennings, *op. cit.* note 32, pp. 47-48.

³⁵ *Eastern Carelia Case*, 1 Hudson, *World Court Reports* 204.

made optional by Article 36, paragraph 2, of the Statute of the Court.³⁶ During the life of the Permanent Court, at certain times as many as 41 states were bound by the Optional Clause provision of the Statute,³⁷ of course with a number of reservations which in fact curbed to a considerable extent the scope of the compulsory jurisdiction of the Court. Although there was a great enthusiasm among the states at the San Francisco Conference in 1945 for conferring compulsory jurisdiction on the Court, and although international society has come to be considerably broadened with the emergence of so many new states, we find that there are only 38 states at present bound by this provision of the Statute. Not only that, but their declarations have been riddled with such damaging and unprecedented reservations that many of them can be regarded as negligible and confer jurisdiction on the Court in name only.³⁸ Of these 38 states, many of which have, after all, though half-heartedly, accepted the jurisdiction of the Court, there are 12 West European, 9 Latin American, 8 Asian, 3 African, the United States, Israel and the four older British Dominions—Canada, Australia, South Africa, and New Zealand. Conspicuous by their absence are the states of the Soviet group.

Moreover, up to now the International Court has been the most unused, though still the most promising, instrumentality there is for peace. During about 16 years of its existence, it has decided only 19 cases and given 11 advisory opinions.³⁹ But with the little work it has been given to do, it has proved its worth and has been the subject of general and well-merited praise. Apart from an extensive body of case law, which is evidence of existing international law of the highest value, the Court, by adopting a policy of progressive realism, has become one of the chief instrumentalities for the gradual development and growth of international law. Moreover, by and large, the judgments of the two courts give them "a reasonable claim to be included among tribunals of 'acknowledged' impartiality."⁴⁰ It is significant that, although the reaction of a number of people untrained in international law and unfamiliar with the Court or its jurisprudence has been adverse,⁴¹ the most competent professional

³⁶ See Report of the Rapporteur of Committee IV/1, 18 U.N.O.I.O. Docs. 382-384 (San Francisco, 1945); M. O. Hudson, "The New World Court," 24 *Foreign Affairs* 83 (1945).

³⁷ M. O. Hudson, *International Tribunals, Past and Future* 76 (1944).

³⁸ C. H. M. Waldock, "Decline of the Optional Clause," 82 *Brit. Yr. Bk. of Int. Law* 244 ff. (1955-1956); H. W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice," 93 *Hague Academy Recueil des Cours* 229 ff. (1958, I).

³⁹ 1960-1961 I.C.J. Yearbook 43-81.

⁴⁰ Jessup, *The Use of International Law* 120 (1959). According to William Samore, "... sweeping allegations or 'historical' statements to the contrary, the scales of justice at the international level have generally been balanced with as pleasing a degree of impartiality as ever graced an American courthouse." "National Origins vs. Impartial Decisions: A Study of World Court Holdings," 34 *Chicago-Kent Law Rev.* 194 (1956).

⁴¹ See *Compulsory Jurisdiction, International Court of Justice. Hearings before the Committee on Foreign Relations, U. S. Senate, 86th Cong., 2nd Sess. on S. Res. 94, Jan. 27 and Feb. 17, 1960,*

opinion finds no reason for lack of confidence in the personnel or the integrity of the Court or in the predictability of its jurisprudence.⁴² It seems, therefore, that distrust of the competence and impartiality of the International Court of Justice is hardly the reason why governments do not submit more cases to that tribunal.⁴³ It may also be safely said that, although minor shortcomings or flaws from one point of view or another may be found to exist in the Statute of the Court, they are not of such proportions as to explain the relatively insignificant part of the Court in world affairs.⁴⁴

The question, therefore, which requires to be answered is: Why are states reluctant to recognize the jurisdiction of the Court, whether generally or for the purpose of a particular dispute? But as the answer to this question depends on an analysis of the motives of governments, it is not possible to give a definite answer, since sources of information on such motives do not flow freely. The answer, therefore, must be in the nature of certain hypotheses, based on whatever observable facts are available, but constantly subject to verification and correction in the light of new facts. It is an interesting study, but because of our self-imposed limits, we shall concentrate here on the attitude of Asian-African countries which have recently emerged and become independent participants in international affairs.

Comparatively few Asian and African countries have accepted the compulsory jurisdiction of the International Court of Justice under the optional provision of its Statute,⁴⁵ and, as the record shows, these countries have generally been reluctant to go before the Court for the settlement of their disputes⁴⁶ in the short time that most of them have been independent. Western scholars have given different reasons for their general apathy towards the Court and propounded some theories about their general reluctance to submit to any third-party judgment.

IV

Thus, according to Professor Northrop, because of the intuitive philosophy and religion of Asia, whether Confucian, Gandhian Hindu or Buddhist, the Asians are against the use of codes and litigation. There

⁴² H. W. Briggs, "Confidence, Apprehension and the International Court of Justice," 1960 Proceedings, American Society of International Law 26-27.

⁴³ Jessup, *op. cit.* note 40, p. 124.

⁴⁴ Max Sørensen, "The International Court of Justice: Its Role in Contemporary International Relations," 14 Int. Organization 272 (Spring, 1960).

⁴⁵ Thus, out of 24 Asian and 28 African states Members of the U.N., 9 Asian (including Israel) and 4 African (including South Africa) states have accepted the compulsory jurisdiction of the International Court of Justice under the Optional Clause of its Statute. 1960-1961 I.C.J. Yearbook 195 ff.

⁴⁶ Out of the 33 contentious cases submitted to the Court they have been parties in five cases. In four cases (Anglo-Iranian Oil Co., "Electricité de Beyrouth" Co., Right of Passage over Indian Territory, and Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-orient) they have appeared as defendant states against European countries; in one case (Temple of Preah Vihear) both the parties (Cambodia and Thailand) are Asian states.

is a traditional Asian theory, Professor Northrop tells us, that all definite, determinate things are transitory. And from this transitoriness of all determinate things, the Asian draws a far-reaching moral implication

that any rule built out of determinate meanings, whether it be a rule of law for society, a rule of personal conduct or a rule of religion, must by the very nature of the meaning of its terms, be something that cannot hold at all times for all men under all circumstances.

The Asian, therefore, believes that to use determinate rules to settle disputes between men, regardless of time, place, person or circumstance, is to act immorally. Hence they should be compromised through mediation between the disputants.⁴⁷

Speaking about India and Gandhi's ideal of peace, which he draws from the *Bhagavadgita* and its doctrine of non-attachment, Professor Northrop refers to the characteristics of *Brahman* or God as explained in the *Gita* and which is declared and regarded as the ideal for every Hindu to attain. *Brahman* has been explained as inexhaustible supreme self, being without beginning and without qualities, without form, without a name and which cannot be told. In short, says Professor Northrop,

the absolute "principle" for which one would dedicate his life is not a principle at all since it cannot be expressed in words or laws, being formless, without any qualities or predicates.

Conversely, he argues,

anything that can be said or expressed in terms of a definite code or law is uncertain, referring only to the qualities and things which are transient. Hence, laws cannot be the basis for settling disputes except as a last resort with men who are unreasonable.

On the other hand trust must be put in the intuitively felt formlessness which is *Brahman*. From this standpoint to appeal to law is merely to insist on the transitory, determinate rights and differences, thereby increasing discord and conflict rather than removing it.⁴⁸

This emphasis upon mediation rather than legal codes and litigation for the settlement of disputes, says Professor Northrop, is also common in pre-Western Confucian China⁴⁹ and Buddhist Thailand.⁵⁰ It does not mean that these countries do not have codes. They do. But the attitude toward them is different from that of the West. They want to avoid them. The code is regarded as an evil to be used as a last resort for settling disputes between immoral men when the moral way to the settling of disputes by intuitive feeling and mediation fails.⁵¹

Contrary to this attitude of the Asian countries, for Islam, as for the West, justice consists in governing individual persons and disputes under codes, commandments or rules which are assumed to be universal and which

⁴⁷ F.S.O. Northrop, *Taming of the Nations* 80-81 (New York, 1952); see also his *Philosophical Anthropology and Practical Politics* 160-168 (1960).

⁴⁸ Northrop, *Taming of the Nations* 63-64 (New York, 1952).

⁴⁹ *Ibid.* 124-125.

⁵⁰ *Ibid.* 126.

⁵¹ *Ibid.* 61-62.

make all men equal before the law.⁵² This difference centers in the fact that the Asian tends to conceive of the Divine and what is common to all men as indeterminate or formless, whereas Islam and the West regard it as determinate or fixed.⁵³

Professor Quincy Wright also supports this thesis of Professor Northrop. According to him, in China particularly,

but in the Orient generally, there has been a preference to settle disputes by negotiation, mediation or conciliation rather than by courts applying positive law. The Orient has preferred government by good men applying intuitions of justice to the facts rather than government by law, that is government by magistrates bound by rules making for certainty and predictability in decisions.⁵⁴

(The Asian nations, Professor Wright says, regard law as a body of ethical and political principles rather than as a logical system of rules to be applied for the solution of disputes and the conduct of relations. Because of these traditions, he thinks, the Eastern states favor the flexibility of negotiation and conciliation, rather than the certainty of the rule of law, to deal with differences. This explains their preference for negotiation or conciliation for the settlement of their international disputes rather than adjudication and application of positive international law. In fact it is the very essence of Asian philosophy that inconsistency and conflict are a condition of existence not to be resolved by logical deductions from legal principles, but to be dealt with by compromises or synthesis in a higher frame of reference.⁵⁵

This writer knows little about Chinese philosophy and thinking and it may be, as Lin Yutang, Francis S. F. Liu and Chiang Monlin have also said, that Chinese are generally reluctant to go before the law, and prefer their disputes to be compromised and settled between themselves.⁵⁶ It may be due to peculiar Chinese thinking and philosophy. But, apart from the fact that great changes have already come in Asian thinking and practice after their contact with Western civilization, it must be admitted that, due to geographical and other factors, Asian peoples exhibit great diversities, not only in their ways of life, but even in their thinking and practice.⁵⁷ This writer shall, therefore, concentrate on Indian philosophy and thought, on which Professor Northrop relies so much for explaining this peculiar attitude of the Asians.

The basic Asian idea on which Professor Northrop bases his theory is the transitoriness of all determinate things and the consequent doctrine of non-attachment with this transitory world. As explained in the *Gita* and understood in Hindu thought, this theory is an attempt to solve the

⁵² *Ibid.* 71.

⁵³ *Ibid.* 81.

⁵⁴ Quincy Wright, "The Influence of the New Nations of Asia and Africa upon International Law," 7 *Foreign Affairs Reports* 38 (1958).

⁵⁵ Wright, "Asian Experience and International Law," 1 *Int. Studies* 84-86 (1959-1960); see also his *Diplomatic Machinery in the Pacific Area* 11, 13, 14 (New York, 1936).

⁵⁶ Quoted by Northrop, *Taming of the Nations*, Ch. 7 (1952).

⁵⁷ Quincy Wright, "Asian Experience and International Law," *loc. cit.* note 55, p. 71.

mystery of the relation of God to the world. The greatest thinkers of the East, as well as those of the West, admit this mystery.⁵⁸ This, however, does not mean that worldly relationships should be ignored, because they have their purpose. To behave as if they do not exist simply because they do not persist is to court disaster. The eternal is manifested in the temporal, and the latter is the pathway to the former. Renunciation or non-attachment is the feeling of detachment from the finite as finite, and attachment to the finite as the embodiment of the infinite. The two are bound to each other, and to separate them is ruinous.⁵⁹ The Hindus, therefore, enforce a strict code of conduct according to *dharma*, which is right conduct. Every form of life, every group of men has its *dharma*, which is the law of its being.

The theory of *Karma*, as depicted in the *Gita*, recognizes the rule of law not only in worldly affairs, but also in the world of mind and morals. Every act, every thought is weighed in the invisible but universal balance scales of justice according to Divine law. The day of judgment is not in some remote future, but here and now, and none can escape it. Divine laws cannot be evaded. We carry with us the whole of our past. It is an ineffaceable record which time cannot blur nor death erase. As we have to attain our own perfections by our actions, we must perform our duties. A breach of duty is, therefore, not so much a defiance of God as a denial of soul, not so much a violation of law as a betrayal of self. Spiritual growth and experience are governed by laws similar to those which rule the rest of the universe.⁶⁰

Thus we find that, contrary to what Professor Northrop told us, the philosophy of *Gita* enjoins a strict rule of law and teaches everybody to do his worldly duties in order to reach his ideal. Whatever a person does, he must be ready for its consequences. Guilt cannot be transferred and there is no question of compromise.

The description of God as formless, without beginning, without end, and an inexhaustible supreme self, is an attempt to explain the reality behind all this world, which Hindus believe is unknown and perhaps unknowable.⁶¹ We feel there is an absolute reality, we know that there is the empirical world; we think that the empirical world rests on the absolute, but the *how* of it is beyond our knowledge. It is an incomprehensible mystery which Hindus call *Maya*.⁶² But no theory has ever asserted that life is a dream and all experienced events are illusions.⁶³

It is impossible for an Asian to interpret or understand, as Professor Northrop does, that, because God cannot be expressed in words, being formless, without any qualities or predicates, therefore anything that can be expressed in terms of a code or law is uncertain, referring only to transient things, and so laws cannot be the basis for settling disputes.

⁵⁸ S. Radhakrishnan, *The Hindu View of Life* 67-68 (London, 1949).

⁵⁹ *Ibid.* 79.

⁶⁰ *Ibid.* 73-74.

⁶¹ Vivekananda, "The Vedanta," *Selections from Swami Vivekananda* 277 (Calcutta, 1957).

⁶² S. Radhakrishnan, *op. cit.* note 58, p. 66. ⁶³ *Ibid.* 69.

The two things do not seem to have any connection. One relates to the relation between this world and the ultimate Reality, and the other is concerned about relationships in the world. According to Hindus, so long as one lives in this world he has to live according to certain rules and perform his *dharma*, which is right action according to law. Every Hindu understands this and knows that he must follow his worldly duties according to his *dharma* or law. This is the essence of the *Gita's* teaching also where Arjuna, having deviated from his right path, was instructed by Lord Krishna to do his duty without fear or favor.

Thus, we find that, while Hindus have meditated upon the potentialities of existence beyond the world with an earnestness unsurpassed in the history of philosophy, that did not make them forget the concerns of worldly life. In the field of jurisprudence their labors were well directed and quite successful. Thus, as revealed by the old Hindu books, *Dharmasastras*, *Arthasastras* and different commentaries, there was a well-developed system of law both on the civil as well as the criminal side, including substantive and adjective aspects. In fact, unlike other ancient laws, such as Roman law and earlier English law, which were extremely formal, there was in this system no meaningless formalism which could be of any importance regarding the consequences of litigation.⁶⁴ There were sound juristic principles of substantive law, which had pre-eminence over the rules relating to procedure.⁶⁵

An historical study of the Hindu legal system makes it abundantly clear that there had been in force a strict rule of law throughout its history. The law of the Hindus had always been regarded as all-powerful, above the king and as king of kings. Even during the period of strong monarchies, the king was never placed above the law and, as actual cases show, there was a possibility of an ordinary person bringing a case against the king before a court of law.⁶⁶ Like all ancient systems of law, the Hindu law was believed to have a Divine origin. The ancient Indian state thus lacked the power of legislation.⁶⁷ This, however, does not mean that law was static. Though law could not be altered in theory by legislation, it

⁶⁴ U. C. Sarkar, *Epochs in Hindu Legal History* 14 (Hoshiarpur, 1958).

⁶⁵ The general view, therefore, that rules relating to procedure and forms of action were the most prominent in early law, and the rules of substantive law were evolved only through the expansion of adjective law, does not hold good in the history of the development of Hindu Law. Sir S. Varadachariar, *The Hindu Judicial System* 84 (Lucknow University, 1946).

⁶⁶ K. P. Jayaswal, *Hindu Polity* 323 (Bangalore, 1943).

⁶⁷ Only once in the history of Indian thought did a writer venture to exalt the royal edict above the customary law. Kautilya, Chancellor of Chandragupta Maurya, laid it down in his *Arthashastra* (written about 300 B. C.) that the royal edict, by its very nature, was of an overriding validity and prevailed, in cases of conflict, over *Dharma* (traditional code), *Vyavahara* (contract) and *Charitra* (local custom); and maybe this rule was followed in the Mauryan Empire. But Kautilya's rule was not accepted by his successors, with the single exception of Narada (100-400 A.D.); and the general rule was that the king's edict was valid only insofar as it conformed to the other time-honored sources of law. See K. A. Nilakantha Sastri, "International Law and Relations in Ancient India," 1 *Indian Year Book of Int. Affairs* 98 (1952).

was in fact changed and reformed by interpretation and application, and also by new treatises by learned jurists.⁶⁸ The king, as we have seen, had no power to make the law; but he had the duty of enforcing it. This he did with the aid of learned jurists known as his councilors. As regards their qualifications, it was declared that they should be learned in the ancient Vedic literature, acquainted with the sacred law, addicted to the truth and impartial towards friend and foe.⁶⁹ Whether as a relic of the earlier system of assembly justice or because of the mistrust of the unaided powers of the king, it seems to have been an established principle of the early judicial system in India that justice should never be administered by a single individual.⁷⁰

There was an elaborate system of courts for the administration of justice, which was regarded as one of the principal means to keep the people in order and to protect them in the proper enjoyment of their rights. As evidenced in the old books of the Hindus, there were no fewer than six classes of courts. Three of them were royal courts, beginning with the king and his councilors, the Chief Justice and regional courts, presided over by puisne judges. From the decision of the puisne judges, appeal lay to the court of the Chief Justice and from that of the Chief Justice to the king in person. Besides these, there were the ordinary courts of *pugas* (groups), *srenis* (guilds) and *kulas* (families) mentioned according to the order of superiority. Each next higher court was competent to hear appeal from the lower courts. Appeal from the last of these courts lay with the Chief Justice and from there with the king himself.⁷¹

The courts in ancient India were held in great esteem and judges were highly-paid king's officers. The court house was regarded as a sacred place and all trials were held openly where all members of the public could have access. It was specifically provided that no trial should be held privately. Elaborate provisions were made regarding the conduct and the character of judges so that they might inspire the confidence of the litigants.⁷² The reputation of the courts for impartiality was so jealously guarded that the judge and assessors holding private conversations with any of the parties were held punishable.⁷³ It was the duty of the court to find out the truth at all cost. Thus a text of *Nanu* compares the task of the judge to that of a hunter who tracks his wounded game by the traces of blood, and *Narada* compares him to a surgeon who skillfully draws out foreign matter from the body in which it has embedded.⁷⁴

Very elaborate and wholesome provisions were made for the initiation of proceedings and conduct of trials. There were clear rules of evidence and for examination of witnesses, and the judge acting unjustly or abusing

⁶⁸ Jayaswal, *op. cit.* note 66, pp. 330-381.

⁶⁹ Priyanath Sen, *The General Principles of Hindu Jurisprudence* 361 (Tagore Law Lectures, 1909) (Calcutta, 1918).

⁷⁰ S. Varadachariar, *op. cit.* note 65, p. 64; Jayaswal, *op. cit.* note 66, p. 326.

⁷¹ U. C. Sarkar, *op. cit.* note 64, p. 35.

⁷² *Ibid.* 100; Jayaswal, *op. cit.* note 66, p. 337.

⁷³ S. Varadachariar, *op. cit.* note 65, p. 123.

⁷⁴ *Ibid.* 122.

his power was subject to severe penalties.⁷⁶ A litigation, once started, *could not be compromised except with the sanction of the court*,⁷⁶ and was regarded as concluded after the decision and the principle of *res judicata* applied.

Thus, even a glance at the history of the Indian legal system shows that India was not ignorant of legal procedures and a system of courts⁷⁷ and, as the history of village *panchayats* in India further shows, people in the remotest villages were quite conversant with these procedures for the settlement of their disputes. The village *panchayats* played a very important part in ancient and medieval India in deciding local disputes,⁷⁸ and they still play an important rôle in modern India. Even today we find that in most of the states in India, by the Village Panchayat Acts, many wide and real powers have been recognized to be exercisable by the village *panchayats*.⁷⁹ Though the *panchayats* may be given multifarious duties, their most important function is thought to be the administration of justice in both civil and criminal cases. The reason for this is not the lack of knowledge of the people about their legal rights or their reluctance to go before the courts, but, on the contrary, too much insistence on their rights and too much litigation, which is supposed to be largely responsible for the ruin of the village economy. A less costly judicial system, capable of speedy disposal of cases was, therefore, most essential. Hence, as a matter of fact, every state has started village *panchayats* essentially for the purpose of the most efficient administration of the villages and for the speedy and effective disposal of cases.⁸⁰

From the above discussion, we do not find Indians, at least, against the use of codes and litigation.⁸¹ Neither their philosophy nor their religion teaches them to prefer mediation and conciliation. Nor does their history show anything of that sort. Hindus have all along insisted on government by law and have always held law as supreme. As far as circumstances permitted, attempts have all along been made to administer justice strictly according to law. The defects and deficiencies, sometimes serious, must have been the result of the geographical features and the political history

⁷⁶ *Ibid.* 155.

⁷⁶ Priyanath Sen, *op. cit.* note 69, p. 364.

⁷⁷ S. Varadachariar, *op. cit.* note 65, p. 174.

⁷⁸ The courts of *pugas*, *srenis*, and *kulas*, referred to above, were analogous to the village *panchayats* in their jurisdiction and function, and it seems that the modern *panchayats* are successors of these tribunals. U. C. Sarkar, *op. cit.* note 64, p. 241.

⁷⁹ Sarkar, *ibid.* 239-242. The Indian Constitution made it a directive principle of state policy for the government "to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government." (Art. 40.)

⁸⁰ Sarkar, *ibid.* 257-259.

⁸¹ Contesting the views of Professor Northrop, Professor Freeman says: "In my work in India with lawyers, law schools and courts, I found law as litigious as in America. The ratio of litigation to settlement was greater than in my own practice; the proportionate cost of litigation was higher; the minuteness of legal detail at issue was greater; the insistence on vindication of legal 'rights' was comparable. In fact, I felt completely at home with the bench and bar of India and South Asia generally." *Loc. cit.* note 23, p. 197.

of the country.⁸² Moreover, those who have deeply studied the Hindu legal system claim that Hindu lawgivers were extremely logical.⁸³ In short, Hindus, nay Indians, have all along believed in a rule of law and practiced it in their national affairs. There does not seem to be any persuasive reason to believe that other Asian states do not do the same.⁸⁴ It is difficult, therefore, to agree with Professor Northrop's views.

V

Professor Julius Stone quite reasonably points out that the diagnosis of the present position in terms of mere cultural differences obscures the real problems of conflicts of interests between Western states and the under-developed states of Asia and Africa. According to him, using the word "debtor" in a broader sense, these states which have recently achieved independence have generally begun their existence in the position of debtor under the traditional international legal order. It means that their authority or territory or both are burdened with debts, concessions, commercial engagements of various kinds or other obligations continuing from the earlier colonial regime. Even though these burdens might have been temporarily adjusted at the time of their achieving independence, then acceptable in terms of early difficulties of the struggle for independence, there are obvious reasons why such new states might desire to keep full freedom in the future with regard to such legal burdens. In theory, of course, Professor Stone says, these countries are still bound, even if they refuse to accept any third-party judgment; but the absence of compulsory jurisdiction obviously leaves much greater freedom of action. It is precisely for this reason, he thinks, that the new states do not accept the jurisdiction of the Court. It might inhibit resort to various extra-legal methods for later adjustment otherwise open to them, "methods ranging from demands of re-negotiation, repudiation, hostile propaganda and boycott, to outright confiscation and the tacit instigation of popular violence. *And the prospect of a vast inflow of new investment capital into these countries will tend, for a long time, to highlight this normal 'debtor' posture and reaction.*"⁸⁵

⁸² S. Varadachariar, *op. cit.* note 65, p. 258.

⁸³ Thus, the well-known Hindu jurist, Dr. Priyanath Sen, says: "Whatever else you may say, no one can claim that our lawgivers were lacking in logical consistency. The Hindu mind has ever been eminently logical; subtlety of discrimination, analytical skill, and logical accuracy in defining legal conceptions have always been its delight; and it has never enunciated a principle without perceiving what it really involves and the deduction which logically follows from it." *Op. cit.* note 69, p. 375. *Cf.* Quincy Wright as cited above, note 55.

⁸⁴ During the course of history many Asian states, such as Burma, Siam, Malaya, Cambodia, Sumatra, Java, Bali and Borneo, were influenced by the Indian culture, traditions and law, and Hindu states were established in them. Indian cultural influence is also to be found in China, Tibet, Korea, Japan, and even the Philippine Islands. See R. C. Majumdar (editor), *The History and Culture of the Indian People*, Vol. III, pp. xlvii-xlviii (Bombay, 1954).

⁸⁵ Julius Stone, "A Common Law for Mankind?" 1 *Int. Studies* 430-431 (1959-1960); "The Rule of Law in the Relations of States," unpublished John Field Simms

In this situation, therefore, Professor Stone feels, it is somewhat ironic for the members of the Twenty-Fourth Commission of the *Institut de Droit International* to find the greatest hope of gaining new jurisdiction for the Court in the expanding area of economic co-operation and development.⁸⁶ To ask the new Asian states to submit to this jurisdiction, especially in respect of governmental measures affecting the interests of the foreign creditor states, Professor Stone believes, would be to ask them to surrender their extra-legal methods of adjustments and of securing release from legal obligations. Any such scheme can be considered plausible only "if the clauses were part of a plan of economic aid, from the creditor to the debtor nations, so generous in its proportions as to outweigh the attractions of the quasi-freebooting system."⁸⁷

These recalcitrant new Asian states, Professor Stone notes, can afford to refuse "in advance to accept the legal *status quo*, by awareness that at a sharper pinch and in the final resort Communist powers would almost certainly, as in the 1956 Suez crisis, support them in any clash with the Western 'creditor' states."⁸⁸ He further points out that the over-optimistic doctrinal and political efforts to read the United Nations Charter as prohibiting all private use of force except in self-defense have seriously undermined the foundations of international law and are the main cause for the present decline of judicial settlement. Formerly, when the use of force as a matter of self-help was permitted under international law, third-party settlement favored the small states, since it gave them *pro tanto* equality, and was accordingly favored by them. Now the prohibition of the use of force has removed this interest of the small states in third-party settlement. The Asian states, therefore, finding themselves generally in the debtor-respondent situation, prefer not to run the risks of third-party judgment according to a traditional law which they feel generally favors creditor states. That, according to Professor Stone, is the explana-

Memorial Lecture delivered at the University of New Mexico, April, 1959. Emphasis added.

⁸⁶ The Institute, in its resolution in 1959, recommended that economic and financial agreements concerning development schemes, whether concluded between states or concluded with states by international organizations or international public corporations, should contain a clause conferring on the International Court of Justice or any other tribunal compulsory jurisdiction in any dispute relating to their interpretation or application. Resolutions adopted by the Institut de Droit International at its Neuchâtel Session, Sept. 3-12, 1959, 48 *Annuaire de l'Institut* 383 (1959, II); 54 *A.J.I.L.* 137 (1960). Mr. C. W. Jenks, Rapporteur of the Commission, in his preliminary report said that the best prospect of securing general acceptance of a larger measure of compulsory jurisdiction is to make such acceptance an integral feature of plans which will commend themselves by their political or economic advantages. An important opportunity of this type, he suggested, may arise in connection with the plans for large-scale international economic development schemes. By linking compulsory jurisdiction and economic development in this manner, he felt, we may be able to achieve more in respect of both than would be achieved separately in respect of either. "The Compulsory Jurisdiction of International Courts and Tribunals," Preliminary Report presented by C. Wilfred Jenks, pp. 135-136 (Geneva, 1957).

⁸⁷ Julius Stone, "The Rule of Law in the Relations of States," *op. cit.* note 85.

⁸⁸ *Ibid.*

tion of what Edvard Hambro calls "the curious fact that the new states, the small states, the underdeveloped states, are afraid of a legal order."⁸⁹

Though Professor Stone has touched the right nerve of the problem, it happens to be a sensitive nerve. He is right in saying that new Asian or, for that matter, even African states, at their birth generally find themselves overburdened with the rights of their past colonial masters, which they have felt and still feel are unreasonable and, though accepted by the present legal order, inequitable. They refuse to submit to these inequitable legal rights which they think are not in accordance with changed international conditions. There is no international legislature to change this position, and though the International Court has not, in its practice, taken an extreme conservative view of the law and rigidly adhered to old concepts, but has, on the contrary, been changing and modifying the law⁹⁰ and may do the same in the future, its legislative action is generally "confined from molar to molecular motions." The Court cannot disregard unambiguous legal positions, and it is very uncertain and doubtful whether it will change the law in a particular case. Moreover, as Kunz has said, courts are wholly unfit and unequipped for changing the law, just as political agencies are unfit for giving objective and impartial decisions. "It would not only be illogical," Professor Kunz warns, quoting Max Habicht, "but dangerous to submit to an ordinary procedure differences with regard to a change in the rules of law in force."⁹¹ Max Sørensen is also of the opinion that the process of adjustment between established legal positions and the national aspirations of new and smaller states is essentially a political process unsuitable for judicial settlement.⁹² The only alternative left for these states, therefore, is to solve such disputes through political means.

That might be the position when in some cases the newly independent smaller countries refuse to go before the Court. Their refusal almost always seems basically to arise from the injustices of the past colonial age or its lingering remnants. Thus, whether it was the case of expropriation of the Anglo-Iranian Oil Company, or the nationalization of the Suez Canal, or the taking over of Dutch properties in Indonesia, or even the rights of passage of the Portuguese authorities over independent Indian territory, all are cases where the new countries have tried to remove an old burden which they did not accept of their own free will, and this might

⁸⁹ Julius Stone, *ibid.* That is also the view of Professor E. Giraud, who feels that the prohibition of resort to force and the fear of the new states that the Court will apply traditional law, are the main causes of the neglect of the International Court. Quoted in Working Papers on the Rule of Law Among Nations, American Bar Association, Special Committee on World Peace through Law, p. 29. See also Jenks' Preliminary Report, *op. cit.* note 86, pp. 124-126; Jessup, *The Use of International Law* 133-135 (Ann Arbor, 1959).

⁹⁰ Lauterpacht, *Development of International Law by the International Court of Justice*, Pt. III (London, 1958).

⁹¹ J. L. Kunz, "Compulsory International Adjudication and Maintenance of Peace," 38 A.J.I.L. 676 (1944); Habicht, *The Power of the International Judge to Give a Decision ex Aequo et Bono* 80 (London, 1935).

⁹² Max Sørensen, *loc. cit.* note 44, p. 274.

have been one of the important reasons for their hesitation or refusal to go before the International Court of Justice. On the other hand, we find that in most of the new agreements, whether for economic aid or otherwise, they have been prepared to accept the jurisdiction of the Court in case of disagreements regarding the interpretation or application of the agreements. In most of the post-independence agreements, these countries have given assurances of every type for the confidence of the "creditor" states and have honored them so far. There is no reason to believe that they do not mean to do so in the future. It is unreasonable to doubt their fidelity. These new countries themselves also understand that it is in their own interest to create confidence among the Western countries that they will observe their legal obligations and burdens which they are freely assuming for their own benefit. Otherwise, they cannot hope to get much help in the development of their rich but underdeveloped economies. It seems, therefore, that the Institute of International Law is right in putting hope of gaining new jurisdiction for the International Court in the expanding area of economic co-operation and development.⁹³ There are already precedents for such action. All International Bank loans are subject to an arbitration clause. The International Finance Corporation will also undoubtedly follow the same practice. The Economic Co-operation Agreements concluded by the United States with different countries, many of them Asian and African, contain such clauses conferring jurisdiction on the Court.⁹⁴ It seems, therefore, that there is no reason for us to be unnecessarily doubtful about the future conduct of the new Asian and African states.

It is true that these countries have sometimes taken very bold steps and stood against some big Powers in a way which would not have been possible before the Second World War, but it can hardly be denied that all the countries have tried to make the best use of means available in the promotion of their own interests or at least what they feel to be in their interests. The unusual condition of present international affairs has helped them to remove some of the inequities of the past age. It is true that this position cannot be maintained for long and it is in the interest of the "uncommitted" states, which conceive it to be in their own interest to avoid political entanglement with one or another power bloc, to concede adherence to the law bloc. But the only way is a compromise of these interests. This can be possible, as we have said earlier, only by concessions on both sides, not by threats or by unnecessary criticism.

VI

(Lack of recourse to the International Court of Justice by the Asian-African countries may also be due, to some extent, as noted by Professor Louis B. Sohn⁹⁵ and Mr. Charles S. Rhyne,⁹⁶ to the remoteness of this

⁹³ See above. Mr. Jenks also holds the same view. *Op. cit.* note 86, pp. 135-136.

⁹⁴ *Ibid.*

⁹⁵ Louis B. Sohn, "Proposals for the Establishment of a System of International Tribunals," in Domke (ed.), *International Trade Arbitration* 64 (1958).

⁹⁶ Quoted by Jessup. *op. cit.* note 40, pp. 106-107.

Court from the non-European countries. There is hardly any doubt that the present International Court is still regarded in many quarters as merely a "Western" court. There is a great element of truth, therefore, in these statements. As Professor Jessup has also said, there might be certain psychological advantages in having the Court sit from time to time in different parts of the world⁹⁷ because, if people in various nations could see it operate, it might create more knowledge and confidence in its working.)

It has also been alleged that, despite its wide composition, the Court as a whole does not understand sufficiently the special problems of various regions, nor does it have sufficient knowledge of the regional systems of international law.⁹⁸ It has therefore been suggested that the Court might establish for any group of states special chambers composed of members of the Court coming from a particular region or well acquainted with the problems of that region and having the same background of law and traditions; any such chamber could be authorized to sit in one of the principal cities of the region concerned to deal with the local disputes.⁹⁹ Suggestions have also been made to establish regional courts with original jurisdiction co-extensive as to subject matter with that of the International Court of Justice, with a limited right of appeal from such courts to the latter tribunal.¹⁰⁰

Apart from all these suggestions, which require serious consideration, there is need for a more adequate representation of the Asian-African states on the Bench of the International Court.¹⁰¹ More Asian and African judges are suggested to represent these countries, not so much because they have different cultural and legal systems, but for psychological reasons, in order to create confidence in them that the Court is truly international and not a "Western" court, that it is as much theirs as those of the Western countries.¹⁰² The problem is to a great extent psychological and must be dealt with from that angle.

CONCLUSION

The above analysis leads us to the conclusion that the reluctance of the Asian-African countries to settle their disputes by judicial means is not due to their different cultural, religious or philosophical backgrounds, nor is it due to the fact that they have not accepted present international law, which originated among the Western countries. The real reasons would seem to be fairly obvious. They include a lawyer-like fear that they might lose the case, and it seems more advantageous to leave the matter

⁹⁷ Jessup, *ibid.* 107.

⁹⁸ Sohn, *loc. cit.* note 95, p. 64.

⁹⁹ *Ibid.* 65.

¹⁰⁰ Working Papers on the Rule of Law Among Nations, American Bar Association, Special Committee on World Peace Through Law 34 (1959).

¹⁰¹ At present there are only three judges from the Asian-African countries, *viz.*, China, Japan, and Egypt.

¹⁰² Professor Jessup has rightly pointed out that the contest for places on the Bench of the Court is inspired by the desire for prestige (national or individual) rather than by any governmental conviction that the presence of one of its nationals is necessary to secure a well-balanced and impartial judiciary. *Op. cit.* note 40, p. 126.

unsettled, an alternative not open to the private litigant in a national court. As Mr. Jenks has also said, the motive of governments in submitting cases to the Court is to win, and they canvass their prospects of winning as closely as any private individual or corporation would do. They are not much bothered about the personal integrity or the intellectual ability of its members, or the extent to which they are attempting to develop the law imaginatively on constructive lines, but the predictability of the Court as a whole.¹⁰³ And this is the case, whether they are Eastern or Western countries. Thus we find that in the U.A.R.-Israel dispute over the right of Egypt to stop Israeli ships and cargoes destined for or coming from Israel, desiring to transit the Suez Canal, the admittedly legal questions were simply by-passed under the leadership of the United Kingdom, the United States, and France, in a resolution passed by the Security Council finding Egypt at fault and calling on her to desist from the practices complained of.¹⁰⁴ It is interesting to note that Egypt's declaration accepting the compulsory jurisdiction of the Court is wide enough to permit this question to be raised before it. But Israel does not want to go before the Court, perhaps fearing that it might lose. Referring to this case, Professor Larson rightly remarked that this was a salutary corrective to any undue stress on the view that one obstacle in the path of the international rule of law was that some other parts of the world did not share or understand our conception of law. It was particularly ironic, said Professor Larson, that it was India and China who were

demonstrating this devotion to law in connection with a body of law which was the peculiar creation of European and American countries, i.e., contraband, blockade, visit and search, etc., a body of law which, far from rejecting as alien, they understood perfectly and wanted to have applied.¹⁰⁵

This case is not an exception. It is the same lawyer-like fear that is depicted in Norway's invocation of the self-determining domestic jurisdiction reservation in her dispute with France¹⁰⁶ which led the Court to declare that it had no jurisdiction over the case, and the United States' hesitation to let the Court decide her Interhandel dispute with Switzerland.¹⁰⁷ Criticizing this attitude of the United States in the latter case, Professor Jessup said "when important interests of our own citizens were

¹⁰³ C. W. Jenks, Preliminary Report, *op. cit.* note 86, p. 126. See also Jessup, *op. cit.* note 40, p. 124.

¹⁰⁴ "The United Kingdom representative, speaking on behalf of the three co-sponsoring Powers, said: ' . . . these legal issues are no doubt debatable, but I do not consider that it is necessary for the Security Council to go into them. . . . The view which the Council takes on this question should depend, in our opinion, on the actual situation as it exists rather than on any legal technicalities.' The objections to this brushing aside of the legal issues came from Egypt, as a party in interest, and from China and India." Arthur Larson, "Peace Through Law; The Role and Limits of Adjudication—Some Contemporary Applications," 1960 Proceedings, American Society of International Law 12.

¹⁰⁵ *Ibid.*

¹⁰⁶ Certain Norwegian Loans Case, [1957] I.C.J. Rep. 9.

¹⁰⁷ Interhandel Case, [1959] *ibid.* 6.

involved . . . our enthusiasm for the rule of law was under the strictest control."¹⁰⁸

It can hardly be denied that international litigation is not regarded as a friendly act. Not only among the antagonistic groups of Communist and non-Communist states,¹⁰⁹ but even among members of the same group, or what may be called like-minded states, international litigation is still regarded as an unfriendly act to be avoided as far as possible.¹¹⁰ This psychology of the litigant—the attitude that if somebody sues us in the Court there is something unfriendly in this action and something unusual may happen—if it is to be found among the Eastern states, it is also not absent among the Western Powers. It is common among all the nations in the world and is perhaps one of the greatest hurdles in the development of a rule of law in the international field.¹¹¹

The basic reasons for the neglect of judicial methods for the settlement of disputes are the same, whether for the Western or for the Eastern states. The division of the world into two power blocs and the resulting tension between states have led to the general deterioration of the position of law in international affairs. The old and powerful states have generally not given whole-hearted support to the International Court. Their declarations accepting the jurisdiction of the Court have been riddled with extravagant and damaging reservations which tend to be doubly harmful. First, they operate mostly to frustrate the "rule of law" even among the Western states themselves; and secondly, they show an example to the new Asian-African states which are generally over-sensitive about their newly-won independence.

The position, however, cannot be left at that. The dangers to all are of a new magnitude. The process can and should be begun to change the present trend by building a rule of law in international affairs. It is as much in the interest of the Eastern as in that of the Western states to help in this endeavor. Nobody has made out a case for ultimate gain by conquest. It may be that a case can be made out for the triumph of law and the principles of unity and co-operation under it.¹¹²

¹⁰⁸ Jessup, *op. cit.* note 40, p. 136.

¹⁰⁹ See Aerial Incident cases brought by the U. S. A. and other non-Communist states against the Soviet Union and other members of the Soviet group. 1959-1960 I.C.J. Yearbook 37-38; Philip O. Jessup, "International Litigation as a Friendly Act," 60 Columbia Law Rev. 29 (1960).

¹¹⁰ As we have seen, in the *Interhandel* case the United States tried every means to avoid international litigation. A similar attitude was shown by Norway (*Certain Norwegian Loans Case*), India (*Case of Right of Passage over Indian Territory*), and Iran (*Anglo-Iranian Oil Co. Case*), when they were arraigned before the Court. See also Jessup, "International Litigation as a Friendly Act," *loc. cit.* 30, 31.

¹¹¹ Jessup, *ibid.* 24 ff.; Richard N. Gardner, "International Economic Litigation as a Friendly Act," *ibid.* 35 ff.

¹¹² See Jessup, *The Use of International Law* 154 (1959).

THE UNITED STATES-JAPANESE PROPERTY COMMISSION *

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United States Member, U. S.-Japanese Property Commission

AND

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Agent of the United States before U. S.-Japanese Property Commission

The United States-Japanese Property Commission is a recent example of the successful use of an international arbitral commission to settle disputes between sovereign nations. The Commission was established at the request of the United States Government pursuant to an agreement between Japan and the United States concluded on June 19, 1952.¹ It had jurisdiction over disputes between the United States and Japan arising under Article 15(a) of the Japanese Peace Treaty. By the terms of that article the Japanese Government agreed to provide compensation for war damage to Allied-owned property in Japan.²

During a period of less than four months, from March to July, 1960, the Commission rendered eight decisions, making awards to twenty-eight claimants for an aggregate amount of about \$19 million. The claims referred to the Commission were the unsettled residue of over 600 claims submitted by American nationals to the Japanese Government under Article 15(a) of the Peace Treaty. Although the claims referred to the Commission represented only 5% of all American claims paid by the Japanese Government, the amounts awarded by the Commission aggregated slightly more than half of the total amount which the Japanese Government has paid to American claimants in fulfillment of the Peace Treaty obligation. The total amount, including both awards of the Commission and payments on negotiated settlements, is Yen 12,296,603,714 (about \$34.1 million).³

In this article the United States member of the Commission and the American Agent before the Commission present their analysis of certain aspects of the work of the Commission. In the first part of the article,

* The views expressed herein are the personal views of the authors and do not necessarily represent the views of the Department of State.

¹ Agreement with Japan for Settlement of Disputes Arising under Article 15(a) of the Treaty of Peace with Japan, June 19, 1952, 3 U. S. Treaties 4054, T.I.A.S., No. 2550.

² Treaty of Peace with Japan, Sept. 8, 1951, Art. 15 (a). 3 U. S. Treaties 3169; T.I.A.S., No. 2490; 46 A.J.I.L. Supp. 71 (1952).

³ Despatch No. 299 of Sept. 13, 1960, from the American Embassy, Tokyo, to the Department of State, Department of State File No. 294.1141/9-1360.

the United States member of the Commission describes the organization of the Commission, its rules of procedure and its methods of handling cases. In the second part of the article, the American Agent before the Commission describes the general principles of compensation and summarizes the decisions of the Commission.

I

THE ORGANIZATION OF THE COMMISSION

A great deal has been written on the general subject of international arbitral or conciliation commissions. However, there is little to be found on the practical problems, both large and small, of organizing a commission and carrying its work through to a successful completion. Hence, it may be useful to set forth, more or less in chronological order, the origin and history of the United States-Japanese Property Commission, which concluded its mission in 1960.

Article 15(a) of the Treaty of Peace with Japan, signed on September 8, 1951, provided in essence that Japan would be responsible for property losses in Japan suffered by Allied Powers and Allied nationals as a result of the war. In many respects it paralleled Article 78 of the Treaty of Peace with Italy and the corresponding articles in the Treaties of Peace with Rumania (Article 24), Bulgaria (Article 23), Hungary (Article 26), and Finland (Article 25).⁴ Unlike Article 78 of the Italian Peace Treaty, however, Article 15(a) of the Japanese Peace Treaty made reference to a local Japanese law for details as to the responsibility of the Government of Japan, stating that "compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951."

The Conciliation Commission to resolve disputes under Article 78 of the Treaty of Peace with Italy was established pursuant to the text of the treaty itself, namely, Article 83. The Commission to resolve similar disputes under Article 15(a) of the Treaty of Peace with Japan was, however, provided for by a separate instrument entitled "Agreement for the Settlement of Disputes Arising under Article 15(a) of the Treaty of Peace with Japan."⁵

Under both the Italian and Japanese treaties and agreements the claims were initially submitted to the respondent governments for settlement. A dispute involving a claim subject to the jurisdiction of a commission arose only when a settlement could not be reached either because the respondent government denied liability or offered an amount considered by the claimant to be insufficient. As a matter of fact, the large majority of claims were

⁴ Treaty of Peace with Italy, Feb. 10, 1947, Art. 78, 61 Stat. 1245; T.I.A.S., No. 1648; 42 A.J.I.L. Supp. 76 (1948); Treaty of Peace with Rumania, Feb. 10, 1947, Art. 24, 61 Stat. (2) 1757; T.I.A.S., No. 1649; 42 A.J.I.L. Supp. 259 (1948); Treaty of Peace with Bulgaria, Feb. 10, 1947, Art. 23, 61 Stat. 1915; T.I.A.S., No. 1650; 42 A.J.I.L. Supp. 186 (1948); Treaty of Peace with Hungary, Feb. 10, 1947, Art. 26, 61 Stat. 2065; T.I.A.S., No. 1651; 42 A.J.I.L. Supp. 234 (1948); Treaty of Peace with Finland, Feb. 10, 1947, Art. 25, Dept. of State Pub. 2743, European Ser. 21; 42 A.J.I.L. Supp. 209 (1948).

⁵ Cited note 1 above.

settled in the early stages by both the Italian and Japanese Governments. Hence, only a small portion of the claims brought by American nationals who suffered war losses in Italy and Japan were ever presented to the respective commissions. Eighteen petitions on behalf of 28 claimants were submitted to the United States-Japanese Property Commission. The most important, from the standpoint of value at least, involved the claims of American minority shareholders in Japanese corporations that suffered damage during the war. Since the amount payable depended upon the cost of repairing the damaged property or of acquiring similar property as of the time of payment and that amount was subject to fluctuation, precise figures as to the amounts which the claimants considered themselves entitled to receive, *i.e.*, the face value of the claims before adjudication, as distinguished from their actual value as determined by the Commission, are difficult to supply. As of the date of the filing of the petitions, however, 16,636,434,206 yen or approximately \$46,212,317.00 was requested (the yen is valued at around 360 to the dollar). Since the Japanese price index has been quite stable, that figure would probably not have been revised substantially merely because of price fluctuations.

To anticipate a little, the Commission made awards in the aggregate amount of 6,834,922,954 yen or approximately \$18,985,897.00. Here again, the figure is somewhat misleading as Standard Vacuum Oil Company withdrew its two claims primarily on the assurance that it could take the losses in the larger claim as a tax deduction under Japanese law, so that the award confirming the compromise did not reflect a monetary sum.

The first measures to organize the Commission were taken in 1957. Experience in Italy had shown that the task of the Commission, except for certain periods of activity, was not a constant and continuing one. Thus, after the formulation of the Rules of Procedure, the Commission necessarily had to wait until the first pleadings were submitted. In fact, there was relatively little it could do until the pleadings were completed. It is true that some work could be done to investigate the bibliographic facilities at the seat of the Commission and to become familiar with the background of the applicable treaty and related provisions. It was not anticipated, however, that those tasks would occupy the Commission for any extended period of time. Hence it was desirable to appoint as members of the Commission persons who had other responsibilities which would occupy them while not engaged in their duties on the Commission. The Japanese Government solved the problem by appointing Mr. Ko Ishii, a distinguished practicing lawyer in Tokyo and a former member of the Japanese Foreign Service. Later Mr. Ishii had to resign because of ill health. His place was taken by the former Japanese Ambassador to France, Mr. Kumao Nishimura, who was also the Japanese Member on other Property Commissions, such as the British-Japanese Property Commission, and was acting as adviser to the Ministry of Foreign Affairs on a number of problems. The writer was appointed as the American member while concurrently holding the position of Consul General in Yokohama. Later, he was transferred to Tokyo as Counselor of Embassy and Supervisory

Consul General. The third member of the Commission had to be a neutral. The American and Japanese Governments were fortunate in obtaining the services of Judge Torsten Salén, President of the Supreme Restitution Court for Berlin, a Swedish jurist of considerable repute, with long experience on the Mixed Courts of Egypt. Arrangements were made, however, to allow Judge Salén to remain in Berlin until the cases had reached a fairly advanced stage.

The first task facing the Commission was the preparation of the Rules of Procedure. That responsibility was imposed squarely upon the Commission by Article 5 of the Agreement for the Settlement of Disputes, which provided that "Each Commission created under this Agreement shall determine its own procedure, adopting rules conforming to justice and equity." As, however, the Agents of the two governments were the individuals who had to submit the various pleadings and the other documents under the Rules, it was thought advisable to have the Agents participate in their formulation so that, to the maximum extent possible, deference could be given to their wishes.

Certain parts of the Rules, such as those relating to the seat of the Commission (Article 1), the adoption of a seal (Article 8), et cetera, were technical in nature and presented few questions. There were, however, a number of points which received long and serious consideration. Probably the most important concerned the time for the submission of evidence. There were three major alternatives. The Commission could have provided that the petition be a mere statement of the case with reference to the applicable law, unaccompanied by evidence, and the answer could, correspondingly, also be restricted to a similar statement. The great advantage of such an approach is that it saved the parties from the expense, which is often considerable, of gathering and submitting evidence in a case that would be decided on purely legal grounds. In essence, it is a system somewhat analogous to that followed in the civil courts in the United States when the sufficiency of a complaint is tested by a demurrer before any evidence is submitted to the court. The disadvantage, of course, is that, if the petition is sustained, additional time is required to gather evidence and the entire procedure is prolonged. Moreover, the Agent for the claimant government is not in a good position to determine whether his government should sponsor the claim until he has a fairly clear indication that the allegations of the claimants are supported by proof, and it is much easier to require such proof from the claimants if the Rules of Procedure make the submission of such proof mandatory.

The Commission could have gone to the other extreme and required that all evidence, both as to the merits of the claim and as to damages, be submitted with the pleadings as they were filed by the parties. The obvious advantage of such an approach is that the Commission would have had before it all the facts of the case and all the evidence to support those facts at an early stage so that the determination of the factual basis of the claim could go hand in hand with the determination of its legal validity. The manifest disadvantage is that it forces the parties to submit consider-

able evidence to prove points that may be admitted by the other party or to establish contentions that the Commission would reject as a matter of law.

After extensive discussion, the Commission evolved a plan which was essentially a compromise. In effect the Commission offered the Agents the possibility of requiring the submission of all evidence concerning the merits of the claim with the appropriate pleadings, but permitting the postponement of the consideration of damages and, of course, the submission of evidence on damages, until after the determination of the merits of the claim. The underlying thought was that the submission of evidence on damages, involving technical appraisals and valuations, could be very expensive and that the expense might be non-productive either because the claim would be dismissed on its merits or the parties, in the event the merits had been decided in favor of the claimant, might well enter into a compromise agreement as to the amount of the damages. The American Agent nevertheless stated that he had to have evidence of damages in any event to determine the desirability of presenting the claim so that he would be willing to present all of his evidence with the petition. The Japanese Agent, however, at his request was relieved of the responsibility of submitting evidence on damages with the answer. Accordingly, the Commission established rules to embody that compromise which, it is believed, are rather unusual. Thus paragraph B of Article 11 reads as follows:

B. The Agent of the Government of Japan may, at his option, refrain from setting forth the amount of damage the Government of Japan considers would be payable in the event its responsibility were established, and may confine himself to a general statement questioning the appropriateness of the amount claimed.

That language was linked to paragraph E of Article 20, relating to the decisions of the Commission. It read:

E. Where a determination is made of all issues of law or of fact other than those relating to the amount of compensation, and the responsibility of the Government of Japan has been established, the Parties shall have one month from the date of such determination to reach agreement as to a mutually agreeable sum. In the event the Parties are unable to agree upon such a sum, the Agent of the Government of Japan shall, within an additional period of two months, submit to the Commission a Statement setting forth the amount of compensation the Government of Japan considers to be due in payment of the claim. Such Statement shall be supported by appropriate written evidence.

Subsequent events vindicated the approach adopted by the Commission, as in no case did it prove necessary to consider detailed evidence of damages.

The Commission also had a lengthy discussion as to oral hearings and written and oral arguments. The United States member expressed the tentative opinion that, as a general rule, it might be better to have all of the testimony presented in written form, particularly in view of the difficulties of conducting a hearing in two languages. It was realized, how-

ever, that there might be exceptional instances when it might be desirable for the Commission to hear witnesses, and a provision for oral hearings was therefore included. Experience proved that this was a wise move, as the Commission did in fact have an oral hearing on three cases in Kobe which helped materially to clarify certain issues of fact.

The relative merits of oral and written arguments were even harder to resolve. It appeared to the United States member that the difficulties of language limited the effectiveness of oral arguments and that written arguments submitted by the Agents at the end of the pleadings would have been preferable. In essence he thought that a brief might be helpful. Since, however, the word "brief" is an Anglo-Saxon legal expression, there was an understandable unwillingness to designate legal arguments by that name. There was also some unwillingness to require briefs in every case, as in some cases the pleadings might be self-sufficient. It was, moreover, observed that the Rules of Court of the International Court of Justice do not include any provision requiring the submission of written legal arguments. Hence, an elastic approach was adopted that permitted the Commission to require such oral or written arguments as might prove to be advisable. Thus Article 14 provided:

The Commission may, on its own initiative or at the request of either Agent, call on either or both Agents for an oral or written argument, or an oral or written explanation on particular factual or legal matters pertinent to the dispute.

As a matter of fact the Commission did hear extensive oral arguments in two instances, one involving a single claim and the other a group of similar claims. As anticipated, the language problem presented obstacles. They were not, however, insuperable.

Quite aside from the value of the hearings to the Commission, the oral sessions served a worthwhile purpose in that they provided the Agents with an opportunity to be heard on their respective positions, which was a privilege both Agents highly desired. After they had struggled laboriously on the pleadings, the least that the Commission could do was to hear their arguments fully.

It was obvious that the two languages of the Commission were to be Japanese and English and that the Agents should have the privilege of submitting their pleadings in either language. On the other hand, it was felt that where an Agent was submitting evidence in a language that was not his own, *e.g.*, the Japanese Agent submitting evidence in English, the Agent would probably have made a translation for his own use which he might as well submit so as to relieve, as much as possible, the translating burden on the Secretariat. Hence, paragraph B of Article 5 provided:

B. Requests for Rulings, Pleadings, and other similar documents may be submitted in either English or Japanese. Supporting statements, affidavits, and other documentary evidence may be submitted in any language. If, however, such evidence is in a language other than the language of the Party presenting the evidence, a translation shall be attached.

The fact that the third member of the Commission was not to arrive until the pleadings had been substantially completed in the first few cases posed a problem, as it was anticipated that it would be necessary for the Commission to grant in the meantime extensions of time and to render other procedural orders. The problem was solved by the inclusion of paragraph B of Article 3 which stipulated:

B. The members appointed by the Government of the United States of America and the Government of Japan may, in the absence from Japan of the third member, and if they are in agreement, make a ruling on behalf of the Commission on any question of a procedural nature.

The examples shown above will serve to illustrate the anxiety of the Commission to provide rules of procedure which would be practical and elastic and would, to the maximum extent possible, save the parties unnecessary expense. Other problems discussed related to costs and the right of an Agent to invoke the assistance of outside counsel in proceedings before the Commission.

Following the preparation of the rules, the next task involving the Property Commission was the selection of the Secretary General for the Secretariat. Since he had to know both Japanese and English and since the number of American nationals, let alone neutrals, who were familiar with both languages and were available for appointment was negligible, it became obvious that a Japanese national would have to be appointed. Accordingly, Mr. Shigehisa Kawamura, a former member of the Japanese Foreign Service, was appointed as Secretary General. He performed his duties faithfully and impartially and justified fully the confidence in his fairness and integrity. The Secretary General, in turn, organized a staff of translators, interpreters and other assistants and provided for office space, first at the Teito, and then at the Imperial Hotel, both for his own staff and for the Commission. All of the members of the Secretariat were Japanese nationals, although at the time of the oral hearings there was an American stenographer to take the minutes.

In the meantime, of course, consideration had been given to the expenses of the Commission. Article 6 of the Agreement establishing the Commission provided that:

Each Government shall pay the remuneration of the member appointed by it. If the Japanese Government fails to appoint a member, it shall pay the remuneration of the member appointed on its behalf. The remuneration of the third member of each commission and the expenses of each commission shall be fixed by, and borne in equal shares by the Government of the Allied Power and the Japanese Government.

The question, therefore, concerned the joint expenses of the Commission. Agreement was soon reached by the Foreign Office and the American Embassy on this matter. The Commission itself had only a benevolent interest in the question, since agreement as to the expenses was incumbent on the two governments and neither the Japanese member nor the United

States member was authorized to speak for his respective government on this score.

After the Commission was organized and the Secretary General had been appointed, there was a period of waiting. During that period the U. S. member made a survey of the international law material available in Tokyo, coming to the conclusion that there was a considerable amount of it in various libraries, but that most of it was inaccessible for ordinary research purposes. Hence, there was requested and obtained some standard material such as Hambro, *The Case Law of the International Court*; *The Annual Digest and Reports of Public International Law Cases* (later *International Law Reports*) prepared by Lauterpacht and his associates; and the *Reports of International Arbitral Awards* prepared by the United Nations. The U. S. Embassy library already had a number of volumes on international law, including such basic texts as Moore's and Hackworth's *Digests*, and the standard international law treatises by Hyde and Oppenheim. The U. S. member also obtained from Rome copies of the available pleadings and decisions relating to the work of the United States-Italian Conciliation Commission. The Japanese Government likewise attached considerable importance to those decisions, and in fact translated and published in both languages the decisions of the Italian-United States Conciliation Commission, copies of which they kindly furnished to the author. The printed decisions of the Franco-Italian Conciliation Commission were also obtained.

January of 1960 marked the arrival of Judge Salén. By that time, however, few, if any, of the cases were ready for final consideration, as in some cases the Agents had asked for delays in the filing of the pleadings and in all cases the task of translating the pleadings incumbent upon the Secretariat had proved to be a considerable burden. The Japanese Foreign Office graciously assisted in the making of the translations. Under the best of circumstances, however, translating the pleadings constituted a laborious and tedious endeavor which was difficult to expedite. The Commission did, however, in this period examine the pleadings filed up to date and had some informal preliminary discussions. Moreover, mindful that an agreed settlement is always preferable to a decision imposed on the parties by the Commission, the latter encouraged the disposal of such cases as could be settled by direct negotiations of the parties. Such settlements had already been provided for by the inclusion of language in the Rules of Procedure providing that "The Commission may try to effect a compromise at any stage of the proceedings" (Article 19). Partly, at least, because of this encouragement, three cases, two involving one claimant, were settled and the Commission ratified the settlements in appropriate decisions.

In the course of the next few months the pace of the Commission's work accelerated materially. As mentioned previously, substantial time was spent by the Commission in the hearing of oral arguments. Even more time was spent on reading the pleadings, evidence and other documents and discussing the arguments of the parties. Toward the end of its sit-

tings, when all other problems had been disposed of, the Commission went to Kobe to hear testimony affecting three different claims. Arrangements for calling witnesses and providing a forum were expeditiously and efficiently made by the Japanese authorities.

In the large minority stockholder cases, considerable time was spent in discussions with the parties to determine whether, once the limits of liability had begun to emerge, the Commission could not arrive at a decision which would avoid the necessity of a protracted inquiry into damages and could be accepted with good grace by the parties. As a result of such discussions and the Commission's own estimates of the various losses, it made awards to each of the individual claimants, which awards, in view of the similarity of the cases, were consolidated into one decision.

In the preparation of the decisions, the Commission members found that their views agreed in all but one case, in which the U. S. member wrote a minority opinion. The disagreement in that case was predicated entirely on different appraisals of the facts. Very often the preparation of the decision was prefaced by the preparation of informal memoranda which served to develop the Commission's views and to channel the discussions. Naturally the Commission wanted to have the decisions correct in form as well as substance. It found that in the available literature there was exceedingly little comment on the proper form of an international arbitral decision. An effort was made to model the form to the closest existing precedent, that is, the decisions of the Franco-Italian and the United States-Italian Conciliation Commissions. It was also decided, although a specific precedent for the action could not be found, to follow the principle of the *alternat* in the two texts, i.e., to have Ambassador Nishimura's name come first in the Japanese text, and to have the U. S. member's name first in the English text.

Since neither Judge Salén nor the writer spoke or wrote Japanese, while Ambassador Nishimura's English was excellent, the decisions were written originally in English. The last decision was placed in final form on the eve of the scheduled departure of Judge Salén and not long before the U. S. member's departure from Japan, so there obviously was not time to prepare the Japanese text for their signature. Hence, there arose the problem of how to sign that text without having it sent to the members of the Commission half-way across the world. As, in any event, reliance would have to be placed on others as to the correctness of the translation, the problem was solved by authorizing the Secretary General to affix rubber-stamp signatures to the Japanese text of the decisions upon certification from the American Embassy as to the accuracy of the translations. After the departure of Judge Salén and the U. S. member, the Secretariat proceeded immediately with the translations, the settlement of accounts, the release of office space and, in general, the termination of affairs.

This, then, is the practical history of the Commission. It is believed that the arbitration or judicial procedure, which involved many millions of dollars, was brought to a conclusion with a speed that far surpassed most arbitral or judicial deliberations, and at a cost to the two govern-

ments and to the claimants that was nominal. A good part of the credit is attributable to the courtesy and consideration of the Japanese member of the Commission and the Japanese authorities who, in addition to manifesting invariably the hospitality and politeness characteristic of the Japanese, co-operated fully in the discharge of a treaty obligation assumed under the Treaty of Peace.

II

THE DECISIONS OF THE COMMISSION⁶

Before discussing the principles of compensation and the decisions of the Commission it seems desirable to make a few comments on the rôle of the Agent of the United States Government.

Although all of the claims referred to the Commission were based upon damages suffered by American nationals, either individuals or corporations, it was not the injured American national but the United States Government which was responsible for presenting each case to the Commission. The principle of governmental rather than individual presentation of the cases was embodied in provisions of the Compensation Law, the Agreement for Settlement of Disputes and the Rules of Procedure of the Commission. The Compensation Law provided that: "A claimant shall file a written claim for payment [of war damage compensation] through the Government of the state to which he belongs. . . ." The Agreement for the Settlement of Disputes Arising under Article 15(a) of the Treaty of Peace with Japan stipulated that it was the Allied Government, not its injured national, which could refer a claim to the Commission for final determination.⁸ The Rules of Procedure of the Commission stated that "The Parties before the Commission shall be the Government of the United States of America and the Government of Japan."⁹

The representatives of the Japanese Government insisted that the Rules of Procedure of the Commission disqualify both the injured national and his attorney from being appointed as Agent or Deputy Agent of the United States Government.¹⁰ There was a curious exception in the rules that the disqualification should not apply to "attorneys who have not acted in a case before its reference to the Commission as a dispute between the Parties,"¹¹ but no situation arose in which the exception could be brought into play. The Japanese representatives also opposed any provision in the Rules of Procedure which would authorize the American Agent to appoint the injured national or his attorney as counsel with the right

⁶ Decisions of the U. S.-Japanese Property Commission have been printed in English in the Japanese Annual of International Law, No. 5 (1961), p. 45 *et seq.* Copies of the decisions in both English and Japanese are available in the State Department library.

⁷ Allied Powers Property Compensation Law, Japanese Law No. 264 of Nov. 26, 1951, published in English translation of Japanese Official Gazette of Nov. 26, 1951, Art. 15.

⁸ Agreement for the Settlement of Disputes, Art. I, note 1 above.

⁹ Enclosure No. 1 to Despatch No. 11 of Aug. 11, 1959, from the American Consulate General at Yokohama to the Department of State, Department of State File No. 294.1141/8-1159, Art. 6.

¹⁰ *Ibid.*, Art. 6, par. C.

¹¹ *Ibid.*

to speak at oral hearings. While such an attitude may seem extreme, the Japanese representatives probably felt that restrictions against the appointment of the injured national or his attorney as Agent, Deputy Agent, or counsel were necessary to assure that, in essence as well as in form, the United States Government, and not the injured national, prosecuted the claim.

The Rules of Procedure prescribed two rounds of pleadings. In preparing the initial petition in each case, the Agent for the United States set forth in separate paragraphs a brief statement of each material fact and identified the evidence in support of that fact. The evidence in documentary form was attached to the petition. The Japanese Agent in his answer then either admitted or denied each allegation in the petition. The second round of pleadings, the reply and counter-reply, tended to be more in the nature of legal arguments or briefs.

In addition to the formal pleadings, both the Japanese and the American Agents requested and received permission from the Commission to file supplemental statements collecting legal authorities on particular points at issue. On several occasions the Commission on its own initiative requested the Agents to submit documentary material such as, for example, a record of the history of the negotiations of the compensation provisions of the Peace Treaty. During the course of oral hearings, one of which lasted nine days, both the Japanese and American Agents made extensive legal arguments and presented a number of exhibits intended as illustrations of the arguments.

It is now proposed to describe briefly the general principles of compensation for war damage to property in Japan and then to summarize the decisions in which the Commission determined how these principles should be interpreted and applied in particular cases.

Limitation of Compensation to Losses in Japan

The obligation which Japan assumed in the Peace Treaty to compensate for war damage to Allied-owned property was limited to losses of property in Japan. This limitation does not mean that Japan was excused from responsibility to compensate for all war losses of property outside Japan. In Article 14(a)(1) of the Peace Treaty, Japan agreed to negotiate reparations arrangements with the Allied Powers whose territories had been occupied by Japanese forces and damaged by Japan. In Article 14(a)(2) of the Peace Treaty, Japan agreed that the Allied Powers should have the right to retain and liquidate all property of Japan and its nationals within their jurisdiction.¹² But the only Allied nationals to whom Japan was obliged to provide direct compensation under the treaty were those who had suffered war losses of property in Japan.

The reasons for the limitation of Japan's liability to provide direct compensation for war damage were: (1) the belief that Japan did not have the capacity to provide substantial compensation in foreign exchange, and (2) the belief that, while Japan could provide compensation in yen,

¹² *Loc. cit.* note 2 above.

such compensation was an appropriate form of compensation only for those who had voluntarily made investments in property in Japan. For war losses of property outside of Japan it was considered that compensation should more appropriately be provided directly by each Allied Power in the currency of the country in which the property was situated or of which the claimant was a national. The Allied Power could use either its own funds, or funds derived from reparations arrangements with Japan or from the liquidation of Japanese assets in its territory.¹³

Incorporation of Japanese Compensation Legislation in Peace Treaty

As late as the March, 1951, draft of the Japanese Peace Treaty, there was no mention of any obligation on the part of Japan to provide compensation for war damage to property in Japan.¹⁴ At that time it was anticipated that any compensation would be provided by Japan on a voluntary basis. Rather than leave the matter in such an indeterminate state, Allied negotiators asked officials of the Japanese Government to supply an outline of proposed compensation legislation.¹⁵ Then, after giving consideration to comments of Allied negotiators on the outline, the Japanese officials prepared a draft text of the compensation law. This draft text was modified during the course of negotiations between representatives of the Japanese Government and of the Allied Powers.¹⁶ The resultant draft text was, consequently, a text which had been agreed between the Allied Powers and Japan prior to its incorporation in the Peace Treaty.

Since there was not sufficient time prior to the signing of the Peace Treaty for the Japanese Diet to act on the draft compensation legislation, it was necessary in the Peace Treaty to refer to the legislation in its draft form. The pertinent provision of the treaty reads:

In cases where such property [property of each Allied Power and its nationals] was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.¹⁷

The above-quoted provision may be compared with the compensation article of the Italian Peace Treaty, which sets forth the obligation to compensate in general terms, but makes no reference to Italian legislation.¹⁸ The

¹³ See Fraleigh, "Compensation for War Damage to American Property in Allied Countries," 41 A.J.I.L. 748-769 (1947).

¹⁴ See Comparative Study of the March, 1951, Draft and August 13, 1951, Text of the Japanese Peace Treaty, circulated as Doc. No. 17 at the Peace Conference at San Francisco.

¹⁵ This statement is supported by preparatory documents concerning the negotiation of the Allied Powers Property Compensation Law, which were submitted to the Commission at its request by the American and Japanese Agents and are identified as General Exhibit No. 1.

¹⁶ *Ibid.*

¹⁷ Treaty of Peace with Japan, Sept. 8, 1951, Art. 15(a). 3 U. S. Treaties 3169; T.I.A.S., No. 2490; 46 A.J.I.L. Supp. 79 (1952).

¹⁸ Treaty of Peace with Italy, Feb. 10, 1947, Art. 78, par. 4. 61 Stat. 1245; T.I.A.S. No. 7642. 42 A.J.I.L. Supp. 17 (1948).

Japanese Diet enacted the compensation legislation, with minor modifications which were agreed to by the Allied Powers, a few months after the signing of the Peace Treaty at San Francisco.¹⁹

The incorporation of the detailed terms of Japanese compensation legislation in the Peace Treaty produced some unexpected complications. Japanese officials tended to think that their interpretation of the legislation should be regarded as authoritative, since it was, after all, their legislation. There appeared to be some uncertainty within the Japanese Government as to whether the terms of the compensation legislation should be regarded as the terms of a treaty or as the terms of domestic legislation, but the issue was not raised before the Commission. The Commission itself stated that provisions of the Compensation Law were "for all intents and purposes made a part of the Treaty."²⁰

General Principles of Compensation for War Damage to Property in Japan

In its compensation legislation the Japanese Government undertook to provide full compensation for damage to Allied-owned property in Japan as a result of World War II. This undertaking differs from the obligation of the Italian Government, which agreed to pay two-thirds of the amount of the war loss, although by a later agreement the Italian Government undertook to pay the full amount of the loss in all cases where the approved amount of the claim was 1.5 million lire or less.²¹

The Japanese Government in its legislation authorized the use of current replacement cost as the measure of damage to tangible property, in conformity with the principle incorporated in the Italian Peace Treaty. There was no provision for loss of profits or income on tangible property, nor for interest on the amount required to replace the damaged property. The adoption of replacement cost as the measure of damage protected the owner of property against the severe depreciation of the yen during the war.

In Article 4 of the compensation legislation the types of damage which are recognized to be "damage suffered as a result of the war" are defined to include:

- (1) Damage caused by acts of hostility on the part of Japan or of any of the states which were at war or in a state of belligerency with Japan;
- (2) Damage caused by the war-time special measures or other measures of the Japanese Government and its agencies;

¹⁹ Compare text of Compensation Law (note 7 above) with Draft Allied Powers Property Compensation Law, approved by the Japanese Cabinet on July 13, 1951, the text of which is enclosed with Despatch No. 239 of Aug. 15, 1951, from the U. S. Political Adviser (USPOLAD) Tokyo, to the Department of State, Department of State File No. 694.001/8-1551.

²⁰ Decision No. 8, U. S.-Japanese Property Commission, U. S. ex rel. Continental Insurance Co. v. Japan, July 20, 1960. Japanese Annual of International Law, No. 5 (1961), p. 50.

²¹ Agreement with Italy of Feb. 24, 1949, interpreting Agreement of Aug. 14, 1947, on Financial and Economic Relations. 63 Stat. 2415; T.I.A.S., No. 1919.

- (3) Damage on account of lack of due care on the part of the administrator or possessor of the property concerned;
- (4) Damage suffered owing to the inability of an Allied national to have the property insured in Japan on account of the war;
- (5) Damage suffered while in use of the Occupation Forces owing to lack of due care on the part of the Occupation Forces or the inability of an Allied national to insure property.

The latter two categories of damage were not involved in any of the decisions of the Commission, but the second category of damage was an issue in several cases. As already noted, the Italian Peace Treaty did not specify the categories of war damage, but it did require Italy to compensate United Nations nationals "for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property,"²² and, by making no mention of "other" measures of the Italian Government, may have excused the Italian Government from a liability which the Japanese Government assumed in defining war damage to include damage caused by "other measures [other than wartime special measures] of the Japanese Government and its agencies."

Compensation was provided in the Japanese legislation for damage to shareholding interests held by Allied nationals in Japanese companies. The damage to shareholding interests was to be computed by first calculating the amount of the damage suffered by the Japanese company, and then awarding the Allied shareholders a proportion of that amount corresponding to their interests in the company.²³ This formula for calculating shareholding claims is the same as that incorporated in the Italian Peace Treaty.²⁴

Compensation was provided for loss of debts in cases where the Japanese Government had collected the debts during the war as enemy-owned assets, and had discharged the Japanese debtors.²⁵ Instead of reinstating the debts, the Japanese Government assumed responsibility to make payments to the Allied creditors. In a provision covering "public loans" the Japanese Government undertook to pay all such loans in cases where the loan instruments had been seized as enemy assets and sold, or had been canceled by payments to Japanese wartime custodians of enemy property.²⁶ Creditors were not protected against the depreciation of the yen, unless they held obligations payable in a foreign currency.

All compensation was payable in yen except where a debt or loan had been designated in foreign currency, in which case the Japanese Government recognized its obligation to make payment in the foreign currency. Conversion of yen compensation into foreign currency was subject to Japanese exchange regulations.²⁷ Although at the time of payment of most claims there were restrictions upon the convertibility of the payment, these restrictions have been gradually removed.

²² Treaty of Peace with Italy, Art. 78, par. 4(d), cited note 18 above.

²³ Allied Powers Property Compensation Law, Art. 11, note 7 above.

²⁴ Treaty of Peace with Italy, Art. 78, par. 4(b), note 18 above.

²⁵ Allied Powers Property Compensation Law, Art. 7, note 7 above.

²⁶ *Ibid.*, Art. 8.

²⁷ *Ibid.*, Art. 17.

Damage Caused by Seizure of Vessels as Prize

In the case of *United States ex rel. Standard Sempaku Kabushiki Kaisha v. Japan*, there was referred to the Commission a claim for compensation for damage to eleven small vessels owned by Standard Vacuum Oil Company through a wholly-owned Japanese subsidiary. The vessels were within the territorial waters of Japan at the outbreak of the war. They were seized as enemy property and placed under the control of a Japanese enemy property custodian. Later they were subjected to Japanese prize court proceedings and adjudged to belong to the Japanese Government as prize. During the Allied occupation of Japan seven of the vessels were repaired to some extent and returned to Standard Vacuum.

The Japanese Government denied any obligation to compensate for damage to the vessels on the ground that, in accordance with Article 17(a) of the Peace Treaty, the claimant should first have applied for review of the prize court proceedings, and also on the ground that no loss or damage was sustained. Under Article 17(a) the Japanese Government agreed that, upon the request of any Allied government, it would "review and revise in conformity with international law any decision or order of the Japanese Prize Courts. . . ." The United States Government contended that Standard Vacuum Oil Company was not obliged to request a review of the prize court proceedings because the Japanese Government was liable to compensate for damage to the vessels as damage caused by their seizure as enemy property under Japanese "wartime special measures." The issue was whether Article 17(a) of the Peace Treaty provided the only remedy for the claimant or whether he had the option of choosing to proceed under Article 15(a).

After all of the pleadings had been submitted and after the case had been under consideration by the Commission for several weeks, the Japanese Government proposed that the United States Government agree to relinquish this claim as part of the compromise settlement of a second claim of Standard Vacuum which was based on damage due to the cancellation of certain forward exchange contracts and the revocation of related permits to remit foreign exchange. The claimant government agreed to the proposal. As a consequence, the decision of the Commission in this case was limited to a formal approval of the compromise settlement.²⁸

Damage Caused by Cancellation of Forward Exchange Contracts and Revocation of Permits to Remit Foreign Exchange

The case of *United States ex rel. Standard Vacuum Oil Company v. Japan* involved a series of financial arrangements between the company, on the one hand, and the Japanese Government and the Yokohama Specie Bank on the other. During the period from March 22 to June 27, 1941, Standard Vacuum obtained from the Japanese Government permits to purchase foreign exchange for the purpose of remitting to the United States proceeds from the sale of oil to be imported into Japan. During the

²⁸ Decision No. 2, June 29, 1960; Japanese Annual of International Law, No. 5 (1961), p. 47 *et seq.*

same period, on the basis of these permits, Standard Vacuum entered into forward exchange contracts with the Yokohama Bank pursuant to which the bank agreed to furnish dollars for yen at an exchange rate of $23\frac{7}{16}$ yen to the dollar. In reliance upon the permits and the forward exchange contracts, Standard Vacuum imported oil into Japan during the period from September to November, 1941. Although the company had sufficient yen in its bank account in Japan to cover the forward exchange contracts, its request for permission to withdraw the yen was never approved by the Japanese Government. Instead, after the outbreak of hostilities the Japanese Government appointed a custodian of the property of Standard Vacuum, and the custodian canceled the contracts.

The claimant government contended that the exchange loss suffered by the company should be regarded as damage falling under the category of "damage caused by the war-time special measures and other measures of the Japanese Government and its agencies." The respondent government in its pleadings called attention to the action taken by the United States Government on July 26, 1941, in freezing all property of Japanese nationals in the United States and the retaliatory measure of the Japanese Government on July 28 controlling the economic activities of American nationals in Japan. This latter measure required Standard Vacuum Oil Company to obtain permission from the Japanese Government to make a withdrawal from its yen account. The Japanese Government also alleged that the exchange permits had expiration dates of the last day of September, 1941, and the last day of November, 1941. Consequently it was the position of the Japanese Government that the permits had lost their validity before the outbreak of the war and that the contracts to purchase foreign exchange had also become invalid before the outbreak of the war.

After the exchange of the pleadings and after the American Agent had submitted to the Commission a written argument on the issues of the case, the two Agents agreed to a compromise settlement of the claim, together with Standard Vacuum's first claim. Under the terms of the settlement the Japanese Government permitted the company to remit to its head office in the United States the amount of dollars required to settle the debt for the imported oil and recognized that the company was entitled to regard the exchange loss it had suffered in making the remittance at the current exchange rate (360 yen to the dollar) as a business deduction for purposes of the Japanese Corporation Tax. The decision of the Commission, as in the first Standard Vacuum case, was limited to a formal approval of the compromise settlement.²⁹

Damage Due to Loss of Interest Coupons on Multiple Currency Bonds Held in Japan

In the case of *United States ex rel. Continental Insurance Company v. Japan*,³⁰ the Commission was asked to determine the amount of compensation payable for the loss of interest coupons on bonds issued by the Jap-

²⁹ *Ibid.*

³⁰ Japanese Annual of International Law, No. 5 (1961), p. 51 *et seq.*

anese Government in 1910. Each bond provided for payment at maturity of an amount of 500 francs in Paris or an amount of 194 yen in Tokyo. Interest was payable on the specified face amount in the currency of the place, Paris or Tokyo, where the interest coupon was presented. The insurance company was holding the bonds and attached coupons in Tokyo at the outbreak of the war. Both bonds and coupons were taken into custody by the Japanese Government as enemy property. They were returned to the company in 1951 with the exception of the interest coupons for the period from 1942 to 1950. The company claimed compensation in francs for the missing coupons. The Japanese Government offered to compensate in the face amount of yen.

The first question for the Commission was whether the coupons conferred an option upon the bondholder to demand payment in either yen or francs or an option upon the Japanese Government to make payment in either currency. The question was important because the face amounts of yen and francs, though equivalent in 1910, had long ceased to be equivalent. In fact the franc was worth almost twice as much yen in 1960 as in 1910. The Commission, referring to decisions of an international claims commission, and of French and United States courts, ruled that the bonds conferred upon the bondholder the option to demand payment of principal or interest in the more valuable of the two currencies at the time of payment.

The next question was whether the company had been deprived of its option to receive payment in francs because the coupons and the bonds were physically located in Japan and could not be exported without the permission of the Japanese Minister of Finance. The Japanese Agent contended that, since the coupons were held in Japan and, in effect, were being presented for payment in Japan, payment should be made in yen, and in the face amount of yen. The American Agent maintained that, by issuing ordinances restricting the exportation of bond instruments the Japanese Government could not relieve itself of its obligation to pay in francs at the option of the bondholder. He argued that the ordinances authorized only a temporary suspension of the bondholder's right to present its bond instruments in Paris during the period in which Japan was experiencing exchange difficulties.

In its decision the Commission stated that it did not have to decide "by the general provisions of international law" whether the Japanese Government, in the exercise of its sovereign power to control foreign exchange, could insist that a foreign holder of its multiple-currency bonds receive payment in yen. The Commission said the question was determined in this case "by the terms of the Treaty of Peace and the Compensation Law." The key provision of the Compensation Law reads as follows:

In case where the amount of money of the . . . loans [public loans] has been designated in terms of currencies other than the yen and should have been paid in foreign currency or, although designated in the Yen, should have been paid in the foreign currency at the fixed exchange rate in accordance with the terms of the contract, the Japa-

nese Government shall recognize its liability to make compensation in foreign currency and make it available to the claimant at the earliest date permitted by the Japanese foreign exchange position and in accordance with the laws and regulations concerning the foreign exchange.⁸¹

Relying principally upon the above-quoted provision of the Compensation Law, the Commission ruled that the Japanese Government was obliged to make payment in francs.

It is not clear how the Commission would have decided the case had it been governed by "general provisions of international law." The Commission says in its decision:

It seems probable that the Government of Japan, in the exercise of its sovereign power to control foreign exchange, could insist that a bondholder holding the bonds in Japan receive payment in yen. In such a case, however, the bondholder would appear to be entitled to receive yen in an amount equivalent in value to the francs the bondholder would have received had it not been prevented from exercising the option of presenting the bonds for payment in French francs in Paris. . . .⁸²

But the Commission also says in a later paragraph of its decision:

In this case, payment is specified both in francs and yen, but the option to determine which currency shall be received lies wholly with the bondholder so that if the bondholder demands payment in francs the situation is the same as if payment were stipulated in francs alone. . . .⁸³

In the opinion of the author, the sovereign power to control foreign exchange does not enable a government to convert its promise to pay in a foreign currency into a promise to pay in its own currency. In fact there is support for the proposition that, even when a government tries to require its bondholders to sell their foreign currency bonds back to it for local currency, a bondholder cannot be compelled to receive local currency, but can continue to insist upon receiving payment in the foreign currency.⁸⁴

Adjustment of Face Amount of Interest Coupons to Conform with Adjustments Granted to Other Bondholders of the Same Issue

After recognizing that the Continental Insurance Company could enforce the franc option in the interest coupons, the Commission took up the question whether the face amount of francs in the interest coupons should be increased to conform with increases granted to other bondholders of the same issue. In 1956 the Japanese Government had entered into an agreement with an association of French holders of the same issue of bonds to increase the face amount of francs in both bonds and coupons twelve times. This agreement was based upon the recommendation of a Swedish arbitrator, Mr. Nils Von Steyern.

⁸¹ Allied Powers Property Compensation Law, Art. 17, par. 2.

⁸² Japanese Annual of International Law, No. 5 (1961), p. 55.

⁸³ *Ibid.*, pp. 56-57.

⁸⁴ Nussbaum, *Money in the Law*, sec. 81.IV (rev. ed., 1950).

The American Agent contended that all of the reasons given by the Swedish arbitrator for increasing the face amount of francs in the coupons held by French nationals applied with equal force to the American claimant. He submitted to the Commission a collection of authorities entitled "References in support of the proposition that a state which has issued foreign currency bonds should accord the same treatment to all non-resident holders of bonds of the same issue."⁸⁵ Simultaneously the Japanese Agent presented to the Commission citations with brief comments in support of the contention of the Japanese Government that there is no such principle in international law.⁸⁶

The Commission concluded that "... it has not been convincingly established that the claimant may under applicable principles of international law invoke the Bondholders Agreement and its benefits." The Commission then took up the question whether it was authorized to adjust the face amount of the coupons "on grounds of equity." On this point the Commission said:

Neither the Treaty of Peace nor the Agreement for Settlement of Disputes referred to above contains any authorization which would permit the Commission to act as an "amiable compositeur". . . .

Failing a specific provision authorizing the Commission to decide a case *ex aequo et bono*, the Commission cannot base its decisions on purely equitable grounds. . . .⁸⁷

Consequently the Commission ruled that the Japanese Government should pay as compensation the face amount in francs of the missing coupons.

The decision of the Commission that it lacked authority to consider the issue of adjustment of the face amount of francs payable on the missing coupons poses the question whether the company may seek agreement of the Japanese Government to refer the issue to a properly authorized conciliator. The Agreement for Settlement of Disputes, under which the Commission was established, provides that the decision of the Commission "shall be accepted as final and binding by the Government of the Allied Power and the Japanese Government."⁸⁸ But it would seem reasonable that the decision of the Commission need not be accepted as final on the issue of adjustment of the face amount of francs, since this issue was regarded by the Commission as outside its jurisdiction but appropriate for consideration by an "amiable compositeur."

Damage to Interests of American Shareholders in Japanese Companies

The Commission considered all claims of American minority shareholders in Japanese companies in one decision, which bears a multiple title beginning with *United States ex rel. Tidewater Oil Company as shareholder of Mitsubishi Oil Co., Ltd. v. Japan*.⁸⁹ Twenty-three Americans, both indi-

⁸⁵ Enclosure to Despatch No. 1271 of April 21, 1960, from the American Embassy, Tokyo, to the Department of State, Department of State File No. 294.1141 Continental Insurance Co./4-2160.

⁸⁶ *Ibid.*

⁸⁷ Japanese Annual of International Law, No. 5 (1961), p. 58.

⁸⁸ Agreement for Settlement of Disputes, Art. VII, note 1 above.

⁸⁹ Decision No. 4, July 20, 1960. Japanese Annual, *loc. cit.*, p. 60 *et seq.*

viduals and corporations, submitted claims based on holdings in fifteen Japanese companies. The United States Government requested the Commission to award compensation on these claims in an aggregate amount of about 16 billion yen (46 million dollars).⁴⁰ The Japanese Government denied that compensation was payable to any of the American claimants except one, to whom it admitted there was due a sum of about 125 million yen (\$346,000).

One of the principal issues between the two governments concerned the allowance of compensation for bomb damage to inventory. The Compensation Law stipulated that compensation should be computed on damage to property owned in Japan at the commencement of the war. Since the Japanese companies in which Americans held minority interests continued in operation during the war, the Japanese Government contended that the items of inventory on which bombs were dropped in 1944 and 1945 were not the same as those owned at the commencement of the war, and hence compensation was not payable for any loss of inventory. The United States Government maintained that such a construction of the Compensation Law was too technical and that compensation should be allowed for damage to that amount of inventory which did not exceed in physical quantity the amount of inventory on hand at the commencement of the war.

An issue over the allowance of damage measured by excessive wartime depreciation turned largely on whether there was sufficient evidence that the damage so measured fell under one of the categories of war losses as those losses were defined in the Compensation Law. An issue over damage due to cancellation of contracts for war equipment and supplies by the Japanese Government involved the question whether a loss had actually been sustained and whether any such loss could properly be regarded as a war loss. The respondent government also objected to consideration of both of the above types of damage because they had not been specifically included in the original claims.

A final issue between the two governments related to the deduction from allowable damage which was authorized by the Compensation Law. The deduction provision required that, in computing compensation, there should be deducted the excess of current market value over acquisition cost of property owned by the company which was not owned by it at the commencement of the war.⁴¹ The American Agent asserted that the property to be considered in calculating the deduction should be any net increase in assets of a company and should not include acquisitions made merely to replace assets sold or scrapped, since such acquisitions served only to maintain the level of property owned in 1941. The Japanese Agent maintained that the deduction should be based on all assets acquired by the company between the commencement of the war and the date of payment of compensation.

In its consolidated decision on the shareholding cases the Commission

⁴⁰ Despatch No. 303 of Sept. 13, 1960, from American Embassy, Tokyo, to the Department of State, Department of State File No. 294.1141/9-1360.

⁴¹ Allied Powers Property Compensation Law, Art. 12, par. 3, note 7 above.

allowed damage to inventory not exceeding in value the inventory on hand at the commencement of the war, in recognition of the commercial concept of inventory as a separate though continually changing entity. The Commission disallowed damage for excessive depreciation and cancellation of government contracts for the reasons that: (1) in at least one case, these categories of damage had not been submitted to the Japanese Government within the requisite period for filing claims; (2) there was insufficient evidence that the damage fell within the definition of war damage in the Compensation Law; and (3) some of the excessive depreciation may have been compensated for at the time it occurred by increased sales with concomitant profits.

The Commission made no reference in its decision to its attitude on the calculation of the deduction allowable in the shareholding cases. It concluded its decision with the following sentences:

After having reached the foregoing conclusions [the conclusions concerning inventory, excessive depreciation and cancellation of government contracts] and having considered the deductions provided for by Article 12 item 3 the Commission entered into discussions with the parties, including the representatives of the claimants, to determine the proper award in each case. As a result of such discussions and the Commission's own estimate of the various losses, it has arrived at the conclusion that payment to the claimants of record should be made as listed below: . . .⁴²

There followed a listing of each claimant and the amount of compensation. The total amount awarded to the shareholding claimants was ¥6,676,000,000 (\$18,544,444).

Damage Caused by Sale of Goods by Lienholder

In the case of *United States ex rel. New York Merchandise Company, Inc. v. Japan*,⁴³ the company had presented a claim for compensation for the loss of certain merchandise which had been sold by the Yokohama Specie Bank during the war in the exercise of its rights as lienholder. The merchandise had been purchased in Japan for New York Merchandise Company by a British company, Strong & Company, and had been placed on board two Japanese ships on July 18, 1941. On the same dates Strong & Company presented to the bank bills of exchange drawn on the New York branch of the bank, together with bills of lading endorsed in blank. The bank discounted the bills of exchange, intending to forward the documents to its New York branch for collection from New York Merchandise Company. By this transaction Strong & Company was reimbursed for its expenditures in purchasing the goods.

Shortly afterward the Japanese ships were recalled to Japan and the merchandise was unloaded in Yokohama. Then the war intervened, and the Japanese Government placed the merchandise under the control of a wartime custodian of the property of Strong & Company. During the

⁴² Japanese Annual, *loc. cit.*, p. 66 *et seq.*

⁴³ Decision No. 5, July 21, 1960. Japanese Annual, *loc. cit.*, p. 70 *et seq.*

course of the war the bank, after obtaining the consent of the custodian of the property of Strong & Company, sold the merchandise and used the proceeds of the sale to pay the bills of exchange.

Both Strong & Company and New York Merchandise Company submitted claims to the Japanese Government for compensation for the loss of the merchandise, calculating the compensation at postwar replacement costs. Strong & Company's claim was presented by the British Government, and New York Merchandise Company's claim by the United States Government. The Japanese Government paid compensation, equivalent to the current value of the merchandise, to Strong & Company. The United States Government contended that the merchandise, at the time of its sale by the bank, was owned by New York Merchandise and not by Strong & Company, and consequently that any war damage compensation for the loss of the merchandise should have been awarded to New York Merchandise Company.

The Commission stated that, even if it were admitted that ownership of the merchandise had shifted to New York Merchandise Company, the ownership of that company was not unqualified, but was subject to the right of the bank as lienholder. The general prohibition of financial transactions between the United States and Japan in July of 1941 had made payment of the bills of exchange by New York Merchandise impossible, and also was the reason for the recall of the Japanese ships.⁴⁴ The Commission concluded that, since the fulfillment of the transaction was frustrated by *force majeure*, the bank was within its rights in selling the merchandise to protect itself against loss. The Commission cited also an article of the Law of Bills of Japan which stipulates that, if *vis major* continues to operate beyond 30 days after maturity, recourse may be exercised, and neither presentment nor the drawing up of a protest shall be necessary. After making the foregoing analysis, the Commission rejected the New York Merchandise Company claim.

While denying compensation to the company because the sale of the merchandise was made by the bank as lienholder, the Commission appeared to consider the payment of war damage compensation to Strong & Company as justifiable. In the next to the last paragraph of its decision it said:

The payment made to Strong & Company by the Government of Japan was obviously made on the basis that the property of Strong & Company, which was considered to have included the property involved in the present claim, was taken into official custody and was disposed of under the direction of the custodian. In the present case, the property of the claimant was never placed into custody.⁴⁵

The Commission made no comment on the contention of the claimant government that it was only due to an error of the Japanese Government that the merchandise had been placed under the control of a custodian for the property of Strong & Company. But the above-quoted paragraph implies that if the Japanese Government had placed the merchandise under the control of a custodian of the property of New York Merchandise Com-

⁴⁴ U. S. Executive Order No. 8832 of July 26, 1941; Japanese Ministry of Finance Ordinance of July 28, 1941.

⁴⁵ Japanese Annual, *loc. cit.*, pp. 75-76.

pany, who had thereafter consented to the sale by the bank, the Commission would have awarded compensation to New York Merchandise Company.

Destruction of Property Not Disclosed During the War to be American-Owned

In *United States ex rel. Industrial Export and Import Corporation v. Japan*,⁴⁶ the claimant sought compensation for the loss of some fur skins and pearl beads which were alleged to have been stored in a warehouse ultimately destroyed in a bombing raid. The evidence concerning the existence of the property was conflicting. The Japanese Government placed considerable emphasis on the fact that no report of the existence of the property had been made to the Japanese Government during the war, in spite of regulations requiring reporting and the turning over of enemy-owned (*i.e.*, Allied-owned) property to custodians appointed by the Japanese Government. The claimant government alleged that ownership of the property by the American company had been concealed from the Japanese Government during the war to avoid seizure of the property, and that no insurance had been taken out on the property for the same reason.

This was the only case in which the decision of the Commissioners was not unanimous. The Japanese and Swedish members of the Commission concluded that the evidence of the existence of the merchandise was contradictory, and hence the claim was rejected. The American Commissioner in a minority opinion stated that he considered the evidence sufficient to support the claim.⁴⁷

Interpretation of Deadline for Filing Claims

In two cases, those brought by the United States on behalf of Frank Hillel and Frank Sassoon,⁴⁸ the Commission was faced first with a question concerning the interpretation of the provision in the Compensation Law requiring that a claimant must file a written claim for compensation with the Japanese Government "through the Government of the state to which he belongs within eighteen months from the time of the coming into force of the Peace Treaty."⁴⁹ In these two cases the claimants had been Iraqi nationals at the outbreak of the war but had become naturalized American citizens before the Peace Treaty was signed. For them to be eligible to obtain compensation it was necessary that Iraq, as well as the United States, ratify the Peace Treaty. The Compensation Law stipulated that claimants must be nationals of one of the Allied Powers both at the commencement of the war and on April 28, 1952. An Allied Power was defined in the treaty to include any state at war with Japan which ratified the treaty.

⁴⁶ Decision No. 6, July 23, 1960. Japanese Annual, *loc. cit.*, p. 77 *et seq.*

⁴⁷ *Loc. cit.*, p. 85.

⁴⁸ U. S. *ex rel. Hillel v. Japan*, Decision No. 7, July 23, 1960, Japanese Annual, *loc. cit.*, p. 89 *et seq.*; U. S. *ex rel. Sassoon v. Japan*, Decision No. 8, July 23, 1960, *ibid.*, p. 102 *et seq.*

⁴⁹ Allied Powers Property Compensation Law, Art. 15, note 7 above.

The United States Government ratified the Peace Treaty on April 28, 1952, but the Iraqi Government did not ratify it until August 18, 1955. The Japanese Government contended that the time limit for filing of the claims was 18 months after ratification of the treaty by the United States. The United States Government maintained that the time limit was 18 months after ratification of the treaty by Iraq, since the claimants were not even eligible to receive compensation until the treaty had been ratified by Iraq. The Commission upheld the contention of the claimant government.

Damage Caused by Forced Sale of Merchandise

After concluding that the Hillel and Sassoon claims were not barred for late filing, the Commission turned to the substance of the claims. They were principally claims for compensation for losses suffered when the Japan Cotton Textile Exporters Association (Nihon Memshi Fu Yushutsu Kumiai) required the Japanese wartime custodian of certain cotton textiles owned by the claimants to sell the textiles to the Association at a fixed price. The claimant government contended that the Association was acting as an agency of the Japanese Government in making compulsory purchases of the textiles. It was the position of the claimant government, therefore, that the loss of the merchandise came within the definition of war damage as "damage due to other [other than wartime special measures] measures of the Japanese Government and its agencies."

The Commission ruled that with respect to certain compulsory purchases by the Textile Association, the Association could be regarded as an agency of the Japanese Government. These were purchases made by the Association "in conjunction with the Resources Mobilization Program implemented by the Government of Japan under the National Mobilization Act with the primary aim of securing and increasing the stock of essential goods in the country as well as making the most efficient and appropriate use thereof." The Commission concluded that certain other purchases of textiles made by the Association were initiated before the outbreak of the war, and in any event were not made under compulsion, nor pursuant to any governmental plan for the mobilization of resources.

The Commission held that the phrase "damage caused by . . . other measures of the Japanese Government and its agencies" was not limited, as the respondent government had contended, to damage caused by measures "taken towards the enemy." Consequently it upheld the proposition that Japan under the Compensation Law had assumed responsibility to compensate for losses due to any measures of the Japanese Government and its agencies during the period of the war.

General Significance of Decisions of the Commission

The foregoing summary of issues raised with the United States-Japanese Property Commission covers all of the eight decisions of the Commission except the first. The first decision merely recorded Commission approval of an agreement between the American and Japanese Agents to split off and settle one small item of the claim of International General Electric

Company, about which there was no dispute.⁵⁰ All of the decisions were rendered during the period from March 29, 1960, to July 27, 1960. In this article the decisions have been discussed in their numerical (and chronological) order.

The decisions of the Commission contain some useful and instructive precedents concerning responsibility for war damage. There is a tendency toward the development of uniformity in the definition of war damage. Drafters of peace treaties tend to follow the language of prior peace treaties, if no good reason appears to the contrary. The provisions relating to war damage compensation in the Italian, Bulgarian, Hungarian and Rumanian Peace Treaties correspond very closely.⁵¹ While differences in the financial capacity of defeated countries to pay compensation must always be considered, the differences can be taken into account by prescribing variable percentages of full compensation for war damage, rather than by defining war damage differently for each defeated country.

There are even pressures toward uniformity in the definition of war damage in national compensation legislation. The negotiation of agreements between Allied countries for reciprocal treatment of nationals of one country owning property in the other country under national systems of war damage compensation has led to bureaucratic comparison of national definitions of war damage. The undertakings of the United States Government to guarantee American investors against future losses due to war damage to property in foreign countries implies that there is a standard for determining what is war damage. There is also the pressure brought by an individual or a corporation with property losses in a number of countries due to the same war. Such a property owner finds it difficult to understand why a certain type of damage is regarded as war damage, and hence compensable, if sustained in one country, but is not so regarded, and hence not compensable, if sustained in another country.

In addition to the usefulness of the Commission's rulings on the nature of war damage, the conclusions of the Commission in some cases may have a bearing on certain issues which may arise in time of peace. The Commission in the *Continental Insurance Company* case considered the issue whether a state can invoke its power of exchange control to relieve itself of its contractual obligation to pay a debt in a foreign currency. Another issue of significance in peacetime is the issue whether a state, which has induced a foreign national to bring needed materials into the country by granting him a license to remit the proceeds of the sale of the materials, may revoke the license after the foreign national has brought in the materials. This issue was raised in the *Standard Vacuum Oil Company* case, but the Commission confined its ruling to the approval of a compromise settlement.

There is another aspect in which the accomplishments of the Commission have significance. It was anticipated that cultural differences between the United States and Japan might cause misunderstandings and compli-

⁵⁰ Decision No. 1, March 28, 1960. Japanese Annual, *loc. cit.*, p. 45.

⁵¹ Cited note 4 above.

cate the arbitral process. But the desire of both governments and of the Commission to arrive at final determinations of the claims as swiftly as possible overcame even the difficulties of the use of two languages.

Differences in attitudes of Japanese and Americans were observable in the course of the arbitration. The Japanese were less willing than the Americans to proceed to final clear-cut decisions in the cases, and preferred compromises when the relative strength of the positions of the two governments had become sufficiently apparent. The Japanese also at times sought to avoid blunt statements of rulings on particular issues, preferring that it be not too obvious which side had won its point. But these attitudes of the Japanese tended to expedite, rather than delay the work of the Commission.

It proved easier for Japanese and American lawyers to reach mutual understandings of legal principles than had been anticipated. The Japanese legal system is fundamentally similar to the legal systems of Western Europe. This similarity dates back to the Meiji era (1868-1911), when the Japanese were drawing upon European experience for sweeping governmental reforms. During that era the Japanese Government substantially revised the legal system of Japan and adopted codes based upon the codes of Germany and France.⁵²

Any misgivings over the ability of Japanese and Americans to work together in an international arbitration have been proved groundless. The Commission has set an example of a successful Japanese-American arbitration. Perhaps its greatest achievement is its demonstration, for the first time as between the United States and Japan, that states with widely different cultural backgrounds may, nevertheless, find in international arbitration a useful device for settling disputes.

⁵² Cf. Takayanagi, "Contact of the Common Law with the Civil Law in Japan," 4 A. J. Comp. Law 60-69 (1955); Appleton, "The Law of Japan," in *Studies in the Law of the Far East and Southeast Asia* 1-28 (Washington Foreign Law Society, 1956).

PENAL SANCTIONS FOR MALTREATMENT OF PRISONERS OF WAR

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The trials of war criminals which occurred subsequent to World War II resulted in a veritable flood of learned books and articles reporting on these trials and discussing their propriety and their legal significance.¹ The subject has, unquestionably, been exhausted² and it should be understood at the very outset that it is not intended here to cover ground already repeatedly traversed. The actual purpose of this article is to attempt to determine, on the basis of past experience plus recent international legislation, the protection which will be available to the prisoner of war in a future widespread international conflict, both in the nature of penal sanctions against others who would make him the victim of illegal conduct, and on trial, should he himself be accused of the commission of a pre-capture offense. In other words, while the sanctions imposed in the past for the maltreatment of prisoners of war amounting to war crimes will be discussed, this will be done solely in their historical context and to set a legal background for the purpose of determining what comparable actions in this regard may be expected in the future.

I. HISTORICAL

In the early days of recorded history the concept of the "prisoner of war" was completely unknown. It follows that there was no such thing as protection against maltreatment for individuals taken captive in battle. These individuals were, in fact, quickly slaughtered. And the victor well knew that this would be his fate should he be less fortunate on the occasion of the next battle. The Old Testament is replete with stories of the killings of persons captured in war; and the practice was one which was, and continued to be, followed by all nations. During this period, and for

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¹ In Briggs, *The Law of Nations* 1017 (2nd ed., 1952), the literature on the subject is termed "overwhelming." The present writer succumbed to the fever and wrote a purely historical article entitled "War Crimes" for the *Encyclopaedia Britannica*.

² An exception should be made of the very fine lectures on the subject which were given by Professor B. V. A. Röling of The Netherlands at the 1960 Session of the Hague Academy of International Law and which are reproduced at 100 *Hague Academy Recueil des Cours* 329 (1960, II) under the title "The Law of War and the National Jurisdiction since 1945."

many centuries thereafter, the captive taken in war became the private property of his captor, to do with as he willed.³

With the advent of the era of Roman might, the practice had not changed. The Romans were as ruthless as had been their predecessors in the treatment of captives taken in war. But they were also the first to realize the economic value of these captives and for this reason, and not because of feelings of humanity or mercy, slavery instead of death became the fate of some of the captives.⁴ Despite the efforts of the Catholic Church to bring some semblance of humanity into the treatment of prisoners of war,⁵ this situation continued, with only one important change, during the first sixteen centuries of the Christian era, that change being the introduction of the practice of ransoming.⁶ However, an evolution in fundamental concepts began to make its appearance during the course of the seventeenth century. By the end of the Thirty Years' War, a captive of war was considered to be in the custody of the enemy state rather than of the individual captor. There was then a better than even chance that he would not be killed or enslaved, but he still had little or no protection against other types of maltreatment. This practice did, however, serve as a base upon which the principle of humanitarian treatment of prisoners of war could be erected.⁷ It remained for Montesquieu, in his *Esprit des lois*, and Rousseau, in his *Contrat social*, to do the theoretical work, and for events emanating from the American and French Revolutions to lead to the practical changes.

In 1785 the Treaty of Amity and Commerce entered into between Prussia and the United States contained an article which constituted the first international attempt to provide in time of peace for the protection of prisoners of war in the event that the then friendly relations between the two countries should be disturbed by war.⁸ Considering the lack of existing

³ The uniformity of the practice in this early era is attested to by the following statement from Khadduri, *War and Peace in the Law of Islam* 126 (1955):

"The practice of taking prisoners of war as part of the spoil is very old and goes back to antiquity. The Persians treated their captives with relentless cruelty; they were blinded, tortured, and finally killed or crucified. The Hebraic rule was no less severe than Persian practice. The Muslims, regarding captives also as part of the spoil, often treated them no less cruelly than their predecessors."

⁴ Davis, "The Prisoner of War," in 7 A.J.I.L. 521, 523 (1913).

⁵ Among other actions in this regard, the Third Lateran Council (1179) pronounced itself against the enslavement of Christian prisoners of war. Marin, "The Evolution and Present Status of the Laws of War," 92 Hague Academy Recueil des Cours 633, 655 (1957, II).

⁶ Davis, *loc. cit.* 524. An Islamic compilation of the laws of war published in Spain in 1280 did prescribe that it was forbidden to mutilate prisoners of war. Marin, *loc. cit.* 656-657.

⁷ Davis, *loc. cit.* 525, 540; Flory, *Prisoners of War* 158-160 (1942). The Treaty of Westphalia (1648), which ended the Thirty Years' War, provided for the release of prisoners of war without the payment of ransom. During the eighteenth and nineteenth centuries the practice of exchanging prisoners of war, both during and after the cessation of hostilities, became firmly established.

⁸ 8 Stat. 84; Treaty Series, No. 292. Substantially the same provision was contained in the new treaty between the same nations which was entered into in 1799 (8 Stat. 162;

precedent at the time the treaty was drafted, the provisions designed "to prevent the destruction of prisoners of war" are amazing in their breadth and scope. Seven years later, in 1792, the French Legislative Assembly enacted a decree which attempted unilaterally to establish a formal code of humanitarian rules governing the treatment of prisoners of war.⁹ It proved to be far in advance of its time;¹⁰ but all of the items of protection which it contained have since been incorporated into the various conventions which were drafted for the protection of the prisoner of war more than a century later and which have been widely accepted by the nations of the world.

Obviously, the nations of Europe and the New World were slowly but surely arriving at the realization that the maltreatment of prisoners of war was an anachronism which had no place in nineteenth-century civilization. An opinion of the King's Advocate, written in 1832, clearly demonstrates the extent to which prisoners of war had gained the right of protection, and the sanctions which nations were prepared to take to insure that such protection was forthcoming. He stated:

. . . cases may possibly occur in which the treatment of Prisoners of War by a nation may be so barbarous and inhuman as to call upon other powers to make common cause against it, and to take such measures as may be necessary to compel it to abandon such practice, and to conform itself to the more lenient exercise of the rights of war, adopted by other States . . .¹¹

Treaty Series, No. 293). A very similar provision may be found in the Treaty of Guadalupe-Hidalgo, between the United States and Mexico, which was signed in 1848 (9 Stat. 922; Treaty Series, No. 207). Even the 1805 Treaty of Peace and Amity between the United States and Tripoli (8 Stat. 214; Treaty Series, No. 359), and the 1815 Treaty of Peace between the United States and Algiers (8 Stat. 224; Treaty Series, No. 1½) contained provisions as to prisoners of war.

⁹ Decree of May 4, 1792, of the French National Assembly, 1 DeClercq, *Recueil des Traités de la France* 217 (1864). The decree reads in part as follows:

"1. Prisoners of war are under the protection of the French nation.

"2. All cruel acts, all violence, and all insults committed against a prisoner of war shall be punished as if committed against a French citizen.

"3. All prisoners of war shall be transported to special places in the rear of the army for which purpose the commanding generals shall have designated specific areas."

The skeptic might be inclined to ascribe to this action of the French Revolutionary legislature the same motives which impelled the Chinese Communists to institute their so-called "Lenient Policy" towards United Nations Command prisoners of war during the Korean hostilities. See *Treatment of British Prisoners of War in Korea* 31 (British Ministry of Defence, 1955).

¹⁰ It is, indeed, a paradox that one of the worst war crimes of modern history, prior to World War II, was the killing at Jaffa, in 1799, by Napoleon Bonaparte, then a general serving under the French Directory, of more than 3,500 Arab prisoners of war for whom he was unable to spare a guard from his already under-strength army. It is paralleled by the execution of many thousands of Republican prisoners of war by Maximilian of Mexico, himself later captured and executed in 1867.

¹¹ 3 McNair, *International Law Opinions* 119 (1956). In an article entitled "Les sanctions pénales dans la première Convention de Genève," in 1952 *Revue Internationale de la Croix-Rouge* 286, Pilloud mentions that it is possible to find examples of punishment being imposed for violations of the laws and customs of war during the eighteenth and nineteenth centuries, although admittedly the cases are comparatively rare. To

It remained for the American Civil War to highlight this problem, to elucidate formally the applicable laws of war, and to administer punishment to individuals who violated those rules. On April 24, 1863, the famous General Orders No. 100 were published by order of President Lincoln.¹² This compilation of the laws of war, prepared by Dr. Francis Lieber, was probably the first complete code of its kind, and it has furnished much of the basic material for all subsequent documents dealing with various aspects of the subject.¹³ Certain of its articles are of particular relevance to our study. These are:

ARTICLE 56

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

ARTICLE 59

A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

ARTICLE 71

Whoever intentionally inflicts additional wounds on an enemy already disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

Records exist of at least three major cases implementing the foregoing rules. In the fall of 1865, after hostilities had ceased, Captain Henry Wirz, formerly of the Confederate Army, was tried by a Federal military commission for the cruel treatment and unlawful killing of prisoners of war who had been in his custody at the Andersonville, Georgia, prisoner-of-war camp. He was convicted, sentenced to death, and hanged. One of his civilian employees, James W. Duncan, was tried for the same offense at Savannah in March, 1866, was convicted, and was sentenced to imprisonment at hard labor for fifteen years. And Major John H. Gee was tried

the same effect see Pictet, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War* (hereinafter referred to as *Commentary*) 617 (1960).

¹² Lieber, *Instructions for the Government of the Armies of the United States in the Field*.

¹³ According to Davis, *loc. cit.* 530:

"The efforts of Dr. Lieber were so far in advance of the times that the conference at The Hague, held over a generation later, could only approve and adopt his work, without adding materially to its humane requirements."

And several generations thereafter, all or the major parts of the eighteen of its articles concerned with prisoners of war were included in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereinafter referred to as 1949 Convention), 6 U. S. Treaty Series 3316; 75 U.N. Treaty Series 135 (1:972); 47 A.J.I.L. Supp. 119 (1953).

at Raleigh, North Carolina, in 1866 for the failure to take proper care of Federal prisoners of war in his charge at Salisbury, North Carolina, and for causing the death of several. He was acquitted.¹⁴

Despite the precedents which had thus been established, and despite the great stride forward in regularizing the laws and customs of war accomplished by the adoption of the 1864 Geneva Red Cross Convention,¹⁵ the Second Hague Convention of 1899¹⁶ contained no provisions for penal sanctions for the killing or maltreatment of prisoners of war and, except for a provision for pecuniary responsibility on the part of the offending state, the same was true of the Fourth Hague Convention of 1907.¹⁷ Both of these conventions did contain provisions requiring that prisoners of war be humanely treated, and prohibiting the killing or wounding of those who had surrendered, but the events of World War I clearly demonstrated the inadequacy of such provisions standing alone. As stated by Hyde:

The conduct of Germany and her allies in the course of World War I, as well as of participants in some subsequent conflicts, has served to emphasize the fact that prisoners of war may still be subjected to the caprice and malice of a captor whose passions differ in no wise from those of the Carthaginian or Goth, and from the violence of which no regulations are likely to assure adequate protection.¹⁸

And in its Report, the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," created by the Preliminary Peace Conference in January, 1919, listed, in addition to a number of general offenses, some of which could apply to prisoners of war as well as to others, two offenses specifically directed against prisoners of war: ill-

¹⁴ Winthrop, *Military Law and Precedents* 791-792 (1895 ed., 1920 reprint). Winthrop states:

". . . any individual officer resorting to or taking part in such act [of putting a prisoner of war to death] or [in unlawful, unreasonably harsh, or cruel] treatment is guilty of a grave violation of the laws of war, for which, upon capture, he may be made criminally answerable." (p. 791.)

¹⁵ The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Time of War. 22 Stat. 940; Treaty Series, No. 377; 1 A.J.I.L. Supp. 90 (1907).

¹⁶ 32 Stat. 1803; Treaty Series, No. 403; 1 A.J.I.L. Supp. 129 (1907). The "Oxford Manual" on the laws and customs of war (*Annuaire de l'Institut de Droit International*, 1881-1882) had contained a provision in Art. 84 for the punishment of persons who violated the laws of war.

¹⁷ 36 Stat. 2277; Treaty Series, No. 539; 2 A.J.I.L. Supp. 90 (1908). With respect to this convention, the following statement appears in Pictet, *Commentary*:

"States were left entirely free to punish or not acts committed by their own troops against the enemy, or again, acts committed by enemy troops, in violation of the laws and customs of war. In other words, repression depended solely on the existence or non-existence of national laws repressing the acts in question." (p. 617.)

Strangely enough, the 1906 Geneva Red Cross Convention, 35 Stat. 1885, Treaty Series, No. 464, contained a chapter entitled "Repression of Abuses and Infractions," and the abuses and infractions against which the parties were called upon to legislate included "ill treatment of the sick and wounded of the armies." Nevertheless, this type of provision is not found in the later (1907 and 1929) conventions dealing specifically with prisoners of war.

¹⁸ 3 *International Law Chiefly as Interpreted and Applied by the United States* 1845 (2nd rev. ed., 1945).

treatment of wounded and prisoners of war; and employment of prisoners of war on unauthorized works.¹⁹ While the American and Japanese members of the Commission filed reservations to certain portions of the Report, the representatives of all ten of the member nations composing the Commission concurred in the portion recommending the imposition of penal sanctions against those responsible for violations of the laws and customs of war; and Article 228 of the Treaty of Versailles contained a recognition by Germany of the right of the Allies "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."²⁰

In 1929 47 nations gathered at Geneva and drafted and signed the Geneva Convention Relative to the Treatment of Prisoners of War.²¹ This convention was intended to supplement, not to replace, Chapter II of the Regulations annexed to the Hague Conventions. It covered areas not covered by the two Hague Conventions and it went into greater detail with respect to areas already covered by those two conventions. While it has been described as "an instrument which lays upon the Detaining Power considerably more obligations towards its captive, than it requires from the captive towards the captor,"²² and while it does contain provisions requiring the humane treatment of prisoners of war, once again no specific penal sanctions were provided for violations of this requirement.²³ Whether or not the incorporation of provisions for such sanctions into the convention would have acted as a deterrent during World War II is, of course, entirely a matter of opinion. However, if we are to accept the basic theory of all penal codes, there are at least some individuals who would have been deterred from their barbaric activities by the threat of punishment prescribed in a widely publicized treaty to which they were subject.²⁴ Be that as it may, the fact remains that there were no such

¹⁹ 14 A.J.I.L. 95, 112-115 (1920). It is interesting to note that in its Report the Commission said:

"Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoner or have otherwise fallen into its power. . . ." (p. 121.)

²⁰ The manner in which the program failed, and the reasons therefor, are discussed in Marin, *loc. cit.* 684-686; and in the History of the United Nations War Crimes Commission and the Development of the Law of War (hereinafter referred to as War Crimes Commission) 46-52 (1948).

²¹ 47 Stat. 2021; Treaty Series, No. 846; 27 A.J.I.L. Supp. 59 (1933). This convention is hereinafter referred to as the 1929 Convention. When World War II commenced there were more than 40 nations party to this convention.

²² Report of the International Committee of the Red Cross on its Activities during the Second World War (hereinafter referred to as Report), Vol. I, p. 218 (1948).

²³ A companion convention, the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 47 Stat. 2074, Treaty Series, No. 847, 27 A.J.I.L. Supp. 43 (1933), provided, in Art. 23, for the enactment of national legislation necessary "to repress in time of war all acts in contravention" of that convention. There was no comparable provision in the 1929 Prisoners of War Convention.

²⁴ Let it not be thought that the writer considers provisions for penal sanctions for maltreatment of prisoners of war to be a panacea which will automatically obliterate

provisions for penal sanctions extant when World War II began and that the treatment of prisoners of war (particularly the treatment of Soviet prisoners of war by the Germans²⁵ and the treatment of all United Nations prisoners of war by the Japanese²⁶) was, very generally, so barbaric as to turn back the calendar many centuries.²⁷

all activities of this nature. That is not the history of any penal legislation. However, it does act as a deterrent for some, and it provides a firm base for the punishment of offenders—something which has heretofore been challenged as lacking. At the 1949 Geneva Diplomatic Conference the Netherlands Delegation took the position, which is particularly applicable to a code dealing with the law of war, that “an international convention had no strength without the possibility to enforce it, had no strength without sanctions.” Final Record of the Diplomatic Convention of Geneva of 1949 (hereinafter referred to as Final Record), Vol. II B, p. 31.

²⁵ Dallin, *German Rule in Russia* 414 (1957); Opinion and Judgment of the International Military Tribunal (hereinafter referred to as Judgment), reproduced in *Nazi Conspiracy and Aggression: Opinion and Judgment* 59-62 (1947), and in 41 A.J.I.L. 172, 226-229 (1947). It is, perhaps, appropriate to quote here the portion of the Tribunal's opinion (pp. 228-229) dealing with the now historic exchange which took place in 1941 between German Admiral Canaris and German General Keitel:

“... On the 15th September 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on the 8th September 1941. He then stated:

‘The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people. . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.’

This protest, which correctly stated the legal position, was ignored. The defendant Keitel made a note on this memorandum:

‘The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.’”

In Keitel's case the Tribunal adjudged the sentence of death, which was executed.

²⁶ 10 Dept. of State Bulletin 145 (1944); Judgment of the International Military Tribunal for the Far East (hereinafter referred to as Far East Judgment) 1002 (mimeo., 1948). The latter states:

“Ruthless killing of prisoners by shooting, decapitation, drowning, and other methods; death marches in which prisoners including the sick were forced to march long distances under conditions which not even well-conditioned troops could stand, many of those dropping out being shot or bayoneted by the guards; forced labor in tropical heat without protection from the sun; complete lack of housing and medical supplies in many cases resulting in thousands of deaths from disease; beatings and torture of all kinds to extract information or confessions or for minor offences; killing without trial of recaptured prisoners after escape and for attempt to escape; killing without trial of captured aviators; and even cannibalism: these are some of the atrocities of which proof was made before the Tribunal.”

²⁷ Estimates of prisoner-of-war mortality during World War II are as varied as they are numerous. Thus one estimate places the total number of Soviet soldiers captured by the Germans at 5,000,000 and the total number of survivors at only 1,000,000. Dallin, *op. cit.* 426. Another estimate is that 2,800,000 Russians died in the prisoner-

During the course of World War II there were a number of official declarations made by leaders of the United Nations to the effect that the punishment of war criminals was one of the major objectives of the war. These culminated in the Moscow Declaration of 1943 and in the Potsdam Declaration of 1945. In the latter it was specifically stated that "stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners." In addition, on a number of occasions during the course of the war, protests were submitted through the Protecting Powers concerning maltreatment of prisoners of war and other violations of the Geneva Convention of 1929.²⁸ In October, 1943, the United Nations War Crimes Commission was established with the primary mission of investigating and perpetuating evidence of war crimes and of formulating the procedures necessary to insure the trial and punishment of war criminals.²⁹ There was, then, adequate warning that the United Nations intended to impose penal sanctions against individuals guilty of the maltreatment of prisoners of war. We shall have occasion later in this article to review a few of the many trials of individual war criminals which followed the termination of hostilities.³⁰ The trials conducted by

of-war camps maintained by the Germans, and that in those maintained by the Japanese the United Nations mortality was 16,000 out of 46,000. Rousseau, *Droit International Public* 563 (1953). (In all fairness, however, it must be pointed out that the same author estimates that in the prisoner-of-war camps maintained by the U.S.S.R., the mortality was 1,321,000 out of 3,700,000 Germans, 68,000 out of 75,000 Italians, and 150,000 out of 615,000 Japanese.) Some of the most authoritative figures are probably those contained in the Far East Judgment which states:

"... Of United States and United Kingdom forces 235,473 were taken prisoner by the German and Italian Armies; of those 9,348 or 4 per cent died in captivity. In the Pacific Theater 132,134 prisoners were taken by the Japanese from the United States and United Kingdom forces alone of whom 35,756 or 27 per cent died in captivity." (pp. 1002-1003.)

²⁸ See, for example, the Department of State Bulletin, *loc. cit.* note 26, where the following is stated with regard to one of the protests:

"... In that protest the Department again called upon the Japanese Government to carry out its agreement to observe the provisions of the convention and warned the Japanese Government in no uncertain terms that the American Government would hold personally and officially responsible for their acts of depravity and barbarity all officers of the Japanese Government who have participated in their commitment and, with the inexorable and inevitable conclusion of the war, will visit upon such Japanese officers the punishment they deserve for their uncivilized and inhuman acts against American prisoners of war."

The protest referred to also summarized the specific articles of the 1929 Geneva Convention which the Japanese had violated. 10 Dept. of State Bulletin 168-175 (1944). A number of these notes of protest are reproduced *in extenso* under the caption "Japanese Atrocities" in 18 *ibid.* 343-357 (1945).

²⁹ War Crimes Commission 112 *et seq.*

³⁰ While exact statistics have never been accumulated, it is probable that something in excess of 2000 separate trials were conducted by a number of the United Nations in Europe and in the Far East. (Of course, many of these involved victims other than prisoners of war, and most of them involved more than one accused.) One table, which does not purport to be complete, lists 1911 trials. Digest of Laws and Cases, 15 Law Reports of Trials of War Criminals xvi. (Hereinafter, in cases reported in this 15-vol. set of records prepared by the U. N. War Crimes Commission between

the International Military Tribunal at Nuremberg in 1945-1946 and by the International Military Tribunal for the Far East at Tokyo in 1946-1947 are too recent and too well known to require extended discussion. It should suffice to point out that the judgment of each of these Tribunals is based in part on the murder and ill-treatment of prisoners of war.³¹

Shortly after the conclusion of World War II the late Dr. Ernst H. Feilchenfeld of Georgetown University found that he had a number of former prisoners of war available on the campus for direct research purposes. He took advantage of this situation to probe deeply into the numerous facets of the prisoner-of-war problem. On the subject under discussion he later said:

It is one of the greatest weaknesses of the existing rules on prisoners of war that they do not contain definite and written provisions on sanctions. There should be sanctions and they should be written into a new convention, especially since a difficult choice of sanctions is inevitably involved. Should there be a system of reprisals? Or should there be a code providing for the punishment of war criminals? Or should there be both?³²

Apparently, the reaction of the International Committee of the Red Cross to the events of World War II was similar to those quoted above, and its members were already convinced that the new prisoner-of-war convention, on which work had started even before hostilities had ceased, must include provisions for the imposition of effective penal sanctions for violations of the laws and customs of war protecting prisoners of war.³³ This conviction eventually found expression in Articles 129 and 130 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War³⁴ which provide as follows:

ARTICLE 129

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party con-

1947 and 1949, the citation War Crimes Rep. will be used.) An Appendix entitled "Statistics on War Crimes Trials" may be found in War Crimes Commission 515. A collection of statistics may also be found in Gross, "The Punishment of War Criminals: The Nuremberg Trial," in 2 *Netherlands International Law Review* 356 (1955).

³¹ Judgment, 41 A.J.I.L. 225-229 (1947); Far East Judgment 1024-1136.

³² Feilchenfeld, *Prisoners of War* 89 (1948). He also stated:

". . . it would be an improvement if a new convention on prisoners of war contained in one chapter a whole criminal code dealing with acts to be treated as war crimes. This code should contain clear definitions and be sufficiently specific. Professor Quincy Wright suggests a code defining as concretely as possible the various crimes against prisoners of war." (p. 91.)

³³ Pietet, *Commentary* 618.

³⁴ Note 13 above.

cerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

ARTICLE 130

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.³⁵

In view of the rapidity with which both sides in the Korean hostilities announced that they would comply with the 1949 Geneva Convention,³⁶ the world was warranted in anticipating that the treatment of prisoners of war would be exemplary and that the need for resort to penal sanctions would be minimal. Unfortunately, such was not the case. Numerous instances of the commission of many of the grave breaches of the convention enumerated in Article 130, and other types of maltreatment of prisoners of war, began to come to light as early as September, 1950, as soon as United Nations Command troops moved into territory previously held by

³⁵ Up to the end of January, 1962, there had been 87 ratifications and accessions to this convention. These include all of the members of the Soviet bloc and all of the more important Powers except Canada and the Republic of China. Comparable provisions may be found in the three other conventions drafted by the same Diplomatic Conference: Arts. 49 and 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U. S. Treaty Series 3114, 75 U. N. Treaty Series 81 (I:970); Arts. 50 and 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U. S. Treaty Series 3217, 75 U. N. Treaty Series 85 (I:971); and Arts. 146 and 147 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U. S. Treaty Series 3516, 75 U. N. Treaty Series 287 (I:973), 50 A.J.I.L. 724 (1956).

³⁶ As early as July, 1950, the Foreign Minister of the so-called Democratic People's Republic of Korea sent a message to the U. N. Secretary General stating that its forces were "strictly abiding by principles of Geneva Conventions in respect to Prisoners of War." *Le Comité International de la Croix-Rouge et le Conflit de Corée: Recueil de Documents*, Vol. I, p. 16 (1952). Nevertheless, a number of the members of the U. N. Command Armistice Delegation at Pan Mun Jom, including the writer, were convinced that not even the North Korean and Chinese Communist negotiators were aware of the actual provisions of the 1949 Convention (or, for that matter, of any earlier prisoner-of-war convention) until many months after July 10, 1951, when the armistice negotiations began, and well over a year after the message was sent to the U. N. Secretary General; and then only when the Russians had pointed to Arts. 7 and 118 of the 1949 Convention as those on which reliance should be placed in the controversy over the problem of the repatriation of prisoners of war.

the Communists—and at the time of the signing of the Armistice Agreement in July, 1953, the United Nations Command had identified and was holding several hundred Communist prisoners of war for trial for pre-capture offenses committed against United Nations Command prisoners of war. Under the provisions of the Armistice Agreement relating to the repatriation of prisoners of war, it was necessary to repatriate these individuals without the imposition of the punishment which most of them deserved.

It is obvious, then, that Korea did not provide a valid proving ground for the penal sanctions contained in the Geneva Convention of 1949. Whether a future conflict, in which any Communist states involved are formally parties to that convention, will prove any different is a matter of conjecture. Certainly, the many brutal atrocities against prisoners of war committed by the North Korean Communists, and the numerous more subtle, but equally reprehensible, violations of the protections accorded to prisoners of war committed by the Chinese Communists, do not augur well for the future.³⁷

It may be stated that in the course of the development of the law of war a type of "common law" of penal sanctions evolved under which punishment was imposed upon offenders for maltreatment of prisoners of war as well as for other violations of the laws and customs of war. This has not been a wholly satisfactory solution either for the common law or for the civil law lawyer, as each of them premises his criminal law system upon the maxim *nullum crimen sine lege*—no crime without a specific law.³⁸

³⁷ According to the findings contained in Treatment of British Prisoners of War in Korea (Ministry of Defence, 1955), the Chinese Communists asserted that:

"Prisoners of war were common people who had been duped by their reactionary governments. Those who did not recognize the 'truth' of this assertion and argued that they were entitled to the provisions of the convention were sharply told that they were 'war criminals' and entitled to nothing—except shooting. For referring to the convention men were struck, threatened and made to stand at attention for long periods." (p. 31.)

And again:

"... the Chinese in Korea, by simply maintaining that all soldiers fighting for their 'bourgeois' or 'imperialist' opponents were, *ipso facto* 'war criminals,' succeeded to their own satisfaction in justifying their complete disregard of the convention. One prisoner was told by a Chinese interrogator that the Prisoners-of-War Convention was fully observed by the Chinese, 'but only after the prisoner had reached a stage of full repentance for his past crimes.' Fighting against the Chinese was the most heinous of these crimes." (p. 32.)

This is almost exactly what had been forecast fifteen years earlier as the treatment of prisoners of war to be expected from the U.S.S.R. (then the only Communist state). Taracouzio, The Soviet Union and International Law 321 (1935). Similarly, upon the death of Japanese Prince Fumitaka Konoye in 1956 in the Soviet Union, where he had been held since his capture in 1945 while serving in the Japanese Army, the Japanese Foreign Office announced that it had learned that he had died while serving a sentence adjudged upon his conviction in 1951 of having committed the war crime of "supporting capitalism." New York Times, Dec. 11, 1956.

³⁸ The statement has been made that, in the United Kingdom, even absent a specific penal statute, a person may be prosecuted "by virtue of the general rules governing

We shall now investigate the extent to which the drafters of the 1949 Convention were able to remedy that situation with respect to those violations of the laws and customs of war involving the maltreatment of prisoners of war.

II. PENAL SANCTIONS UNDER THE GENEVA CONVENTION OF 1949

Article 119 of the draft convention approved at the 17th International Red Cross Conference held at Stockholm during August, 1948 (which was used as the working draft at the 1949 Geneva Diplomatic Conference), provided only that the contracting parties would recommend to their legislatures the enactment of any necessary penal legislation and that

Each Contracting Party shall be under obligation to search for persons alleged to be guilty of breaches of the present Convention, whatever their nationality, [and] in accordance with its own laws to indict such persons before its own tribunals, or if it prefers, to hand them over for judgment to another Contracting Party.³⁹

The inadequacy of these provisions was apparently appreciated, for the Conference adopted a resolution recommending that the International Committee of the Red Cross continue to study this problem.⁴⁰ With the help of a small group of experts, the provisions of the draft convention were greatly expanded by the Committee, the new draft articles including a list of substantive offenses.⁴¹ While the 1949 Diplomatic Conference did not officially use the new draft articles as a working basis, the latter unquestionably furnished much of the material for an amendment co-sponsored by a number of delegations, which not only considerably amplified the original draft Article 119, but, at the same time, listed the specific offenses covered.⁴² With some modifications and additions, the amplified version of Article 119 became Article 129 (procedure) and the list of specific offenses became Article 130 (grave breaches).

A. SUBSTANTIVE OFFENSES

In effect, Article 130 of the 1949 Convention places five offenses committed against prisoners of war in the category of grave breaches of the convention, thereby making them offenses which the contracting parties are under an obligation to punish or to assist in punishing, regardless of the nationality of the offender. And so obviously serious are the offenses enumerated that there can be no possible quarrel with the statement contained in the report of the committee of the Diplomatic Conference to

civilised society." Remarks and Proposals submitted by the International Committee of the Red Cross (hereinafter referred to as Remarks and Proposals) 20 (1949). This is definitely not the rule in the United States, where even a penal statute is strictly construed. *Smith v. U. S.*, 360 U. S. 1 (1959); *Fasulo v. U. S.*, 272 U. S. 620 (1926).

³⁹ Final Record, Vol. I, pp. 100, 101-102; *ibid.*, Vol. III, p. 43 (Annex 50).

⁴⁰ Remarks and Proposals 5.

⁴¹ *Ibid.* 64-65. The new draft articles also contained provisions with respect to the defense of superior orders (note 127 below) and trial safeguards.

⁴² Final Record, Vol. III, p. 42 (Annex 49).

the effect that only those offenses were included "which no legislator would object to having included in the penal code."⁴³

(1) "*Wilful killing*":

This is murder, an offense under the penal code of every civilized nation.⁴⁴ It is the offense against prisoners of war which has been most frequently punished in the past. It was prohibited by Article 23 c of the Regulations annexed to both the Second Hague Convention of 1899 and the Fourth Hague Convention of 1907, although neither of those codes provided for penal sanctions for violations thereof. However, in its notes on the *Dreierwalde* Case, the United Nations War Crimes Commission stated:

It is also safe to say that the killing of prisoners of war constituted a war crime under customary International Law even before the promulgation and ratification of the Conventions of 1907 and 1929.⁴⁵

This seems to have been the general consensus, because we find that, after World War II, the courts of the countries trying war crimes cases, whether of common law or of civil law heritage, uniformly applied penal sanctions in cases involving the killing of prisoners of war.⁴⁶ It appears beyond dispute that in including this offense among the grave breaches of the convention which are subject to penal sanctions, the drafters of the 1949 Convention were merely continuing in complete conventional form what had previously been based on a combination of customary and conventional law.

The contention has been advanced that the term "wilful killing" includes a death caused by faults of omission *provided* that the omission was wilful and was intended to cause death.⁴⁷ While there may be some controversy in connection with the basic premise, with that proviso it is rather difficult to see how the death could be deemed to have resulted from a fault of omission. The examples given to support this contention—reduc-

⁴³ Report on Penal Sanctions, Fourth Report of the Special Committee of the Joint Committee, Final Record, Vol. IIB, p. 115.

⁴⁴ See, for example, the Uniform Code of Military Justice, Art. 118, 10 U.S.C. 918. As a background for the discussion which follows in this portion of this article, reference will be made to the relevant provisions of the Uniform Code of Military Justice (hereinafter referred to as Uniform Code) wherever there is one specifically proscribing one of the offenses designated in Art. 130 of the 1949 Convention as a grave breach of the convention. The substantive penal provisions of the Uniform Code are used because it is probably the penal code which will be applied in most trials conducted by the United States of individuals alleged to have committed such offenses (p. 459 below).

⁴⁵ The *Dreierwalde* Case, 1 War Crimes Rep. 81, 86. See also Arts. 56, 59, and 71 of Lieber's Code, p. 436 above.

⁴⁶ See, for example, U. S.: The *Dostler* Case, 1 War Crimes Rep. 22, and The *Jaluit Atoll* Case, *ibid.* 71; U.K.: The *Essen Lynching* Case, *ibid.* 88, and The *Stalag Luft III* Case, 11 *ibid.* 31; Canada: The *Abbaye Ardennes* Case, 4 *ibid.* 97; and France: Trial of Robert Wagner, 3 *ibid.* 23, and Trial of Carl Bauer, 8 *ibid.* 15. (Some of the European countries based their prosecutions on violations of their national penal codes committed within their territory or against their nationals, rather than on international law.)

⁴⁷ Pictet, Commentary 626-627.

tion of food rations to a point where deficiency diseases cause death, and putting to death as a reprisal, despite the fact that reprisals against prisoners of war are specifically prohibited—can scarcely suffice for that purpose. An execution knowingly performed as a reprisal, reprisals being specifically prohibited, would certainly be a wilful killing, but by an act of commission, not by an act of omission. And the reduction of the food ration to a point which would not support life, if done wilfully and intentionally, and not because of circumstances beyond the control of the offender, would probably constitute both a wilful killing by a specific act of commission and the offense of “wilfully causing great suffering or serious injury to body or health” which is hereinafter discussed.⁴⁸

(2) “*Torture or inhuman treatment, including biological experiments*”:

The prisoner-of-war codes of 1899, 1907, and 1929 all provided for the humane treatment of prisoners of war, but none of them contained sanctions for inhumane treatment. This omission has now been rectified. Article 13 of the 1949 Convention provides, in pertinent part, that “prisoners of war must at all times be humanely treated.” Article 130 makes “inhuman” treatment a “grave breach” of the convention. From the phraseology employed in Article 130, both in English and in French, it appears evident that the drafters intended the captioned items to describe only one offense;⁴⁹ and it is probable that this is so, with inhuman treatment being the broad term within which the other two items fall, specific mention being made of torture and the use of prisoners of war as human guinea pigs because, unfortunately, these two offenses occurred with such alarming frequency during World War II.

The above-captioned provision of the 1949 Convention leaves open for interpretation the question as to exactly when maltreatment, other than torture or biological experiment, becomes inhuman. It seems clear that this is a decision which it will be necessary for the national courts concerned to reach on a case-by-case basis.⁵⁰ Inasmuch as national standards vary greatly, it can be assumed that problems will arise in this area.

⁴⁸ P. 449 below. With respect to the failure of a commander to exercise proper command responsibility, see p. 466 below.

⁴⁹ The Report of the 1956 Commission of Experts, assembled by the International Committee of the Red Cross in Geneva in October of that year to study the problem of grave breaches, made this comment:

“The Commission noted that the framers of the Conventions had considered torture and inhuman treatment to be different aspects of one and the same ‘grave breach,’ which also comprised biological experiments. In the Experts’ opinion, all acts or omissions that led to great moral suffering or caused serious deterioration in the victim’s mental condition should also be comprised in that ‘grave breach.’” (p. 5.)

⁵⁰ Post-World War II cases in which the national courts had no great difficulty in finding punishable maltreatment include: Trial of Baba Masao, 11 War Crimes Rep. 56 (death march); Trial of Tanaka Chuichi, *ibid.* 62 (tying prisoners of war to a post and beating them); Trial of Arno Heering, *ibid.* 79 (forced march with inadequate supplies); Trial of Willi Mackensen, *ibid.* 81 (forced march with inadequate supplies); The Gozawa Trial (ed. by Sleeman, 1948) (flogging, overworking, and general maltreatment).

It is worthy of note that the Commission of Experts, convened by the International Committee of the Red Cross in October, 1956, to study the "grave breaches" provisions of the convention, arrived at the conclusion, in which the Committee apparently concurs, that, for maltreatment to constitute a "grave breach," it is not necessary that it involve an attack on the physical integrity or health of a prisoner of war and that it includes moral suffering.⁵¹ While such an interpretation, if followed in trials for alleged grave breaches of this category, will be of some assistance in determining that a particular offense falls below the lowest level of humane treatment, it does not definitively solve the problem of exactly where the lowest level should be placed.⁵²

Even with respect to the two categories of maltreatment specifically mentioned in the convention—torture and biological experiments—questions of interpretation arise. Thus the position has been taken that the term "torture," as used in the convention, relates primarily to maltreatment resorted to as an illegal method of obtaining a confession or information.⁵³ While this undoubtedly has been the motivation for a large part of the torture of which prisoners of war have been victims,⁵⁴ such an interpretation must not be permitted to remove from the scope of the definition of this grave breach of the convention torture administered out of sheer sadism, or, even more important in these days of the war for men's minds, torture administered to "convert" an adamant prisoner of war to the Detaining Power's political ideology.⁵⁵ In other words, torture is, and

⁵¹ Note 49 above. In Pictet, Commentary 627, the conclusion of the Commission of Experts was adopted and amplified as follows:

"*Inhuman treatment.*—The Convention provides, in Article 13, that prisoners of war must always be treated with humanity. The sort of treatment covered here would therefore be whatever is contrary to that general rule. It could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant prisoners of war in enemy hands a protection which will preserve their human dignity and prevent their being brought down to the level of animals. Certain measures, for example, which might cut prisoners of war off completely from the outside world and in particular from their families, or which would cause great injury to their human dignity, should be considered as inhuman treatment."

This same position had earlier been taken by the Far East Tribunal, which referred to "mental torture," giving as an example an incident in which a number of actions were taken one evening to make certain prisoners of war (several of Doolittle's fliers) believe that they were about to be executed by a firing squad, but at the last minute they were told that the Japanese executed only at sunrise and that they would be executed in the morning if they did not talk before then. Far East Judgment 1063.

⁵² In a claim for pecuniary damages made to the U. S.-German Mixed Claims Commission established after World War I, the claimant, a former prisoner of war of the Germans, contended that the use of paper bandages in a German hospital to bandage his wounds constituted maltreatment. The claim was disallowed. 4 Hackworth, Digest of International Law 278 (1948). Such an act, particularly where caused by force of circumstances, would unquestionably fall above the line of demarcation.

⁵³ Pictet, Commentary 627; Pilloud, "La protection pénale des conventions humanitaires internationales," in 1953 *Revue Internationale de la Croix-Rouge* 842, 854. Physical and mental torture inflicted in order to obtain information is specifically proscribed by Art. 17 of the 1949 Convention.

⁵⁴ Far East Judgment 1029; Trial of Erich Killinger, 3 War Crimes Rep. 67.

should always be considered, a grave breach of the convention, whatever its motive, and even if motiveless.

The extensive use of prisoners of war during World War II as "guinea pigs" for medical experimentation, much of which was scientifically pointless, was without precedent in the history of war.⁵⁵ There was no opposition to the specific inclusion of this offense among the grave breaches of the convention to be listed in Article 130. However, there was some difference of opinion as to phraseology. It will be seen that in Article 130 reference is made solely to "biological experiments"; while in Article 13 there is a prohibition against "medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest." An effort was made by one of the Netherlands delegates to have both articles use the term "biological experiments."⁵⁷ While the statement of the Netherlands delegate that the two terms were meant to cover the same illegal acts is undoubtedly correct, the definition contained in Article 13 appears to be far more definite and far less likely to result in legalistic disputes on interpretation. It is unfortunate that the Diplomatic Conference neither accepted the suggestion of the Netherlands delegate nor took the reverse action (that of changing Article 130 to make it coincide with Article 13), and that it allowed the two different terms to remain in the convention. However, from the history of the negotiations, it appears possible to conclude that any violation of the portion of Article 13 quoted above will constitute the grave breach of performing "biological experiments" which is proscribed by Article 130.⁵⁸

⁵⁵ The following statement clearly demonstrates the use of torture, not as a method of interrogation, but to force a prisoner of war to abandon his loyalty to his own country and to adopt the political views of his captors:

"When all these methods of inducement had failed . . . the Chinese had recourse to physical coercion and torture, revolting to the humane mind and expressly forbidden by the Prisoners-of-War Convention. Before the middle of 1951 the Chinese adopted the simple attitude that if a prisoner would not co-operate he was punished. If the punishment resulted in his death it was because he was an obstinate 'war criminal.' Later the argument was changed, and physical punishment was said to be inflicted for special offences rather than a general refusal to see 'the light.' Torture and ill-treatment were carried out quite cold-bloodedly for the purpose of breaking a man's resistance." (Treatment of British Prisoners of War in Korea 22.) See also note 37 above.

⁵⁶ For post-World War II trials which included incidents involving involuntary and illegal medical experiments on prisoners of war (and civilians), see: Judgment, 41 A.J.I.L. 228 (1947); Far East Judgment 1065; Trial of Rudolf Hoess, 7 War Crimes Rep. 11, 14-16, 24-26; The Medical Case (U. S. v. Karl Brandt), 1 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, pp. 11-14 (hereinafter in citing cases reported in this 14-vol. set of reports prepared by the U. S. Department of the Army between 1949 and 1953, the citation, Trials, will be used); The Milch Case (Trial of Erhard Milch), 2 Trials 355, 361-363.

⁵⁷ Final Record, Vol. II A, p. 381.

⁵⁸ Pictet, Commentary 141 and 627-628. The Report of the 1956 Commission of Experts states:

"The Commission discussed, but without reaching a decision, the question whether every biological experiment on a protected person should be considered as a grave

Finding a substantive penal provision which could be used by the United States as a basis for charging an individual with the offense of inhuman treatment of a prisoner of war should present no great difficulty in the majority of cases of this category. Many, if not most, of them will result in the death of the prisoner of war and thus will permit of prosecution for murder⁵⁹ or manslaughter;⁶⁰ others will fall within the definitions of maiming,⁶¹ assault,⁶² or maltreatment of a person subject to one's orders;⁶³ and a few, which do not constitute any of the foregoing offenses but involve military offenders, can probably be charged under the provision of law which permits the military to punish its members for "conduct of a nature to bring discredit upon the armed forces."⁶⁴

(3) "*Willfully causing great suffering or serious injury to body or health*":

Because this grave breach has a dual nature, some commentators consider it to constitute two separate offenses.⁶⁵ However, in view of the fact that the two specified aspects of this grave breach are so inextricably interwoven, it appears probable that the drafters intended to establish a single offense.

It is here that the International Committee of the Red Cross would place sadistic torture, rather than in the preceding category of offenses.⁶⁶ The inclusion of this particular grouping as a grave breach of the convention should serve to prevent an offender from avoiding punishment as a result of an overly restrictive interpretation of the terms "inhuman treatment" and "torture." Actually, this category of grave breaches appears to be a sort of residual provision intended to cover most of the cases of physical or mental maltreatment not included within the previous category of grave breaches.

It has already been indicated that mental torture and moral suffering may fall within the ambit of the preceding category of grave breaches.⁶⁷ They may also constitute a violation of the present category of grave breaches. It is for this reason that reservations must be attached to any statement concerning the existence and availability in United States law of

breach, as some experts considered. The Commission agreed, nevertheless, that every biological, medical or scientific experiment carried out against a person's will, or dignity, or likely to cause serious physical or mental injury, was prohibited by the Conventions and should be repressed." (p. 5.)

Ten excellent principles for use in determining the legality of the performance of medical experiments on a prisoner of war are set forth in the opinion of the U. S. Military Tribunal in *The Medical Case*, 2 Trials 181-182, note 56 above. These principles are reproduced in Taylor, "The Nuremberg War Crimes Trials," *International Conciliation* 284-286 (April, 1949, No. 450).

⁵⁹ Art. 118, Uniform Code, 10 U.S.C. 918. ⁶⁰ Art. 119, *idem*, 10 U.S.C. 919.

⁶¹ Art. 124, *idem*, 10 U.S.C. 924.

⁶² Art. 128, *idem*, 10 U.S.C. 928.

⁶³ Art. 93, *idem*, 10 U.S.C. 893.

⁶⁴ Art. 134, *idem*, 10 U.S.C. 934. One exception to this generalization is the problem of mental torture and moral suffering discussed above, p. 447.

⁶⁵ Pictet, *Commentary* 628; Pilloud, *loc. cit.* 856.

⁶⁶ Pictet, *op. cit.*

⁶⁷ P. 447 above, and note 51.

substantive penal statutes which can serve as a basis for prosecutions for offenses constituting these two categories of grave breaches. It is extremely difficult to conceive of any existing statute in United States penal codes which can be considered as proscribing the offense of causing great moral suffering in the absence of a direct physical act.⁶⁸

(4) *"Compelling a prisoner of war to serve in the forces of the hostile Power":*

During World War II there were many instances, particularly on the part of the Germans, of the recruitment or the compelling of prisoners of war (and enemy civilians) to serve in the armed forces of the Detaining Power and, in some instances, to fight against their own country or its allies. Such compulsion was specifically prohibited by the Fourth Hague Convention of 1907,⁶⁹ but once again no sanction was attached to the prohibition. This defect has now been remedied.

It will be noted that the only prohibition contained in Article 130 is against compulsion, and that no mention is made of recruitment of prisoners of war into the armed forces of the Detaining Power. This latter is probably prohibited by Article 7, which provides that prisoners of war may not "renounce in part or in entirety the rights secured to them by the present Convention."⁷⁰ Any decision to the contrary would, in effect, nullify the grave breaches provision under discussion, as a Detaining Power so inclined would certainly contend that the challenged enlistments were all voluntary, and would certainly have documentary and other evidence to establish the voluntariness of the act.⁷¹

⁶⁸ An incident causing great mental suffering, such as that related by the Far East Tribunal (note 51 above), might possibly be considered to constitute the offense of communicating a threat, a violation of Art. 134, Uniform Code, 10 U.S.C. 934. This would take care of some offenses of this category of grave breaches. But by no stretch of the imagination can an offense presently be found on the statute books which would permit a conviction for many other acts which would undoubtedly cause great mental suffering. The present writer concurs completely with the statement contained in Pictet, Commentary 628: "... it may be wondered if this is not a special offense not dealt with by national legislation."

⁶⁹ Art. 23 of the Regulations annexed to the Fourth Hague Convention of 1907, note 17 above, forbade a belligerent "to compel the nationals of the hostile party to take part in the operations of war against their own country, even if they were in the belligerent's service before the commencement of the war." (This provision did not appear in the Second Hague Convention of 1899, note 16 above.)

⁷⁰ The 1949 Convention contains no specific provision other than that in Art. 130 with respect to a prisoner of war serving in the hostile armed force. In the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (note 35 above), Art. 51 affirmatively provides that "The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces," while Art. 147 parallels Art. 130 of the 1949 Prisoners of War Convention. Moreover, Art. 51 of the Civilian Convention contains an additional provision not found in the 1949 Prisoners of War Convention prohibiting "pressure or propaganda which aims at securing voluntary enlistment."

⁷¹ During the course of the hostilities in Korea the Communists announced at various times the capture of from 50,000 to 75,000 prisoners of war. When the discussion of

One problem which was the subject of lengthy discussion at the 1956 Conference of the Commission of Experts, and which was not resolved by them, is the question of the definition of the term "forces" used in this grave breach clause. Does it include the labor service organizations, the factory guard units, the anti-aircraft artillery units, the special police units, et cetera, which flourished during World War II, as well as other auxiliary units, or is it limited to the regular armed forces? One member of the Commission felt, and there is much to be said for his position, that the word "auxiliary" was intentionally omitted from the grave breaches article of the convention so that compelling service in the hostile force would not be a grave breach unless the prisoner of war was compelled to take part in combat against his own country;⁷² other members of the Commission felt that the question should be left for determination by the judges trying cases which raise the problem;⁷³ while still others were of the opinion that the categories of organizations mentioned in Article 1 of the Regulations annexed to the Fourth Hague Convention of 1907 and in Article 4 of the 1949 Convention should govern.⁷⁴ It appears that this question will, of necessity, have to be decided by the tribunals which may be called upon to sit on cases of alleged violations of this clause of Article 130.

Here, again, no existing United States statute has been found which could be used as the vehicle for the trial and punishment of persons guilty of this grave breach of the convention.

(5) *"Wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention":*

After World War II a number of war crimes trials were conducted in which the accused were charged with having participated in trials of prisoners of war which had made a mockery of justice.⁷⁵ In each of these

the prisoner-of-war problem began at the armistice negotiations, they claimed that they were holding only a very small fraction of even the lower figure. When challenged as to the fate of the balance, the great majority of whom had been members of the Republic of Korea Army, one of the assertions made by the Communists was that many of the missing prisoners of war had been "re-educated" and had then "volunteered" to serve in the North Korean Army. It does not require much imagination to visualize the nature of the "re-education" or the actual extent of the "volunteering."

⁷² Record of Conference, 7th Meeting, p. 6 (mimeo. in French, International Committee of the Red Cross, 1956). Note that the word "auxiliary" is used in the Civilian Convention, note 70 above.

⁷³ Report of the 1956 Commission of Experts 6.

⁷⁴ *Ibid.* This problem is further complicated by the fact that the French version of Art. 130 uses the term "forces armées."

⁷⁵ Far East Judgment 1027; Trial of Robert Wagner, 8 War Crimes Rep. 23; Trial of Shigeru Sawada, 5 *ibid.* 1; Trial of Harukei Isayama, *ibid.* 60; Trial of Tanaka Hisakazu, *ibid.* 66. In its recital of the evidence in the Shigeru Sawada Case, the U.N. War Crimes Commission said:

"... The fliers were not told that they were being tried; they were not advised of any charges against them; they were not given any opportunity to plead, either guilty or not guilty; they were not asked (nor did they say anything) about their bombing mission. No witnesses appeared at the proceedings; the fliers themselves did not see any of the statements utilized by the court that they had previously made at

alleged trials the prisoner of war being "tried" was charged with a pre-capture offense. In the *Yamashita* Case the United States Supreme Court held that persons charged with pre-capture offenses were not entitled to all of the protections afforded by the Convention of 1929, but that

Independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense.⁷⁶

The drafters of the 1949 Convention included this offense among the grave breaches of the convention—and rightly so. The "rights of fair and regular trial prescribed in this Convention" to which a prisoner of war is entitled are undoubtedly included among those substantive and procedural rights enumerated in Articles 84–88 and 99–108, inclusive, of the convention, but not all of those rights are necessarily vital to a "fair and regular trial."⁷⁷ During the Diplomatic Conference at which Article 130 was conceived and adopted, there was some discussion as to the advisability of listing therein the specific judicial rights which were guaranteed, but this proposal was rejected.⁷⁸ Hence, once again, much has been left for interpretation by each national tribunal which tries an individual charged with the commission of this particular grave breach of the convention.

Although members of the United States Armed Forces who are alleged to have committed this offense could probably be tried under the provisions of the Uniform Code of Military Justice, there is no existing provision of United States law under which other persons could be tried for this grave breach.⁷⁹

(6) *Miscellaneous:*

While the foregoing are all of the "grave breaches" listed in Article 130 of the 1949 Convention, there are certain other substantive violations which warrant discussion.

(a) Article 13 of the convention provides, in part, that

Tokyo; they were not represented by counsel; no reporter was present; and to their knowledge no evidence was presented against them." (pp. 2–3.)

In the Tanaka Hisakasu Case, the Commission summarized the offense as follows:

"The accused were in fact found guilty of the denial of certain basic safeguards which are recognized by all civilized nations as being elements essential to a fair trial, and of the killing or imprisonment of captives without having accorded them such a trial." (p. 73.)

⁷⁶ Matter of *Yamashita*, 327 U. S. 1, 24, note (1946); 40 A.J.I.L. 432, 444 (1946).

⁷⁷ Final Record, Vol. II B, p. 117.

⁷⁸ *Ibid.* 88. For a listing of all of the guaranteed judicial safeguards and a discussion of their applicability, see below, p. 457.

⁷⁹ Art. 37, Uniform Code, 10 U.S.C. 837, prohibits any commanding officer from coercing or influencing the actions of any military tribunal convened under the Code, or any member thereof; and Art. 98 of the Code, 10 U.S.C. 898, provides for the punishment of violations of the procedural provisions of the Code. However, as indicated, these provisions apply only to U. S. courts-martial, and not to improper trials by enemy tribunals.

Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.

Three comments appear appropriate: first, while this provision refers to "any unlawful act or omission by the Detaining Power," the latter acts through human agents and, as contemplated by Article 129, the responsible individuals are those who will suffer punishment for the offenses which they have committed or ordered to be committed;⁸⁰ second, the phrase "causing death or seriously endangering the health of a prisoner of war" is probably intended to be co-extensive with the Article 130 grave breaches of "wilful killing" and "wilfully causing serious injury to body or health," but this is not so, the first cited portion of Article 130 ("wilful killing") being more restrictive than the Article 13 provision, and the second cited portion ("wilfully causing great suffering or serious injury to body or health") being more extensive than the Article 13 provision; and third, whether a "serious breach" of the convention is a "grave breach" thereof is not specifically resolved in the history of the drafting of the convention.⁸¹

(b) The differences in the phraseology of the "biological experiments" provision of Article 130 and the "medical and scientific experiments" of Article 13 have already been mentioned.⁸²

(c) Article 13 provides that prisoners of war must be protected against "acts of violence or intimidation and against insults and public curiosity." This is one of the areas in which personnel of the Detaining Power may be found to have committed a violation of the convention by an act of omission. During World War II there were numerous instances of civilians being permitted to commit acts of violence, including murder, upon prisoners of war, without any attempt being made to protect them by those in whose custody they were. After the war many of these latter were tried for this offense.⁸³

(d) Various other prohibitions in the treatment of prisoners of war, some of which concern extremely serious actions, others of which are of

⁸⁰ In the Judgment, 41 A.J.I.L. 221 (1947), the Tribunal said:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

⁸¹ Of some help in this regard is the fact that in the French version of the convention, which is equally authentic, the words "une grave infraction" and "les infractions graves" are used in Arts. 13 and 130, respectively.

⁸² P. 448 above.

⁸³ See, for example, The Essen Lynching Case, 1 War Crimes Rep. 88; Trial of Albert Bury, 3 *ibid.* 62; Trial of Kurt Maelzer, 11 *ibid.* 53. In the Judgment, the following statement appears:

"When Allied airmen were forced to land in Germany they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them." (p. 226.)

For the documentary evidence of the foregoing, see The Justice Case (U. S. v. Altschetter), 3 Trials 1095-1099.

lesser seriousness, appear throughout the 1949 Convention.⁸⁴ As we shall see, the convention contemplates that punishment will be adjudged for these violations as well as for those which are specifically designated "grave breaches."⁸⁵

B. PROCEDURAL PROVISIONS

The "code of criminal procedure" for persons tried for the offense of maltreatment of prisoners of war is contained, in capsulated form, in Article 129 of the 1949 Convention, which has already been quoted in full in the text.⁸⁶ By analysis and analogy we shall endeavor to arrive at a conclusion as to just how this procedure would work in practice.

(1) *Undertaking to enact necessary legislation:*

In the first paragraph of Article 129 each party to the convention undertakes "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." During the hearing conducted by the Committee on Foreign Relations of the United States Senate prior to the latter giving its advice and consent to the ratification of the four 1949 Geneva Conventions for the Protection of War Victims, testimony was given to the effect that "it would be difficult to find any of these acts [grave breaches] which, if committed in the United States, are not already violations of the domestic law of the United States."⁸⁷ Subsequently, the Department of Justice wrote a letter to the Chairman of the Committee in which, among other matters, the statement was made that:

A review of existing legislation reveals no need to enact further legislation in order to provide effective penal sanctions for those violations of the Geneva Conventions which are designated as grave breaches.⁸⁸

Unfortunately, the foregoing statements are not entirely correct. As has already been pointed out, there are a number of grave breaches as to

⁸⁴ Art. 13: measures of reprisal; Art. 16: adverse distinction based on race, nationality, religious belief, or political opinions; Art. 17: physical or mental torture, coercion; Art. 19: unnecessary exposure to danger; Art. 22: interning in a penitentiary; Art. 23: use to render areas immune from military operations; Arts. 50 and 51: compelling prisoners of war to perform unauthorized or prohibited work; Art. 87: collective punishment, corporal punishment, torture or cruelty; Art. 99: moral or physical coercion; et cetera.

⁸⁵ P. 455 below.

⁸⁶ P. 441 above. Actually, this "code" contemplates the application of national procedures with the proviso that they must guarantee certain minimum judicial standards.

⁸⁷ Hearing before the Committee on Foreign Relations, U. S. Senate, 84th Cong., 1st Sess., June 3, 1955, on the Geneva Conventions for the Protection of War Victims 24 (hereinafter referred to as Hearing). Note that in any event the quoted assertion was limited to "acts committed in the United States." What of acts of maltreatment of prisoners of war which occur before these latter ever reach the United States? And what of acts of maltreatment committed against American prisoners of war in foreign territory by enemy personnel later captured by the United States?

⁸⁸ *Ibid.* 58. Note that no mention is made of violations of the convention other than grave breaches,

which it is extremely doubtful that proper penal legislation presently exists for the punishment of individuals who commit them.⁸⁹ And even if it should appear that existing law may possibly be adequate for the punishment of a particular grave breach, this does not justify inaction and reliance on that law. Should the courts later decide that the law in question is not actually adequate, this might make it impossible for the United States to prosecute any grave breach of this category which had been committed prior to the enactment of subsequent remedial legislation. It scarcely seems proper to disregard a treaty commitment and to risk an inability to prosecute one or more of these serious violations of the convention solely in order to avoid bringing the need for legislation to the attention of the Congress. (Of course, the United States could, as it did after World War II, merely allege, in general, a "violation of the law of war" and then, in a specification, set forth the facts constituting the violation. But it is this procedure, with the criticism which it provoked, which Articles 129 and 130 were intended to remedy.) It was easily foreseeable that the existing penal codes of most parties to the convention would be found inadequate and that it would, therefore, be necessary for them to enact additional national penal legislation. A number of countries have already done so.⁹⁰ The United States would be well advised to follow their example.

The third paragraph of Article 129 also imposes a requirement for legislation, this time to suppress all acts contrary to the convention other than the grave breaches. As we have seen, the 1949 Convention is replete with prohibitions placed upon the Detaining Power and its personnel in the treatment of prisoners of war.⁹¹ Although many of these acts were punished after World War II as violations of the law of war, few of them fall within the prohibitions of specific penal legislation of the United States. Once again, legislation is indicated both in order to fulfill the treaty obligation and in order to enable the United States properly to punish those who violate any of the provisions of the convention, even though such violations may not be considered to be at the level of seriousness of the "grave breaches."⁹²

⁸⁹ Pp. 449, 451, 452, above, and note 68.

⁹⁰ Pictet, Commentary 621, note 1, lists only Switzerland, Yugoslavia, and The Netherlands as having enacted the necessary legislation. Czechoslovakia, Ethiopia, Thailand, and Belgium have also done so. On Dec. 25, 1958, the U.S.S.R. promulgated its "Law of Criminal Responsibility for Military Crimes," of which Art. 32 is entitled "Maltreatment of Prisoners of War." However, this law cannot be said to implement more than a very small portion of Art. 130. And the United Kingdom has enacted the "Geneva Convention Act, 1957" (5 & 6 Eliz. 2, C. 2), which makes the grave breach of willfully killing a prisoner of war punishable by life imprisonment, and all other grave breaches of the 1949 Convention punishable by imprisonment for not more than fourteen years.

⁹¹ Note 84 above.

⁹² In Pictet, Commentary 629, the excellent suggestion is made that if a statute with separate provisions for each violation of the convention is not feasible, the minimum requirement would be a statute with separate provisions as to each grave breach and a general provision providing for a moderate punishment for all other violations.

(2) *Search for and try or extradite accused persons:*

Under the provisions of the second paragraph of Article 129, each party to the convention, *whether or not a belligerent*, places itself under an obligation (a) to search out persons alleged to have committed, or to have ordered to be committed, any grave breach; (b) to bring such persons, regardless of nationality, to trial before its own courts; and (c) if it prefers, and subject to its laws, to turn such persons over to another party for trial, where such party has made out a *prima facie* case against them.⁹³ It is obvious that this paragraph provides the alternative procedures found in many extradition treaties: deliver or punish. The party in whose territory the person who is alleged to have committed a grave breach of the convention is found, may, even if it is not a belligerent, and if its national laws permit, try the individual concerned in its own courts. If it does not desire to, or cannot do so, it may, again if its national laws permit, grant extradition of the accused to the party which has requested him and which, as is customary in requests for extradition, has produced evidence constituting a *prima facie* case.

This procedure was undoubtedly intended to cover all conceivable contingencies in order to insure that persons charged with grave breaches of the convention could not seek and obtain refuge in neutral states and thereby avoid trial and punishment for their offenses. Admirable and salutary as the provision is, it is probable that it does not entirely attain the desired result. Assume a war between Graustark and Ruritania, both parties to the convention. A Ruritanian, charged with the grave breach of compelling Graustarkian prisoners of war, confined on the territory of Ruritania's ally, Grand Fenwick, to serve in the Ruritanian Army, makes his way to the United States, a neutral and a party to the convention. Graustark demands that the United States either turn him over to Graustark for trial, at the same time submitting evidence constituting a *prima facie* case against him, or itself try him for the grave breach of the convention allegedly committed by him. The United States cannot try him, as he is not subject to United States civil law (he has committed no offense within the territorial jurisdiction of the United States),⁹⁴ nor is he subject to United States military law⁹⁵ (in which case the place of

⁹³ It should be observed that this provision relates only to grave breaches and not to other violations of the convention.

⁹⁴ In Yingling and Ginnane, "The Geneva Conventions of 1949," 46 A.J.I.L. 393 (1952), the authors, both of whom were members of the U. S. Delegation to the 1949 Geneva Diplomatic Conference, state:

"In the case of the United States, whose regular courts generally exercise jurisdiction only over crimes committed within their territorial jurisdiction, legislation may be required to provide for the trial, or permissively to allow the extradition, of persons who are accused of having committed grave breaches in a conflict to which the United States was not a party." (p. 426.)

The United Kingdom's Geneva Convention Act, 1957 (note 90 above), obviates this problem by endowing British courts with authority to try cases thereunder "as if the offence had been committed" at the place of trial.

⁹⁵ He is not within one of the categories of persons over whom U. S. courts-martial exercise their limited peacetime authority. See Art. 2, Uniform Code, 10 U.S.C. 802. See also *Toth v. Quarles*, 350 U. S. 11 (1955), and *Reid v. Covert*, 354 U. S. 1 (1957).

the commission of the offense would not matter⁹⁶). The United States cannot extradite him because, even assuming that there is an extradition treaty with Graustark, this grave breach would not be extraditable under present United States law⁹⁷ and, moreover, it would most probably not be one of the offenses listed in any current extradition treaty as extraditable. The alleged offender has acquired a haven from prosecution. And, unfortunately, there are many variations of the hypothetical set of facts given above, in which the results would be the same (the neutral sanctuary is not a party to the convention, the fugitive is a national of the country in which he finds refuge, the offense with which he is charged is deemed to be political in nature, et cetera).

Let it not be thought that this provision of the convention is of no value. Far from it! There are many cases which fall within its ambit and which will result in murderers, sadists, and other criminals receiving the justice which they so richly deserve. It is only unfortunate that the attempt to close all loopholes could not have been more successful.

(3) *Judicial safeguards:*

The specific judicial safeguards guaranteed to prisoners of war are contained in Articles 84-88 and 99-108, inclusive, of the 1949 Convention. Article 85 provides that:

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.⁹⁸

The fourth paragraph of Article 129 provides only that persons accused of a violation of the convention

shall benefit by safeguards of proper trial and defence, *which shall not be less favourable than those provided by Article 105 and those following of the present Convention.* (Italics added.)

⁹⁶ The Uniform Code has no territorial limitations. See Art. 5 thereof, 10 U.S.C. 805.

⁹⁷ The U. S. Extradition Law (18 U.S.C. 3184) requires a complaint charging a person "with having committed within the jurisdiction of any such foreign government any of the offenses provided for. . . ." The hypothetical offense was not committed within the territorial jurisdiction of Graustark. Under the U. S. extradition statute, Graustark cannot obtain extradition; and under the convention, Grand Fenwick is under no compulsion to seek it.

⁹⁸ All of the Soviet-bloc countries made reservations to Art. 85, under which persons convicted of war crimes and crimes against humanity may be subjected "to the conditions obtaining in the country in question for those who undergo their punishment." Some fear has been expressed that these reservations make it possible for the Communists to defeat the entire purpose of the convention; and in advising and consenting to the ratification of the convention the U. S. Senate felt it necessary and appropriate to reject the reservation. However, it must be borne in mind that the U.S.S.R. has made it quite clear that its reservation applies only to conditions of punishment *after* a prisoner of war has been found guilty of, and sentenced for, a pre-capture offense. Pietet, Commentary 424-425. Accordingly, it should be assumed that the discussion and conclusions which follow in the text would be applicable in the case of the trial by the U.S.S.R. of a prisoner of war, whether for a pre-capture violation of the convention or for a post-capture offense.

At first reading, these provisions might appear to be in conflict. Closer review will reveal that such is not the case.

A prisoner of war being tried by the Detaining Power for an offense, whether alleged to have been committed before or after capture, is entitled to *all* of the judicial safeguards enumerated in the convention. Accordingly, if a prisoner of war is tried for a pre-capture violation of the convention, he will, by virtue of Article 85, benefit by *all* of the judicial safeguards contained in Articles 84-88 and 99-108, inclusive. However, if the individual being tried for maltreatment of prisoners of war in violation of the 1949 Convention is not a prisoner of war, he will benefit solely by the safeguards contained in "Article 105 and those following" of the convention. In other words, when an individual falling within one of the categories enumerated in Article 4 of the convention⁹⁹ allegedly commits an offense which constitutes a violation of the convention, and is subsequently captured, he becomes a prisoner of war and is entitled to all of the benefits of prisoner-of-war status, including all of the judicial safeguards, if he is thereafter compelled to answer to a charge of having committed a pre-capture violation of the convention. On the other hand, when an individual who does not fall within any of the categories enumerated in Article 4 allegedly commits a violation of the convention and subsequently comes under the power of the enemy state, he does not become a prisoner of war, and he is only entitled to the safeguards of Article 105 and those following when he is tried.¹⁰⁰ Similarly, if an individual is tried by a neutral state for a grave breach of the convention, he would not have prisoner-of-war status and he would, therefore, be entitled only to the safeguards of Article 105 and those following.¹⁰¹

Inasmuch as it is a grave breach of the convention wilfully to deprive a prisoner of war of the rights of fair and regular trial prescribed in the convention,¹⁰² it appears appropriate to review, at least briefly, the judicial safeguards to which a prisoner of war is entitled when tried by the Detaining Power, whether for a pre-capture or a post-capture offense.¹⁰³ Omitting those portions of the cited articles which are actually only collateral to judicial safeguards, and re-arranging the sequence as far as possible so that we proceed from the pre-trial to the trial to the post-trial rights, we find that: As a jurisdictional matter, the Protecting Power, the prisoners' representative, and the accused prisoner of war must receive

⁹⁹ Art. 4 of the 1949 Convention lists the various categories of persons who, when they fall into the hands of the enemy, are prisoners of war.

¹⁰⁰ Of course, there is nothing to preclude a state from permitting an accused non-prisoner of war to benefit from the more liberal prisoner-of-war provisions.

¹⁰¹ A neutral state may intern troops belonging to the belligerent armies who enter its territory, but it does not make them prisoners of war. Art. 11, Fifth Hague Convention of 1907, 36 Stat. 2310; Treaty Series, No. 540; 2 A.J.I.L. Supp. 117 (1908).

¹⁰² P. 451 above.

¹⁰³ The subject of trials of prisoners of war is so extensive as to necessitate and to warrant a discussion limited exclusively thereto. A short analysis of the trial safeguards accorded in the various war crimes trials which took place after World War II may be found in the Digest of Laws and Cases, 15 War Crimes Rep. 180-199.

a specification of the charge and notice of the time and place of trial at least three weeks in advance thereof (Article 104). A prisoner of war may be tried only by a military court, unless members of the armed forces of the Detaining Power may be tried by civil courts for the offense charged; and the court must be one offering the essential guarantees of independence and impartiality (Article 84). He must be tried by the same courts and according to the same procedure as are members of the armed forces of the Detaining Power (Article 102).¹⁰⁴ He may not be tried or sentenced for having committed an act which was not forbidden by the law of the Detaining Power or by international law in force at the time the act was committed¹⁰⁵ and he must be afforded an opportunity, with the assistance of qualified counsel, to present a defense (Article 99). He has the right to: defense counsel; a competent interpreter, if necessary; particulars of the charge; time to prepare his defense; opportunity to consult with his counsel freely and privately; opportunity to confer with defense witnesses; and, normally, the presence of representatives of the Protecting Power at the trial (Article 105). He may only be sentenced to those penalties provided for in respect of members of the armed forces of the Detaining Power who have been convicted of the same offense; and the court must take into consideration the fact that the accused prisoner of war is not bound by any duty of allegiance to the Detaining Power and is in its power as a result of circumstances beyond his control (Article 87).

After the trial, notice of the judgment and sentence and the appellate rights of the prisoner of war, as well as his decision to use or waive his

¹⁰⁴ Art. 102 of the 1949 Convention is similar to Art. 63 of the 1929 Convention. In *Matter of Yamashita*, note 76 above, the U. S. Supreme Court held (pp. 21-22) that an individual being tried for a pre-capture offense was not entitled to the benefits of Art. 63. Art. 85 of the 1949 Convention has, in effect, legislated the decision in the *Yamashita* Case out of existence. As stated by General Dillon, one of the members of the U. S. Delegation at the 1949 Geneva Diplomatic Conference, in "The Genesis of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War," 5 *Miami Law Quarterly* 40, 58 (1950):

"The United States delegation made it perfectly clear that it intended to punish all war criminals but that it favored one judicial system for all prisoners of war whether their alleged offense was committed before or after capture."

The U. S. Army has already provided, in par. 178 b of its new *Field Manual 27-10, The Law of Land Warfare* (1956):

"Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted, are subject to the jurisdiction of United States courts-martial and military commissions. They are entitled to the same procedural safeguards accorded to military personnel of the United States who are tried by courts-martial under the Uniform Code of Military Justice, or by other military tribunals under the laws of war."

¹⁰⁵ It could be argued that any trial governed by Arts. 129 and 130 of the 1949 Convention would be for a violation of a provision of an international convention and that it would, therefore, be for an act forbidden by international law, even if not forbidden by the law of the Detaining Power. Pictet, *Commentary* 416-417. Perhaps this is so, but the U. S. Senate was assured that those articles did *not* create an international penal code. Hearing 24; Report of the Committee on Foreign Relations, U. S. Senate, Exec. Rep. No. 9, 84th Cong., 1st Sess., on the Geneva Conventions for the Protection of War Victims 27; 101 Cong. Rec. 8540 (Daily ed., July 6, 1955),

appellate rights, must be reported immediately to the Protecting Power, to the prisoner's representative, and to the prisoner of war himself in a language he understands, if he was not present when sentence was pronounced; and if the sentence has become final or if the death sentence has been adjudged, additional detailed information must be furnished the Protecting Power (Article 107). The convicted prisoner of war is entitled to the same appellate rights as are members of the armed forces of the Detaining Power, and must be fully informed of those rights (Article 106). He retains, even if convicted of a pre-capture offense, all of the benefits of the convention (Article 85). He may not be tried twice for the same offense (Article 86). The death sentence may not be executed until six months after notification thereof has been given to the Protecting Power (Article 101). Sentenced prisoners of war may not receive more severe treatment than that applied in respect of the same punishment to members of the armed forces of the Detaining Power (Article 88). And sentences to confinement must be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power, which conditions must conform to the requirements of health and humanity; and the prisoner of war retains his rights to make complaints concerning the conditions of his confinement and to receive the visits of the representatives of the Protecting Power (Article 108).¹⁰⁶

Full compliance with the foregoing judicial safeguards will present no problem to the United States with regard to trials for post-capture offenses. One problem exists with regard to compliance by the United States insofar as pre-capture offenses are concerned. Article 2 (9) of the Uniform Code of Military Justice grants courts-martial jurisdiction over "prisoners of war in custody of the armed forces,"¹⁰⁷ and Article 18 thereof specifies that:

General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.¹⁰⁸

But do these provisions grant jurisdiction to try a prisoner of war for an offense committed at a time when he was not in the custody or under the jurisdiction of the United States? It appears probable that they do.¹⁰⁹

C. MISCELLANEOUS PROBLEMS

Any discussion of the imposition of penal sanctions for maltreatment of prisoners of war would not be complete without reference to a few of the

¹⁰⁶ It is actually with respect to Arts. 88 and 108 that the Communist reservations to Art. 85 (see note 98 above) are applicable. It will have been observed that, in any event, many of the cited provisions, including those relating to the serving of sentences, contemplate that national treatment by the Detaining Power will be the governing standard.

¹⁰⁷ 10 U.S.C. 802(9).

¹⁰⁸ *Ibid.* 818.

¹⁰⁹ The reasoning of the U. S. Supreme Court in *Ex Parte Quirin*, 317 U. S. 1, 38-44 (1942), would seem to indicate that this question should be answered in the affirmative. See also *Duncan v. Kahanamoka*, 327 U. S. 304, 313-314 (1946), and *Johnson v. Eisentrager*, 339 U. S. 763, 786 (1950).

major problems which arose in the post-World War II war crimes trials and some indication of how it can be expected that those problems will be solved in the future.

(1) *Time of trial:*

There is nothing in the 1949 Convention, nor in international law generally, which prohibits the trial of a prisoner of war, or other accused, during the course of the conflict, for a violation of the convention or of any of the other laws and customs of war. It has, however, been the custom to postpone such trials until the termination of hostilities, probably because of a fear that the enemy will counter with trials which will be only a thinly disguised form of reprisal. Inasmuch as wars usually end in the victory of one side and the defeat of the other (stalemates such as Korea are the exception, rather than the rule), the impression has grown that only the defeated are tried, even for conventional war crimes.¹¹⁰ But trials of one's own personnel for breaches of the convention, or of other laws of war, can be and often are conducted during the course of hostilities, without raising the specter of reprisals by states which follow the rule of law and expect their citizens, civilian and military, to do likewise.¹¹¹

While there was never any concrete proposal made at the Diplomatic Conference that trials of prisoners of war for pre-capture offenses should be postponed until the cessation of hostilities, the matter was the subject of inconclusive discussion during the debate on Article 85, two delegates (Lamarle of France and Slavin of the U.S.S.R.) expressing the opinion that such trials should not be put off until the close of hostilities, and one delegate (Gardner of the United Kingdom) expressing the opposite view.¹¹² The International Committee of the Red Cross has long taken the position that, if such a trial is conducted during the course of hostilities, an accused does not have a fair opportunity to produce all of the evidence which might be available to disprove or lessen his responsibility.¹¹³

¹¹⁰ This subject is discussed by Professor Röling, cited note 2 above, at 336 and 429.

¹¹¹ During early 1951 the writer was a member of a general court-martial in Korea which tried, convicted, and sentenced several American soldiers for offenses against prisoners of war and enemy civilians. The U. S. Army Field Manual, The Law of Land Warfare, provides in par. 507 *b* that:

"The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code."

Similarly, the British Manual of Military Law (Part III, The Law of War on Land) states (note 3, at 181) that members of the British Armed Forces who commit war crimes are tried under the appropriate Service Act.

¹¹² Final Record, Vol. IIA, pp. 819-820. In the Matter of Yamashita, note 76 above, the contention was advanced that a military tribunal was incompetent to try a case alleging a violation of the law of war after the cessation of hostilities. The U. S. Supreme Court held (p. 12) that this power continued until the formal state of war has ended by treaty or proclamation, "for only after their cessation could the greater number of the offenders and the principal ones be apprehended and subjected to trial."

¹¹³ Pictet, Commentary 626.

As we have already seen, a number of prisoners of war were tried for alleged pre-capture offenses during the course of World War II.¹¹⁴ The patent unfairness of these trials glaringly reveals the danger of trials for pre-capture offenses conducted during the course of the war.¹¹⁵

(2) *Status of the accused:*

Grave breaches of the 1949 Convention may be committed by members of the military or by civilians. After World War II individuals in both of these categories were tried for their offenses.¹¹⁶ As to military personnel, there appears to be no problem. During the course of the hearing conducted by the Committee on Foreign Relations of the United States Senate on the 1949 Geneva Conventions for the Protection of War Victims, the question was asked whether the grave breaches provisions of the conventions would apply to "private persons" or whether they would apply only to "Government officials."¹¹⁷ A somewhat equivocal answer having been given to that question, the Department of Justice felt it appropriate to clarify the situation and did so in a letter to the Chairman of the Committee which includes the following statement:

In a related question, Senator Mansfield asked whether the articles dealing with grave breaches could result in imposing criminal liability upon persons without official status. Generally, the acts designated as grave breaches are to be treated as such only when they are in some way the result of action by civilian or military agents of a detaining or occupying power in violation of the conventions. Moreover, as a practical matter, only persons exercising governmental authority ordinarily would be in a position to commit grave breaches against protected persons, such as the serious mistreatment of prisoners of war, sick and wounded of the armed forces, civilian internees, or the inhabitants of occupied territory. We are reluctant to state that the mistreatment of a person protected by the conventions by a private person (e.g., the killing of a wounded airman) could never constitute a grave breach no matter what the intent and circumstances. However, it is entirely clear that these provisions of the conventions were not intended to convert into grave breaches every common crime in which the victim happens to be a person protected by the conventions.¹¹⁸

Except for the possible intent of the last sentence quoted, this statement appears appropriate. And as to the last sentence, if it merely means that a member of the civilian population accused of having committed a common law offense, such as murder, against a prisoner of war, should be

¹¹⁴ Note 75 above.

¹¹⁵ On the other hand, when trials are delayed until after the cessation of hostilities, the deterrent effect of widespread publicity of prompt punishment is lost. And, certainly, it is neither necessary nor advisable to apply this rule of delay to post-capture offenses as was done in the case of the common criminals at the prisoner-of-war camp at Koje-do, Korea, who rioted, wantonly destroyed property, murdered fellow prisoners of war, et cetera, and went completely unpunished because they were not promptly tried.

¹¹⁶ See, for example, The Essen Lynching Case, 1 War Crimes Rep. 88.

¹¹⁷ Hearing 31.

¹¹⁸ *Ibid.* 58-59.

tried for that common law offense, and not for a grave breach of the convention, there is no reason to dispute its propriety. However, no impression should be permitted to be conveyed that members of the civilian population, whether or not having official status, are not amenable in some manner to punishment for grave breaches of the convention.¹¹⁹

(3) *The defense of superior orders:*

The defense that the accused was ordered by a superior to commit the act subsequently charged as an offense, and that he had no alternative but to comply, was probably the affirmative defense most frequently advanced in post-World War II war crimes trials. It was almost universally rejected as a defense, but was usually considered in mitigation of sentence.¹²⁰

The defense of superior orders has had a long and checkered history. Even prior to World War I, the German Military Penal Code provided that the subordinate could only be punished for complying with the order of a superior if he knew that the act ordered constituted a violation of law.¹²¹ This provision was applied during the course of the Leipzig Trials which followed World War I.¹²²

¹¹⁹ There does not appear to be any basis whatsoever for the statement appearing in Castrén, *The Present Law of War and Neutrality* 86 (1954), that only uniformed military personnel can commit war crimes. In Greenspan, *The Modern Law of Land Warfare* 464 (1959), it is properly stated that war crimes may be committed "both by and against members of the armed forces and civilians." The summary on this problem appearing in the *Digest of Laws and Cases*, 15 War Crimes Rep. 59, fully and clearly states the correct law:

"... to itemise the different categories of persons who have been found guilty of war crimes and related offences is important in view of the argument sometimes previously advanced that only military personnel could be held so guilty. Those actually found so guilty have included not only soldiers, but civilians coming within the categories of administrators, political party officials, industrialists, judges, prosecutors, doctors, nurses, prison wardens, and concentration camp inmates. Soldiers held guilty have included not only the rank and file, but high-ranking officers and chiefs of staff. *It is clear that the mere fact of being a civilian affords no protection whatever to a charge based upon international criminal law.* . . ." (Italics added.)

¹²⁰ This problem has been dealt with so extensively that only a brief résumé is given here. For a summary of the national laws applied in various war crimes trials, see 2 Lauterpacht's *Oppenheim, International Law* 508, note 1 (7th ed., 1952), and the War Crimes Commission Notes on the Case of the Trial of Shigeru Sawada, 5 War Crimes Rep. 13-22 (especially 19-22). For what is presumed to be the official Soviet position, see Trainin, *Hitlerite Responsibility under Criminal Law* 80 (1945). A succinct statement on this matter may be found in the *British Manual of Military Law* (Part III, *The Law of War on Land*) 176, note 2 (Part III of the Manual was largely the work of the late Sir Hersch Lauterpacht).

¹²¹ Par. 47(2), German Military Penal Code (quoted in 11 War Crimes Rep. 46). See also Sack, "Punishment of War Criminals and the Defence of Superior Order," in 60 *Law Quarterly Review* 63, 65 (1944).

¹²² In *The Llandovery Castle Case*, 16 A.J.I.L. 708 (1922), Annual Digest of Public International Law Cases, 1923-1924, Case No. 235, the Supreme Court of Leipzig refused to accept superior orders as a defense to the killing of unarmed persons in a lifeboat, an obviously illegal order, but did consider it in mitigation of sentence. On the other hand, the defense of superior order was sustained in *The Dover Castle Case*, 16 A.J.I.L.

In 1940 the United States Army published a manual, entitled *The Rules of Land Warfare*, which provided:

Individuals of the armed forces will not be punished for these offenses [war crimes] in case they are committed under the orders or sanction of their governments or commanders.¹²³

In November, 1944, this was changed by the total elimination of the quoted statement and by the insertion of a new subparagraph providing for the punishment of individuals who violated the laws and customs of war, and for the defense of superior orders to "be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."¹²⁴

The Charter of the International Military Tribunal was specific on this point. Article 8 stated:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.¹²⁵

The defense was, of course, raised at the trial and the International Military Tribunal dealt with it in short order, holding:

That a soldier was ordered to kill or torture in violation of international law has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.¹²⁶

704 (1922), Annual Digest, 1923-1924, Case No. 231, where the accused were found not to have been aware of the illegality of the order.

¹²³ Par. 347, Basic Field Manual 27-10, *The Rules of Land Warfare*. Par. 443 of the comparable British Army Manual, *The Laws and Usages of War on Land*, was to the same general effect.

¹²⁴ Change 1, Nov. 15, 1944, to *The Rules of Land Warfare*, par. 345.1. The comparable provision of the British Army Manual had been changed in April, 1944, to provide that superior orders do not "in principle, confer upon the perpetrator immunity from punishment."

¹²⁵ Charter of the International Military Tribunal, 59 Stat. 1544; 82 U.N. Treaty Series 279; 39 A.J.I.L. Supp. 258 (1945). Art. 6 of the Charter of the Far East Tribunal was to the same effect. Charter of the International Military Tribunal for the Far East, T.I.A.S., No. 1589; Far East Judgment, Annexes, p. 22. The rules promulgated by the various U. S. military commanders for the trials of war criminals followed this principle and not that of the amended Rules of Land Warfare.

¹²⁶ Judgment, 41 A.J.I.L. 221 (1947). The extent of the "moral choice" referred to by the Tribunal was later the subject of discussion in two of the cases which followed the major Nuremberg trial. In *The High Command Trial* (U. S. v. von Leeb), 11 Trials 509, the Military Tribunal stated:

"The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense. To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case."

The Commission of Experts convened by the International Committee of the Red Cross in December, 1948, in connection with the grave breaches provisions which had been approved by the Stockholm International Red Cross Conference, drafted a proposed article relating solely to the defense of superior orders.¹²⁷ The 1949 Geneva Diplomatic Conference did not include such a provision in the conventions as finally approved. Accordingly, this problem will once again have to be resolved on a national basis. Efforts to solve this problem on an international basis in a related area have been undertaken by the International Law Commission, but these efforts have not yet become definitive.¹²⁸

It is obvious that there is no clear and well-defined rule which will be applied to the defense of superior orders when it is advanced, as it undoubtedly will be, in future trials for violations of the grave breaches and other provisions of the 1949 Convention. However, it is believed that it may safely be stated that, as after World War II, the mere fact that the act complained of was committed pursuant to superior orders will not suffice as a defense. Whether the United States will adhere to the extremely liberal rule which its Army now proclaims as its policy remains to be seen.¹²⁹

In *The Einsatzgruppen Case (U. S. v. Ohlendorf)*, 4 Trials 471, the Military Tribunal held:

"If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he would himself risk a few days of confinement. Nor if one acts under duress, may he without culpability, commit the illegal act once the duress ceases."

¹²⁷ Remarks and Proposals 64-65. It reads:

"The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify."

¹²⁸ The Draft Code of Offences against the Peace and Security of Mankind, contained in the Report of the International Law Commission, 6th Sess., U.N. General Assembly, 9th Sess., Official Records, Supp. No. 9 (A/2693), 49 A.J.I.L. Supp. 1 (1955), contains the following as its Art. 4:

"The fact that a person charged with an offence defined in this code acted pursuant to an order of his government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order."

¹²⁹ The latest edition of the U. S. Army Field Manual 27-10, *The Law of Land Warfare*, published in 1956, provides in par. 509:

"a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civilian, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

"b. In considering the question whether a superior order constitutes a valid defense,

In discussing the defense of superior orders it appears appropriate to give at least passing notice to two connected problems: the responsibility of the superior himself for the illegal act committed pursuant to his order; and his responsibility for the illegal acts of his subordinates committed without his orders. As to the first such problem, the 1949 Geneva Diplomatic Conference specifically disposed of the question, insofar as grave breaches are concerned, when it provided in Article 129, paragraph 1, that the national penal legislation to be enacted should provide for "effective penal sanctions for persons committing, *or ordering to be committed*, any of the grave breaches of the present Convention." (Italics added.) There is no reason to believe that this provision, which expresses a rule which had previously been true, is not equally applicable to the violations of the convention, other than grave breaches, covered by paragraph 3 of the same article. Even in the absence of such a provision of law, persons guilty of ordering a war crime to be committed, although not themselves participating in the actual crime, were punished after World War II.¹⁸⁰

As to the problem of the responsibility of the superior for the illegal acts of his subordinates committed without his orders and, perhaps, without his knowledge, no provision is made in the convention, so once again it will be necessary to have recourse to the general rules of international law. It was fairly well established after World War II that a commander is responsible when he fails in his duty to control the operations of the members of his command by permitting them to commit violations of the laws and customs of war and, hence, of the convention;¹⁸¹ or when, having learned of such violations, he fails to take any action to punish them or to prevent their recurrence.¹⁸² There seems little doubt that the same rule will be applied in future cases.¹⁸³

the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; . . ."

(See also the Manual for Courts-Martial, United States, 1951, par. 197 b.) The comparable provision (par. 627) of the British Army Manual, The Law of War on Land, is much less detailed.

¹⁸⁰ *E.g.*, The Dostler Trial, 1 War Crimes Rep. 22; The Abbaye Ardennes Case, 4 *ibid.* 97; Trial of Baba Masao, 11 *ibid.* 56.

¹⁸¹ The decision of the U. S. Supreme Court in the Matter of Yamashita, note 76 above, at 14-16, which firmly established this principle, was generally followed. See, for example, Far East Judgment 29-32.

¹⁸² In the Far East Judgment the Tribunal said:

" . . . If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes." (p. 32.)

In his dissenting opinion, Judge Röling said:

"To hold an official criminally responsible for certain acts which he himself did not order or permit, it will be necessary that the following conditions are fulfilled:

(4) *Permissible punishments:*

After World War II all of the nations trying war crimes cases took the position that, under international law, the punishment of death could be adjudged against any person found guilty of any violation of the laws and customs of war. However, as a matter of practice, in only a very few cases not involving the death of the victim was the death penalty adjudged, or, if adjudged, confirmed.¹³⁴

There has been a noticeable tendency to adopt on a permanent basis a more flexible policy with respect to the punishment to be adjudged against persons convicted of offenses such as grave breaches of the 1949 Convention—a policy of “letting the punishment fit the crime.” Thus, the United Kingdom’s Geneva Convention Act, 1957, provides for life imprisonment in the event of a wilful killing of a prisoner of war, and for imprisonment of not more than fourteen years for any other grave breach of the convention.¹³⁵ The Netherlands has enacted a series of laws which punish with imprisonment (for periods ranging from not more than fifteen years to life) and death various violations of the laws and customs of war committed under various circumstances.¹³⁶ The U.S.S.R. has enacted a law which provides for detention for a period of from one to three years for ill-treatment of prisoners of war which occurs frequently or is char-

1. That he knew or should have known of the acts.

* * * * *

2. That he had the power to prevent the acts.

* * * * *

3. That he had the duty to prevent these acts.” (p. 59.)

There can be no quarrel with these requirements, especially since he also concedes that power and duty go hand in hand.

¹³³ In par. 501 of the United States Army’s *The Law of Land Warfare* the following rule is laid down:

“... The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”

Par. 631 of the British Army Manual, *The Law of War on Land*, is practically identical with the foregoing.

¹³⁴ 2 Lauterpacht’s *Oppenheim, International Law* 572-574 (7th ed., 1952); *Digest of Laws and Cases*, 15 *War Crimes Rep.* 200-202. In preparing this latter volume in 1949 the staff editors of the U.N. War Crimes Commission said:

“... It seems that, despite the fact that international law has previously permitted the death sentence to be passed for any war crime, some kind of international practice is growing according to which Allied Courts, apart from avoiding inhumane punishments, have themselves attempted to make the punishment fit the crime; any habitual practice of this kind would tend in time to modify the general rule that any war crime is punishable by death.” (p. 201.)

¹³⁵ Note 90 above. It will be noted that no provision is made therein for the punishment of other than grave breaches of the convention. Par. 638 of the British Army Manual still provides that “all war crimes are punishable by death,” but this is obviously no longer a correct statement of British law.

¹³⁶ Pictet, *Commentary* 621, note 1.

acterized by particular cruelty.¹⁸⁷ And in *The Law of Land Warfare*, the official United States Army interpretation of the rule of international law as to the permissible punishments for violations of the laws and customs of war is that, while the death penalty may be adjudged for grave breaches of the convention, the punishment actually imposed "must be proportionate to the gravity of the offense."¹⁸⁸

III. CONCLUSION

It was only as a result of the atrocious maltreatment which many prisoners of war received during World War II—maltreatment which was contrary to all criteria of civilized conduct in the twentieth century—that punishment was meted out to offenders on a scale commensurate with the number and nature of the offenses committed. The need to punish those who had, in their treatment of prisoners of war, violated the laws and customs of war, highlighted the fact that pious statements guaranteeing humane treatment of prisoners of war contained in international treaties are of only moral value unless they are backed up by the guarantee of specific sanctions for violations of those statements.¹⁸⁹ And to the individuals who violated the laws and customs of war during World War II moral values were of little import. Through the initiative of the International Committee of the Red Cross, provisions relating to violations of the several Geneva Conventions for the Protection of War Victims were drafted and, eventually, after redrafting by the 1949 Geneva Diplomatic Conference, they became integral parts of each of those conventions, including the new Prisoner of War Convention. Their value as a deterrent power has not yet been tested, Korea not having provided a valid testing ground, but they have now been ratified or adhered to by countries representing a very large percentage of the population of the earth, and sufficient time has elapsed to permit knowledge with respect to their contents to have been disseminated to all levels of all armies, as well as to civilian populations. Should another holocaust descend upon us, there is now advance warning to all persons coming in contact with prisoners of war that a definite minimum standard of treatment has been established for them by international legislation, which likewise prescribes that punishment must and will be meted out to those who wilfully fail to comply with that minimum standard. While instances of maltreatment of prisoners of war will undoubtedly continue to occur in future conflicts, it is devoutly to be hoped that they will become the exception rather than the rule, and that the unbridled cruelties suffered by prisoners of war during World War II will prove to have been the end of an era.

¹⁸⁷ Note 90 above. This law apparently applies only in the trials of Soviet military personnel and not in the trials of enemy nationals.

¹⁸⁸ Par. 508.

¹⁸⁹ As Röling stated in his 1960 lectures at the Hague Academy of International Law, "The way to international hell seems paved with 'good' conventions." 100 *Hague Academy Recueil des Cours* 445 (1960, II).

EDITORIAL COMMENT

THE ISSUES AT PUNTA DEL ESTE: NON-INTERVENTION *v.* COLLECTIVE SECURITY

The cornerstone of the inter-American regional security system is the Treaty of Reciprocal Assistance, signed at Rio de Janeiro, September 2, 1947, known popularly as the Rio Treaty.¹ It was the final outcome of a succession of steps first taken in 1936, when the United States set aside its traditional claim under the Monroe Doctrine to intervene in Latin American affairs for the purpose of restoring order and taking from European Powers any justification for intervention on their part. That the claim should have been resented by the leading Latin American Powers was to be expected; and by 1936 the new policy was proposed of abandoning intervention, if the Latin American states would on their part accept a collective responsibility to maintain the peace.² The proposal was accepted; by 1940 it took the form of a declaration that an attack upon one was an attack upon all;³ and by 1947 it became a specific and detailed treaty obligation.

Could the Rio Treaty meet the challenge of the revolution in Cuba? The United States had doubtless recognized the new government of Fidel Castro too hastily, accepting his promises of economic and social reform at their face value. Then, as appropriation of property under eminent domain soon took the form of confiscation, it was clear that the new government had no intention of keeping within the bounds of international law. The denial of fundamental rights followed; opposition to the revolution became an offense against the law; within months a dictatorship of the most rigid character had been established; and the Soviet Union was invited to co-operate in the new regime. Sixty years earlier the United States would doubtless have moved in and put an end to it all. But there were the obligations of the Rio Treaty and other agreements prohibiting unilateral action. A new order of collective responsibility had come into being, and the United States, in good faith, looked to it for a solution.

But the Meeting of Foreign Ministers at San José, Costa Rica, in 1960 could get no further than a reprimand of Cuba for misbehavior, even the name of the culprit being suppressed. The collective group simply would not take effective action. The meeting held under the Rio Treaty was willing to apply sanctions to the Dominican Republic for complicity

¹ Pan American Union, *International Conferences of American States*, 2nd Supp. 1942-1954, p. 142 (1958); T.I.A.S., No. 1838; 43 A.J.I.L. Supp. 53 (1949).

² Convention for the Maintenance, Preservation and Reestablishment of Peace, Buenos Aires, Dec. 23, 1936. U. S. Treaty Series, No. 922; 31 A.J.I.L. Supp. 53 (1937).

³ Second Meeting of Ministers of Foreign Affairs, Havana, July 21-30, 1940, Final Act: Declaration XV on Reciprocal Assistance and Coöperation for the Defense of the Nations of the Americas. 3 Dept. of State Bulletin 127 at 136 (1940); 35 A.J.I.L. Supp. 15 (1941).

in the attempted assassination of the President of Venezuela, but the same Ministers, meeting the following week under the much less drastic Article 39 of the Charter, were unwilling to apply similar sanctions against the government of Fidel Castro.⁴ By October, 1961, the situation had taken on more serious aspects, and the Government of Peru requested a Meeting of Foreign Ministers, this time under the Rio Treaty, to take more positive action. But it appeared that there was not the two-thirds majority necessary for action under the Rio Treaty, so the Council of the Organization referred the Peruvian request to the Inter-American Peace Committee to conduct investigations that might later be made the basis for decision. A month later the Government of Colombia, finding the situation too urgent to be postponed, requested a meeting under the Rio Treaty; and this time, after sharp debate, the Council, by a close vote, convoked the meeting, to be held at Punta del Este on January 22, 1962.

In preparation for the meeting the Department of Legal Affairs of the Pan American Union prepared an elaborate "Background Memorandum on the Convocation of the Meeting," setting forth the separate items included in the Colombian request under the broad and somewhat vague heading of "the threats to the peace and to the political independence of the American States that might arise from the intervention of extracontinental powers directed toward breaking American solidarity." Was this sufficient to form an indictment of a sovereign state? Arguments were presented at the Council meeting that it was not. Yet more specific charges against Cuba might have defeated the necessary vote. The Background Memorandum did no more than recite and present in systematic form the earlier condemnations of subversive activities and the interpretations that had been given on previous occasions to the scope of the Rio Treaty in respect to the intervention of extracontinental Powers in American affairs, notably the resolution taken at the Caracas Conference in 1954 against the domination or control of an American state by the international Communist movement, and the condemnation of intervention by an extracontinental Power at San José in 1960.

⁴Seventh Meeting of Ministers of Foreign Affairs, San José, Costa Rica, August, 1960. The two opening paragraphs of the Declaration of San José, adopted Aug. 28, 1960, read as follows:

"The Seventh Meeting of Consultation of Ministers of Foreign Affairs

- "1. Condemns emphatically the intervention or the threat of intervention, even when conditional, by an extracontinental power in the affairs of the American republics and declares that the acceptance of a threat of extracontinental intervention by any American state jeopardizes American solidarity and security, wherefor the Organization of American States is under obligation to disapprove it and reject it with equal vigor;
- "2. Rejects, also, the attempt of the Sino-Soviet powers to make use of the political, economic, or social situation of any American state, inasmuch as that attempt is capable of destroying hemispheric unity and jeopardizing the peace and the security of the hemisphere;" (43 Dept. of State Bulletin 407 (1960).)

But strong as was the condemnation in general terms of the existing conditions in Cuba, none of the ten resolutions adopted at the Meeting mentioned the name of Cuba specifically.

Supplementing the Memorandum of the Department of Legal Affairs was a report of the Inter-American Peace Committee which had been prepared in response to the request presented by Peru after it had failed to obtain a vote of the Council in favor of a Meeting of Foreign Ministers under the Rio Treaty. The report was a head-on attack upon the Cuban Government, presenting in detail violations of fundamental human rights, the action of international Communism in Cuba and incorporation of the Cuban Government in the Sino-Soviet bloc, and the Communist infiltration by the Government of Cuba itself in the other countries of America. Each of these items raised questions of the application of Article 6 of the Rio Treaty.

In contrast with Article 3 of the treaty, which deals with armed attacks of one country against another and which has not as yet been at issue, Article 6 deals with acts of aggression short of an armed attack and with acts or situations that might endanger the peace;⁵ but it begins with a formidable "if" clause to the effect that the acts of aggression short of armed attack and the threats to the peace with which it deals must affect "the inviolability or the integrity of the territory or the sovereignty or political independence" of the American state. In other words, the framers of the treaty did not intend to put into effect the sanctions enumerated in it unless the circumstances were of a serious and urgent character pressing, in a sense, upon the very political existence of the state.

Conceding that there was denial of fundamental rights in Cuba, was there a ground here for intervention? The advocates of the principle of non-intervention appeared to find almost as much objection to collective intervention, or better, collective action under the Rio Treaty, as to individual intervention of the old type so rigorously denounced before the acceptance of the principle of collective responsibility. An ugly picture was presented by the report of the Peace Committee: denial of freedom of speech and freedom of the press, denial of the right of assembly; trial by military courts and execution by firing squads for open opposition to the revolution. But was not the Government of Cuba entitled to enforce the program of the revolution against those who were seeking to undermine and defeat it? While the methods might, perhaps, have been extreme, there was nothing novel about them, certainly nothing to justify the intervention of other American states, many of whose governments had resorted to such measures on occasion in the past. That the denial of fundamental rights in Cuba was contrary to the principles of the Charter could be conceded. But the Rio Treaty, it had been argued before the Council, did not undertake to enforce principles unless they came within

⁵ Art. 6: "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent."

the terms of Article 6; there was that "if" clause that could not be overlooked.

The second item in the indictment presented in the report of the Peace Committee dealt with the "Ties of the Government of Cuba with the Sino-Soviet bloc." Did this present a "fact or situation that might endanger the peace of America"? There was no doubt that the ties were close; the leader of the revolution had only recently described himself as "a Marxist-Leninist." But could he not be that of his own initiative? The Caracas Resolution of 1954 had described the "domination or control of the political institutions of any American State by the international Communist movement" in terms of the provisions of Article 6; but the obligations of a resolution were short of those of a treaty. As against these arguments the report of the Peace Committee made it clear that the ties with the Soviet Union were more than ideological; that they defined "the position of a country in the game of international politics"; and that the pledges given by the Soviet Prime Minister of armed aid to Cuba against aggression, together with the open repudiation by Cuba of the binding force of the Rio Treaty, clearly identified Cuba with the inherently aggressive policy of the Sino-Soviet bloc.

A final item in the indictment was based upon the subversive activities of the Cuban Government against legitimately constituted governments and the democratic institutions of America. It was found, among other activities, that there existed "a constant and systematic activity of radio propaganda through the government transmitters of Cuba," inciting public disorder and revolutionary movements. One government after another was cited as demanding the withdrawal of the Cuban Ambassador for intervening in the internal affairs of the country, some nine governments being indicated.

The debates at Punta del Este followed closely the points of view expressed by the members of the Council when the requests of Peru and of Colombia were before the Council for a convocation of the Organ of Consultation under the Rio Treaty. The conflict was between the principles of non-intervention and of "self-determination," deemed essential to the maintenance of inter-American solidarity even at the cost of the misdemeanors of the Cuban Government, and, on the other hand, the violations by the Cuban Government of fundamental human rights and the danger of the bridgehead obtained by international Communism in Cuba and the extension of the system to other American states. The opposing points of view were at all times in the background, although actual debate both in public sessions and in private groups centered on the concrete proposals of the United States Delegation, which called for breaking relations with the Cuban Government by the states that had not already done so and establishing an economic boycott of the country. Later the United States withdrew its two demands and accepted the alternative of excluding the existing Government of Cuba from participation in the inter-American system. This substitute proposal was debated as a direct mandate to the Council of the Organization of American

States, and alternatively as an instruction to the Council to find ways and means of doing so. The opponents of exclusion argued insistently that, in view of the absence of any provision in the Charter fixing the terms of exclusion, the exclusion of a member state from the Organization could not be effected without an amendment to the Charter, which would require the calling of a special conference and ratification by a two-thirds vote, after which another conference would be required to complete the exclusion. The alternative of reference of the exclusion to the Council under instructions to find ways and means of bringing it about would have involved far less delay, although apparently sufficient delay to satisfy a number of the opponents of strong action. Throughout the debates there appeared to be on the whole a safe vote of two-thirds for strong measures, but a willingness was manifested by the majority to moderate their demands up to a certain point in the hope of winning over the so-called "soft group" for a more commanding vote.

Once agreement was reached to proceed to a vote on the concrete issue of exclusion of the Cuban Government from participation in the inter-American system and upon the somewhat less controversial issue of an economic boycott, it was not difficult to obtain agreement upon the larger issue of principle, condemnation of the Cuban Government in general terms being unanimous. The Final Act⁶ containing nine separate resolutions was then voted as a whole, with reservations upon the two specific sanctions. The vote on the crucial issue of expulsion was 14 to 1, with six abstentions, and that on suspension of economic relations was 16 to 1, with four abstentions. The seven other resolutions were, with one exception, voted unanimously, namely: I, "Communist Offensive in America," calling for counter-measures to the subversive activities of Communism in America; II, "Special Consultative Committee on Security against the Subversive Action of International Communism," to advise member states requesting assistance; III, "Reiteration of the Principles of Non-Intervention and Self-Determination," reaffirming the abstract principles, but urging the organization of governments on the basis of free elections; IV, "Holding of Free Elections," repeating the principles of the Declaration of Santiago of 1959; V, "Alliance for Progress," commending the principles of the agreement of August 17, 1961; VII, "Inter-American Defense Board," excluding the present Government of Cuba from that body; IX, "Revision of the Statute of the Inter-American Commission on Human Rights," amplifying and strengthening the attributes of that body. Resolutions VI and VIII dealt with the two controversial issues, which, by a somewhat curious procedure, were described in the Final Act as "approved," and then qualified by the opposing signatories in statements at the close of the Act.

Apart from the light thrown by the Meeting of Ministers upon the interpretation of Article 6 of the Rio Treaty, an interesting question is presented for students as to whether a member of an organization can

⁶ Organization of American States, Doc. 68 (English) Rev., Jan. 31, 1962. OAS Official Records OEA/ Ser. F/11.8 (English). Reprinted below, p. 601.

be excluded from it when there is no provision for exclusion in the treaty. The Covenant of the League of Nations had an express provision (Article 16) to the effect that, by a prescribed vote, a Member might be excluded for any violation of a covenant of the League; and the Charter of the United Nations provides (Article 6) that a Member which has "persistently violated" its principles may be expelled by the General Assembly upon recommendation of the Security Council. The Charter of the Organization of American States, however, contains no provision for suspension of the rights of membership or for expulsion from the Organization for violations of the Charter. The draft prepared by the Governing Board of the Pan American Union contained a provision that, in order to enjoy the rights of membership, a state should "fulfill in good faith the obligations inherent in such membership," carrying the implication that failure to do so could result in loss of membership. But this provision did not appear in the final draft of the Charter.

Query: Does the rule of international law that the breach of the obligations of a bilateral treaty by one party releases the other party from the obligations of the treaty hold equally well for multilateral treaties? It would seem that it should do so, except that the issue would be presented as to the majority required to take the necessary decision. Where the treaty is, like the Charter of the O.A.S., in the nature of the statute of a corporate body, a larger majority would properly be required, and the seriousness of the violations of the treaty would be taken into consideration in the decision. Here the two-thirds vote required for decisions under the Rio Treaty, which forms Article 25 of the Charter, would seem to suggest the proper majority, confirmed by the necessity of a two-thirds vote for the adoption of amendments to the Charter. The resolution excluding the existing Government of Cuba from the inter-American system, in addition to offering as justification that its connections with the Sino-Soviet bloc were incompatible with the principles and standards governing the regional system, and that the acceptance of military assistance offered by Communist Powers broke down the effective defense of the inter-American system, took the position, believed to be proper to a multipartite treaty, that "no member state of the inter-American system can claim the rights and privileges pertaining thereto if it denies or fails to recognize the corresponding obligations." The right to exclude a member of an organization for violations of the provisions of its charter is thus held to be implied in the very statement of the rights and duties set forth as constituting the conditions of membership and the objectives of the organization. It should be noted that Resolution VI makes it clear in paragraph after paragraph that the decision to exclude is directed not against Cuba as a state but against "the present Government of Cuba," so that the action taken would appear to be more or less in the nature of the suspension of participation of Cuba in the organs of the Organization, leaving Cuba still a member of the Organization, to be readmitted to active participation when the reasons for its exclusion might no longer exist.

C. G. FENWICK

CODIFICATION TREATIES AND PROVISIONS ON RECIPROCITY,
NON-DISCRIMINATION OR RETALIATION

Should treaties which are drafted to codify and develop existing international law contain provisions permitting one party, in the name of reciprocity, to discriminate or retaliate against another party in applying the provisions of the treaty? Where most of the highly variegated states of the world have agreed on treaty provisions setting forth their reciprocal rights and obligations, it might be assumed that reciprocity has been built into the treaty and that its provisions are intended to be applied without discrimination. Should a violation of the treaty occur, principles of international law outside the treaty can be invoked in certain circumstances to justify retaliatory steps, although resort to more pacific methods of settling the dispute is usually possible. A distinction must be made, however, between methods of redress for violation of the treaty and the insertion in the treaty itself of a unilateral right to vary its application on the basis of a subjective determination that it is not being reciprocally applied by another party. Such a treaty provision appears to enshrine reciprocity in place of law, to provide that the agreed rules of international law carefully defined in the treaty are legally binding only so long as states do not exercise their ill-defined treaty right to vary their application on the basis of unilateral determinations.

These reflections are suggested by the provisions of Article 47 of the Vienna Convention on Diplomatic Relations of April 18, 1961,¹ and by the modified version set forth in Article 70 of the International Law Commission's draft on Consular Intercourse and Immunities, adopted by the Commission at its Thirteenth Session in 1961.² By Resolution 1685 (XVI), December 18, 1961, the United Nations General Assembly has decided to convoke an international conference of plenipotentiaries at Vienna in March, 1963, to draft an international convention on consular relations, taking the Commission's 1961 draft as the basis for its work. Questions as to the desirability of including provisions on reciprocity, non-discrimination or retaliation in a codification treaty are quite likely to be raised again at that conference and it may be useful to outline here some previous discussions of the issues.

Article 47 of the Vienna Convention on Diplomatic Relations of April 18, 1961, reads as follows:

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

¹ U.N. Doc. A/CONF. 20/13, April 16, 1961; 55 A.J.I.L. 1076 (1961). Cf. Ernest L. Kerley, "Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities," 56 A.J.I.L. 88-129 (1962). Although Kerley does not discuss the drafting of Art. 47, he makes reference to problems of non-discrimination and reciprocity on pp. 98-99.

² Report of the International Law Commission covering the Work of Its Thirteenth Session, 1961, U.N. Gen. Assembly, 16th Sess., Official Records, Supp. No. 9 (A/4843), p. 39; 56 A.J.I.L. 353 (1962).

2. However, discrimination shall not be regarded as taking place:
 - (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
 - (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

This text closely follows Article 44 of the final draft of the International Law Commission on Diplomatic Intercourse and Immunities as adopted at its 10th Session in 1958.³ Neither the Commission's provisional draft of 1957⁴ nor the Special Rapporteur's draft of 1955⁵ contained such an article. The reasons for this omission are not stated in the record, but may perhaps be due to the assumption that the traditional pattern of observance of the customary international law governing diplomatic privileges and immunities has developed largely because of the reciprocal nature of the institution. As Mr. Jaroslav Zourek later observed before the Commission:

Diplomatic relations were of course based on reciprocity of treatment, but the Commission was preparing a draft convention, and by virtue of that convention reciprocity would be largely assured by the application of the rules of the convention. It would always be open to States which held that the terms of the convention were not being correctly applied to resort to the machinery of peaceful settlement provided for in the treaties to which they were parties.⁶

The issue was nevertheless raised before the International Law Commission because of the comments of certain governments on the Commission's provisional draft of 1957. In its observations, dated March 26, 1958, on the 1957 draft, the Netherlands Government suggested the insertion of "a general provision embodying the principle of reciprocity without, however, making the observance of a strict reciprocity a condition for diplomatic intercourse." It also took "the view that the articles of the Commission's draft do not interfere with the possibility of taking reprisals in virtue of the relevant rules of general international law,"

³ 1958 I.L.C. Yearbook (II) 105 (Report of the Commission); 53 A.J.I.L. 289 (1959). Art. 44 of that draft reads as follows:

"NON-DISCRIMINATION"

Article 44

"1. In the application of the present rules, the receiving State shall not discriminate as between States.

"2. However, discrimination shall not be regarded as taking place:

- (a) Where the receiving State applies one of the present rules restrictively because of a restrictive application of that rule to its mission in the sending State;
- (b) Where the action of the receiving State consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules."

⁴ 1957 I.L.C. Yearbook (II) 133 ff. (Report of the Commission); 52 A.J.I.L. 180 ff. (1958).

⁵ 1955 I.L.C. Yearbook (II) 9 ff. (Doc. A/CN.4/91, April 21, 1955, Report of A.E.F. Sandström).

⁶ 1958 *ibid.* (I) 196 (467th Meeting).

but did not request the inclusion of any provision on that point. As for non-discrimination, the Netherlands Government believed that references to it in some articles might create the impression that it applied only to them, whereas "the principle of non-discrimination is a general principle on which the application of all the draft articles should be based."⁷

For other reasons, the United States Government, in its comments of February 24, 1958, objected to the provision for non-discrimination found in paragraph 2 of Article 7 of the Commission's 1957 draft, which provided that in certain circumstances a receiving state may "on a non-discriminatory basis, refuse to accept [diplomatic] officials of a particular category." This provision, observed the United States comment, "not only fails to mention the principle of reciprocity, but apparently contemplates that the receiving State must treat all foreign missions alike, without regard to how the sending State treats representatives of the receiving State."⁸ The United States also objected to the requirement of non-discrimination implicit in Article 20 of the Commission's 1957 draft, which provided:

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

This article, commented the United States, appeared to sanction present restrictive practices of certain governments. Moreover:

The latter part of the article would require that travel controls be applied without discrimination to diplomatic representatives of all States, including those which do not restrict the movements of representatives of the receiving State. The principle of reciprocity, however, is an integral factor in matters of this nature. It is believed that it would be preferable to have no article on the subject, rather than one so subject to arbitrary abuse.⁹

The International Law Commission gave consideration to these comments at its 453rd and 467th meetings on May 30 and June 19, 1958. Mr. Sandström, Special Rapporteur, suggested the drafting of "a special article enunciating the principles both of non-discrimination and of reciprocity," but the Commission voted, 12 to 1, "that the principle of non-discrimination be enunciated in a substantive article."¹⁰ Mr. Sandström nevertheless drafted articles on both principles, the one intended to deal with reciprocity reading as follows:

If a State applies restrictively a rule of this draft which is capable of being applied liberally or restrictively, then the other States shall not be bound, *vis-à-vis* that State, to apply it liberally.¹¹

In the discussion which followed, Mr. Kisaburo Yokota observed with reference to the United States position that a state should be permitted to discriminate against another in the name of reciprocity:

⁷ *Ibid.* (II) 124 (Annex to the 1958 Report of the Commission).

⁸ *Ibid.* 134.

⁹ *Ibid.* 136.

¹⁰ *Ibid.* (I) 112 (453rd Meeting, May 30, 1958).

¹¹ *Ibid.* 194.

The principle of reciprocity could not, however, apply in that case. The duty of non-discrimination was not optional but obligatory . . . it was not the principle of reciprocity which was involved but the right of reprisal.¹²

The choice confronting the drafters, as Mr. Grigory Tunkin had observed, was whether to enunciate the principle of non-discrimination or to enunciate the principle of reciprocity: enunciation of the latter in the draft "would lead in practice to discrimination as between missions accredited to the same State."¹³ Reciprocity, said Mr. Zourek, was largely assumed in the draft as a whole; but some articles, like Article 7, which permitted the receiving state to limit the size of a mission, were based not on reciprocity but on particular circumstances in the receiving state and the particular needs of the sending state.¹⁴ If a state voluntarily accorded to a particular foreign mission treatment more favorable than was required by the convention, it could ask for, but had no right to insist upon, reciprocal treatment.¹⁵ Nevertheless, the Commission agreed that if two states, on a reciprocal basis, accorded each other's missions such favorable treatment, this should not be deemed to be discriminatory against other parties to the convention.¹⁶

If, on the other hand, a state accorded treatment falling short of the requirements of the convention, this was a violation of international law, and no principle of reciprocity entitled the injured state to commit a similar violation. If a right of reprisal or retaliation existed, it was not the principle of reciprocity which established it and governed its employment.¹⁷ What seemed desirable, therefore, was to enunciate the principle of non-discrimination in the convention and omit references to reciprocity or retaliation.

However, the Commission attempted in Article 44 to deal in part with all three principles and produced, in Article 44, a hybrid of some ambiguity. After setting forth the rule of non-discrimination in paragraph 1, the article provides, in effect, in paragraph 2(a) that discrimination shall not be regarded as discrimination if justified as an act of retaliation which falls short of a violation of the convention; and in paragraph 2(b) that, in a case not falling within the scope of the convention (*i.e.*, where two states, on the basis of reciprocity, accord treatment more favorable than is required by the convention), the non-discrimination rule of the convention does not apply!

The Commentary on Article 44 is likewise ambiguous in implying that "no discrimination occurs" when discrimination is "justified by the rule of reciprocity"; in assuming that the application of a rule within "the strict terms of the rule" can properly be regarded as a "restrictive" application; and in the assumption with reference to paragraph 2(b)

¹² *Ibid.* Cf. similar view of Mr. Radhabinod Pal, *ibid.* 195.

¹³ *Ibid.* 112.

¹⁴ *Ibid.* 196.

¹⁵ Cf. views of Mr. Yuen-li Liang, Secretary of the Commission, *ibid.* 197.

¹⁶ Art. 44, par. 2(b).

¹⁷ Cf. views of Mr. Liang and Mr. Tunkin, *loc. cit.* 197.

that it was necessary to state that the convention does not apply to acts which, by hypothesis, do not come within the scope of the convention.¹⁸

In the replies received from various governments only the United States Government expressed approval of this article. In its *note verbale* of June 10, 1959, the United States observed that Article 44 (which was labeled "non-discrimination" by the Commission) "embodies the principle of reciprocity in relations between States." It was regarded as meeting United States objections to provisions of the 1957 draft which required "that the receiving State shall not discriminate in the treatment it accords to the various diplomatic missions in its territory, and members of such missions."¹⁹ Thus the article drafted by the International Law Commission to prevent discrimination was approved by the United States because, in the name of reciprocity, it authorized discriminatory treatment in certain situations.

The International Law Commission had an opportunity to reconsider its drafting of Article 44 when Mr. Zourek, Special Rapporteur, introduced it as Article 53 of the draft on Consular Intercourse and Immunities at the 548th meeting on May 27, 1960. Pointing out that "the principle of reciprocity had been deleted from previous articles of the draft" but had been "reintroduced through the back door" in paragraph 2(a), he suggested its deletion.²⁰ In reply to the argument that paragraph 2(a) did not deal with retaliation for a violation of the convention, but only for a restrictive application, Mr. Tunkin observed that "in so far as a rule of the draft itself allowed some latitude, a State would be applying the rule correctly if it availed itself of that latitude; the question of a restrictive or liberal application did not arise in that case."²¹ Mr. Milan Bartoš thought it "difficult to see how such privileges and immunities as were necessary for the performance of consular functions could be subordinated to the condition of reciprocity."²² At its 573rd meeting on June 28, 1960, the Commission, by a vote of 13-0-1, adopted an article on non-discrimination,²³ based on Article 44 of its draft on Diplomatic Intercourse and Immunities, but omitting paragraph 2(a), as follows:

Non-discrimination

1. In the application of the present articles, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place where the action of the receiving State consists in the grant, on a basis of reciprocity, of privileges and immunities more extensive than those provided for in the present articles.²⁴

In its Commentary on this article, the Commission stated that, having had an opportunity to reconsider paragraph 2(a) of Article 44 of its

¹⁸ *Ibid.* (II) 105.

¹⁹ U.N. Doc. A/4164, Annex, p. 52.

²⁰ 1960 I.L.C. Yearbook (I) 146.

²¹ *Ibid.* 147.

²² *Ibid.* 150.

²³ *Ibid.* 312.

²⁴ Art. 64 of the Commission's provisional draft of 1960 on Consular Intercourse and Immunities, Report of the Commission covering the Work of Its Twelfth Session, 1960 (U.N. Doc. A/4425), pp. 34-35; 55 A.J.I.L. 300 (1961).

draft on Diplomatic Intercourse and Immunities, it now doubted whether it should be retained even in that draft. The attention of the 1961 Vienna Conference on Diplomatic Intercourse and Immunities was drawn to this change of position by the International Law Commission. Although representatives of eight states advocated deletion of paragraph 2(a) of Article 44, and only representatives of the United States, Italy and Viet Nam spoke for its retention, the Committee of the Whole decided to retain the provision by a vote of 30-20-19.²⁵ At the 10th plenary meeting on April 13, 1961, the Conference, after voting again to retain paragraph 2(a), adopted the article, which became Article 47 of the Vienna Convention,²⁶ by a vote of 61-0-9.²⁷

The comment made by the Norwegian Government on January 30, 1961, although directed to Article 64 of the International Law Commission's 1960 draft on Consular Intercourse and Immunities, would likewise be pertinent to Article 47 of the Vienna Convention. The Norwegian Government observed:

It is difficult to see any valid reasons for including the provisions of this article. They seem, at best, superfluous and might give rise to misconstructions.

When the two paragraphs of the article are read in conjunction, it appears clearly that discrimination *per se* is unobjectionable. The less favoured State can only object if the privileges and immunities accorded . . . are less extensive than those laid down in the preceding articles. In this case, however, it is the non-compliance with these articles, not the discrimination, which affords the basis for a complaint.²⁸

The case against including in a consular convention a provision that consular privileges and immunities should be based upon the principle of reciprocity was well stated by Mr. Zourek, Special Rapporteur, in his 3rd Report on Consular Privileges and Immunities:

2. It should be pointed out in the first place that many consular privileges and immunities are based on customary international law. Examples of these are the use of the national flag and of the State coat-of-arms, the inviolability of the consular premises and archives, and of the documents and official correspondence of the consulate, the freedom of communication of the consulate, the levying of consular fees and charges and the exemption from taxes and dues. Every State has a duty to respect the provisions in question, and the idea of reciprocity is irrelevant.

3. Even in the case of provisions constituting wholly or partly a progressive development of international law—the draft does not distinguish the provisions which do from those which do not—the Commission, after due consideration, dropped the idea of a reciprocity

²⁵ U.N. Doc. A/CONF. 20/C.1/SR. 37 (afternoon meeting of March 30, 1961), pp. 5-9.

²⁶ See above, p. 475.

²⁷ U.N. Doc. A/CONF. 20/SR. 10, p. 8.

²⁸ U.N. Doc. A/CN.4/136, April 8, 1961, Comments by Governments on the 1960 draft articles on Consular Intercourse and Immunities, p. 22; Report of the International Law Commission covering the Work of Its Thirteenth Session, 1961 (U.N. Doc. A/4843), Annex I, p. 63.

clause. It took the view that all the provisions would be equally binding on all the contracting parties, with the consequence that the parties would all be on a footing of equality, which would make a reciprocity clause unnecessary.

4. The Commission applied the reciprocity concept to those consular privileges and immunities only *which are granted in addition* to those provided for in the present articles. . . .²⁹

At its 13th Session, the International Law Commission again re-examined the question at its meeting of June 12, 1961. Although three members urged that Article 64 of the Commission's provisional draft on Consular Intercourse and Immunities be drafted to correspond to Article 47 of the Vienna Convention on Diplomatic Relations by re-inserting the retaliation or retorsion provision found in paragraph 2(a) of the latter, nine members opposed the inclusion of what one member referred to as "the worst paragraph in the Vienna Convention." The Chairman ruled that a large majority had spoken in favor of retention of the 1960 text of Article 64.

As adopted by the Commission in its final draft on Consular Relations in 1961, the text (now Article 70) reads as follows:

Article 70

Non-discrimination

1. In the application of the present articles, the receiving State shall not discriminate as between the States parties to this convention.

2. However, discrimination shall not be regarded as taking place where the receiving State, on a basis of reciprocity, grants privileges and immunities more extensive than those provided for in the present articles.³⁰

It is this text which will come before the Vienna Conference of 1963 as a basis of discussion. In the writer's opinion it is preferable to the text of Article 47 of the Vienna Convention on Diplomatic Relations (reproduced at the beginning of this editorial) because it omits the provision contained in paragraph 2(a) of Article 47 which authorizes discriminatory or retaliatory practices on grounds of reciprocity—a practice which should not be sanctioned by treaty.

The question remains whether any of the provisions of Article 70 of the Commission's draft are necessary or desirable. If paragraph 1, setting forth the rule of non-discrimination in the application of the convention to its parties, were eliminated, would there be any question that the application of the provisions of the convention was nevertheless intended to be on a non-discriminatory basis? Could it be seriously argued that a treaty setting forth an agreed restatement and development of the law of consular privileges and immunities authorized, or was intended to permit, discrimination in its application, if it contained no provision on the subject?

The assumed necessity for paragraph 2 of Article 70 disappears, it is

²⁹ U.N. Doc. A/CN.4/137, April 13, 1961, p. 26. *Italics in the original.*

³⁰ Report of the International Law Commission covering the Work of Its Thirteenth Session, 1961 (U.N. Doc. A/4843), p. 39; 56 A.J.I.L. 353 (1962).

submitted, in the provision of Article 71, which declares that "The provisions of the present articles shall not affect conventions or other international agreements in force as between States parties to them," and the clear implication of its Commentary that this applies to future as well as to past consular treaties and agreements.⁸¹ The granting of consular privileges and immunities more extensive than those provided for in the Commission's draft is not excluded by Article 70 when such privileges and immunities are granted on the basis of reciprocity, i.e., at the least, on the basis of an implied agreement. The insertion in the convention of a provision relating to matters declared to be beyond its scope betrays confusion of thought: action outside the convention is not in "application" of its provisions, and whether or not such action is discriminatory cannot be determined by an admittedly inapplicable treaty.

The writer would answer in the negative the question posed in the opening sentence of this editorial.

HERBERT W. BRIGGS

THE STATE OF SYRIA: OLD OR NEW?

Among events in the fall of 1961 was the reappearance on the international scene of a state of Syria. The result of a successful *coup d'état*, it marked the disruption in fact of the original United Arab Republic created by the union of Syria and Egypt in 1958 under the presidency of Gamal Abdel Nasser. One problem immediately raised by the change was whether the new Syrian Arab Republic of 1961 was or was not identical in international personality with the Republic of Syria which had existed prior to 1958. The answer was of practical concern because of its effect on Syria's position in the United Nations and on its international obligations in other respects.

The facts of the situation were briefly these. Early in the morning of September 28, 1961, a group of Syrian officers of the United Arab Republic's First Army seized the radio station and Army headquarters in Damascus. Styling themselves the "Supreme Arab Revolutionary Command of the Armed Forces," their avowed intent was "to end corruption and tyranny and to restore legal rights to the people."¹ At the outset there was apparently some hope that these goals might be achieved within the framework of the United Arab Republic; but after fruitless discussions during the day, followed by a denunciation of the group by President Nasser over Radio Cairo, the insurgents resolved to seek complete independence for the Syrian Region of the United Republic.

By the morning of September 29, the authority of the Revolutionary Command had been established in the principal cities and was spreading rapidly and without opposition throughout the rest of the country. By

⁸¹ *Ibid.*

¹ Communiqué broadcast over Radio Damascus at 6:30 a.m., Sept. 28, 1961. The account in the text is based on contemporary press and radio reports, including Radio Damascus and Radio Cairo.

that evening, its success was signalized by President Nasser's broadcast declaration from Cairo recognizing the accomplished fact and affirming that, since the unity of Syria and Egypt had resulted from the will of the people, it should not be enforced against them by military means. The entire operation had taken less than forty-eight hours.

The Revolutionary Command, disclaiming any intent to impose a military regime upon the country, moved with equal speed to organize a civil government. On the morning of September 29, Dr. Mahmud Kuzbari was charged with forming a cabinet "which will be entrusted with the administration of the affairs of the country preparatory to the restoration of constitutional life therein."² Dr. Kuzbari named an all-civilian cabinet the same day, retaining for himself the premiership and the Ministries of Defense and Foreign Affairs.³ On October 29 the transitional cabinet promulgated an electoral law to govern the choice of a constituent assembly. Elections thereunder were held on December 1-2, at which time the voters also approved a brief Provisional Constitution. Article 1 of this instrument declared the Syrian Arab Republic to be "an independent sovereign state, forming part of the great Arab homeland"; the remaining seven articles provided for the organization of the government and for the preparation of a permanent constitution by the Assembly within six months.⁴

The changes in Syria caused prompt reactions on the international front. The revolutionary regime was recognized by Jordan on the morning of September 29 and by Turkey later the same day. By October 10, the date on which the United States extended recognition,⁵ some sixteen states had already taken such action, including the Soviet Union. The United Kingdom and the Vatican followed suit shortly after. Syria was seated in the United Nations General Assembly on October 13, as discussed below; and on October 28 it took its place without objection as a member of the Arab League at a meeting of the League Council in Cairo.⁶

On these facts there can be no doubt about the re-emergence of a state of Syria as an international person, with all the usual attributes of sovereignty, independence, and equality. But is it the same state as the pre-1958 Republic of Syria? The mere establishment of an independent state in territory which has been at an earlier date the situs of another independent state does not necessarily involve a continuity of identity between the two. To take a current example, it is unlikely that the present Republic of the Congo (Leopoldville) considers itself to be identical in

² Communiqué No. 17 of the Revolutionary Command, as broadcast over Radio Damascus.

³ Decree No. 1, published in the Official Gazette of the Syrian Arab Republic, No. 1, Oct. 5, 1961.

⁴ The text of the provisional constitution was printed in the Official Gazette, No. 11, Nov. 15, 1961.

⁵ Text of U. S. announcement in 45 Dept. of State Bulletin 715 (1961).

⁶ In taking his seat, the Syrian delegate referred to the United Arab Republic as "the eldest sister . . . which will always continue to be dear to us." Egyptian Gazette (Cairo), Oct. 29, 1961.

personality with the sovereign Congo Free State fathered by Leopold II in the 1880's. Where a feeling of national identity is strong, however, a re-establishment of independence may well be regarded as effecting a revival of a state personality which had been merely dormant in the intervening period. Thus the Austria of today is the same state which existed prior to its 1938 *Anschluss* with Germany—a view confirmed by the Austrian State Treaty of 1955, which expressly recognized Austria as being "re-established as a sovereign, independent and democratic State" within the frontiers it possessed on January 1, 1938.⁷

The union of Syria and Egypt in the United Arab Republic, which was proclaimed on February 1, 1958, and approved in a plebiscite on February 21, created a single state and a single Member of the United Nations where there had previously been two.⁸ Syria was thereby extinguished, at least for the time being, as an international personality. Yet it is clear that the revolutionary group which effectively broke up the union in September, 1961, viewed itself as restoring the state which had existed prior to 1958. This was evidenced by many of its actions at home and abroad: for example, Article 8 of the new Provisional Constitution directed that executive authority for the time being should be exercised in accordance with the provisions of the Syrian Constitution of 1950. These actions reinforced an already strong sense of continuity based on popular feeling, on the fact that the old and new republics comprised the same territory and population, and on the fact that much of the older Syria's law and administrative organization survived through the period of union into the new era.

The official attitude of the new government as to the juridical nature of Syria's international position was indicated in a message despatched by Premier Kuzbari to the President of the United Nations General Assembly on October 8, 1961. This read in part:

. . . It may be recalled that the Syrian Republic was an original member of the United Nations under Article Three of the Charter and continued its membership in the form of joint association with Egypt under the name of United Arab Republic. In resuming her formal status as an independent state the Government of the Syrian Arab Republic has the honour to request that the United Nations take note of the resumed membership in the United Nations of the Syrian Arab Republic. By separate communication I am submitting the

⁷ Arts. 1 and 5 of the Treaty of May 15, 1955, 6 U. S. Treaties 2869, 49 A.J.I.L. Supp. 163 (1955); Kunz, "The State Treaty with Austria," 49 A.J.I.L. 535, 541 (1955). After World War I, on the other hand, there was considerable difference of opinion on the question whether the new Austrian Republic was the same international person as the prewar state. 1 Oppenheim, *International Law* (8th ed., by Lauterpacht) 155, note. Cf. the case of *The Netherlands*, cited note 15 below.

⁸ This result may be contrasted with the subsequent "federation" on March 8, 1958, of Yemen with the United Arab Republic under the style of the United Arab States, in which both parties retained their international identities. The federation was never more than nominal, and was itself dissolved on U.A.R. initiative as an aftermath of the Syrian breakaway.

credentials of the delegation of Syria to the Sixteenth Session of the General Assembly. . . .⁹

The question of Syrian membership posed by this communication was without precise precedent in United Nations practice. The closest previous situation had arisen in 1947 when India, an original Member of the United Nations, was divided into the two states of India and Pakistan; but in that case there had been no history of prior United Nations membership held by the component parts. Viewed in the abstract, three possibilities could be envisaged as open to the General Assembly for the treatment of the request:

- (1) As proposed in the Syrian message, the applicant state should be regarded as identical with the original Member, and entitled as such to occupy the place of the original Member automatically;
- (2) Even if not identical with the former Syrian state, the applicant should be seated automatically as the successor in Syria of the United Arab Republic, a United Nations Member;
- (3) The applicant should be treated as a wholly new state, subject to the regular admission procedures laid down in the Charter.

The theory that the successors of a divided United Nations Member automatically inherit membership had been advanced by Pakistan in 1947; but it had declared at the time its readiness to apply for membership, if this view were not acceptable. In that instance Pakistan was admitted to membership by the General Assembly upon the recommendation of the Security Council without either body taking a clear-cut decision on the legal point. No action at all was taken with respect to India, which simply continued in its existing seat.¹⁰ For future guidance, however, the Sixth Committee of the Assembly was asked at the same session to clarify the legal principles involved. In its report the Committee said in part:

. . . .

2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

3. Beyond that, each case must be judged according to its merits.¹¹

⁹ U.N. Doc. A/4914, Oct. 9, 1961. In an earlier message of Sept. 30, Dr. Kuzbari had notified the President of his appointment as Prime Minister and Foreign Minister of the Syrian Arab Republic. U.N. Doc. A/4913, Oct. 9, 1961.

¹⁰ United Nations, 1 Repertory of United Nations Practice 175.

¹¹ *Ibid.* 176. In June, 1960, the Federation of Mali, comprising the former French territories of Senegal and French Sudan, was recommended to the Assembly by the Security Council for U.N. membership. Before the Assembly acted, the Federation broke up into the two independent republics of Senegal and Mali. Both were admitted as new Members by the Assembly on Sept. 28, 1960, without any further recommenda-

In the light of this opinion, the only way in which Syria in 1961 could be seated without going through the regular admission process was on the theory of identity with the earlier Syria. This was the view in fact accepted by the Assembly, although regrettably without illuminating discussion. On October 13 the President, Mr. Mongi Slim, called the Syrian message to the attention of a plenary meeting and observed:

I have consulted many delegations on this question and the consensus seems to be that, in view of the special circumstances of this matter, Syria, an original Member of the United Nations, may be authorized to be represented in the General Assembly as it has specifically requested.

Therefore, if no objection were raised prior to the plenary meeting that afternoon, he would arrange for the seating of the Syrian Arab Republic "as a Member of the United Nations."¹² No objection was made, and the Syrian Delegation was duly seated that afternoon.¹³ The identification of the new Syria with the old thus became the view not only of the Syrian Government itself but also of the world community.

If the present Syrian Arab Republic is the same state as pre-1958 Syria, it must be bound by the treaties and agreements entered into by the latter, insofar as these have not lapsed or been terminated on other grounds. Any other result would be inequitable, for the present Republic cannot be entitled to benefits derived from the old Syria, such as immediate seating in the United Nations, without assuming its obligations as well: it cannot pick and choose. It is true that the treaties of a state which loses its international personality through merger are generally held to be terminated by that fact;¹⁴ but it would seem that this rule should not apply when the state in question is subsequently revived and is generally accepted as being the same international person before and after the interruptions. The treaties, like the state itself, should be viewed as having been in a sort of suspended animation.¹⁵ In the present case, however,

tion from the Security Council. It thus appears that, while a successor state cannot inherit membership, it can benefit from the recommendation for membership made with respect to its predecessor.

¹² U.N. General Assembly, Provisional Verbatim Record of the 1035th Meeting, U.N. Doc. A/P.V. 1035, Oct. 13, 1961, pp. 2-3.

¹³ *Ibid.*, 1036th Meeting, U.N. Doc. A/P.V.1036, Oct. 13, 1961, pp. 21-22.

¹⁴ Jones, "State Succession in the Matter of Treaties," 24 Brit. Yr. Bk. of Int. Law 360, 365 (1947); but practice is not wholly consistent: see 2 Hyde, *International Law* 1529 ff. (2d ed., rev.).

¹⁵ At the time of Austria's absorption by Germany in 1938 the Department of State apparently viewed American treaties with Austria as having been terminated. 2 Hyde, *op. cit.* 1533. Currently, however, several pre-war treaties with Austria are listed by the Department as being in force. Department of State, *Treaties in Force* January 1, 1961, pp. 8-10; McIntyre, *Legal Effect of World War II on Treaties of the United States* 321. The 1955 Austrian State Treaty contained no provisions on the status or revival of pre-war treaties. By way of contrast, mention may be made of the treaty of October 8, 1782, between the United States and the United Netherlands. The latter state was afterward subjugated by Napoleon and in 1815 incorporated in the larger Kingdom of The Netherlands. Because of this history, it was eventually agreed

it is unnecessary to decide the point because of the position taken on the matter by the United Arab Republic at the time of its creation.

This position was stated in the following terms in Article 69 of the Provisional Constitution of the United Arab Republic of March 5, 1958:

The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between either Syria or Egypt and foreign powers. These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their ratification, according to the principles of international law.¹⁶

From this it is clear that existing Syrian treaties were unaffected by the establishment of the union; and since they never went out of force, the question of their revival in 1961 does not arise. It should also be remarked that the regime which came to power upon the restoration of Syrian independence has given no indication of adopting any other view. On the contrary, it has affirmed its respect for Syria's international commitments.¹⁷

The question of treaty continuity is of particular interest from the American standpoint. Among the agreements binding on the pre-1958 Republic was a Syrian-American exchange of notes of September 7-8, 1944,¹⁸ which substantially reaffirmed a French-American Convention of April 4, 1924,¹⁹ relating to the then French-mandated territories of Syria and Lebanon. This earlier instrument embodied important provisions for the protection of American interests, including a most-favored-nation clause and assurances of respect for vested rights, which are of continuing significance. Both the 1924 and the 1944 agreements were regarded by the Department of State as being in force under the United Arab Republic regime,²⁰ and there can be no doubt that they have been carried over into the new situation.

The case may be different with agreements concluded by the United Arab Republic in the period between February, 1958, and September, 1961. States which arise through a successful act of secession or dissolution do not normally inherit the treaty obligations of the state from which they came;²¹ but there may be an exception in the case of obligations relating only to territory or interests lying within the new state. It does not appear that this problem is of major consequence in the present context.

that there had been such a substantial change in party that the treaty had lost its binding force. 5 Moore, *Digest of International Law* 344-345.

¹⁶ As quoted in Department of State, *Treaties in Force* January 1, 1961, p. 178. Assurances to the same effect were given in a note addressed by the U.A.R. Ministry of Foreign Affairs to the Secretary General of the United Nations on March 1, 1958.

¹⁷ "We shall respect all international commitments, as can be gathered from the Ministerial Declaration of the Government of the Republic." Mr. Chalaoui (delegate of Syria) in the General Assembly, Oct. 13, 1961. U.N. Doc. A/P.V.1036, Oct. 13, 1961, p. 22.

¹⁸ 53 Stat. 1491; U. S. Executive Agreement Series, No. 434.

¹⁹ 43 Stat. 1821; U. S. Treaty Series, No. 695; 19 A.J.I.L. Supp. 1 (1925).

²⁰ Department of State, *Treaties in Force* January 1, 1961, p. 180.

²¹ Jones, *loc. cit.* note 14 above, p. 366.

The important conclusion to be drawn from this history is that the Syrian Arab Republic of today is, from the international standpoint, the same state as the pre-1958 Republic of Syria, and possesses in general the same rights and obligations.

RICHARD YOUNG

THE CHANGING SCIENCE OF INTERNATIONAL LAW

Ἡράκλῃς βεῖ.
Heraklitos.

I

Half a century ago this writer began his life-long studies of international law at the Vienna University Law School under the great scholars, Heinrich Lammash and Leo Strisower. Looking back for a moment at these fifty years, it is amazing to compare international law and its science as they then were and as they are today.¹ Then, in 1911 international law was at the peak but also close to the end of its "classic" period. Now, in 1961 the "new" international law, which by 1920 had entered a turning-point of its history without undergoing a revolutionary break with its past, has seen a first era of change during the League of Nations period, followed by a period of much more far-reaching change since 1945. There can be no doubt that international law at present is not only in an era of full transformation, but is also in a profound crisis.

Corresponding to this changing law of nations, of course, is a changing science of international law. It reflects this crisis, all the progressions and retrogressions of international law, all its hopes and disillusion, all its contradictions, its uncertainty, inadequacy, its often experimental and sometimes ephemeral character. It is the science of an international law in a period of transition from the "classic" law of nations, which is definitively gone, to some "new" international law which has not yet arrived and the exact shape of which we do not yet know.

Hence the great changes and very different patterns of the science of international law everywhere. There are some particularities in this country because of the legal and political background, because of world-wide contacts and because the leadership of the democratic world has fallen upon the United States. The present international law of transition has influenced the science of international law in every scientific and technical aspect. The question of what the scientific character of this science consists is again under full discussion. Is its first duty objectivity and the impartial search for truth? There are today, more than ever, the dangers of wishful thinking, of a confusion of methods, by presenting one's own wishes, mere proposals *de lege ferenda*, as the law actually in force. The whole question of the correct methods of this science is again under debate. The continuous expansion of international law as to its

¹ Compare, e.g., in German, the then celebrated treatise on international law by Franz von Liszt with the 1959 treatise by Alfred Verdross, or, in English, the first edition of Oppenheim's treatise with the latest edition by Lauterpacht.

subjects and to the objects it governs has had its influence on the systematic problem of the science of international law.²

Yet, in one respect, we believe, there is scientific progress. The permanent and growing publication of all types of international law materials, sources and documents has made it possible for scholars to know much more about the actual law than was the case fifty years ago. This development has also brought about a rapprochement, so long advocated by this writer, between the so-called "Continental" and "Anglo-American" methods. International lawyers of the "Common Law" countries no longer rely exclusively on "cases," but take other materials, particularly the literature, into consideration. International lawyers of the countries of the "Civil Law" duly continue their theoretical investigations, continue to use all the literature in the principal languages, but they also use "cases" more and more; and thus modern continental works on international law are very different from the earlier literature.³

II

By 1945 we saw everywhere a disillusionment with international law. Outstanding writers and faithful adherents of international law gave us perhaps too somber a critique.⁴ The whole Occidental idea of international organization, an idea according to which it is possible to maintain international peace by a mere loose union of sovereign states—an idea developed since the fourteenth century in Western European utopian writings, and on which the League of Nations was based and the United Nations is still based—is being critically analyzed and found ambiguous and unsatisfactory.⁵ This disillusionment finds different reactions in different men. Some are simply in a state of despair, like the late Professor Marcel Sibert; others begin to lose their interest in the study of international law; a great scholar like the late Professor Edwin Borchard tried to cling to the "classic" law of nations and to stem with all his forces and with all his learning the "new" international law—in vain; for the wheel of history cannot be turned back.

There always had been "deniers" of international law, that is, those who did not deny the existence of the "materials, commonly known as international law," but who denied their legal character. Such deniers are again numerous at the present time. The denial today is based primarily⁶ on the insufficient structure of international law as shown by an analytical critique.⁷

² See this writer's editorial in 53 A.J.I.L. 379-385 (1959).

³ See, as a recent example, the abundance of international and municipal "cases," quoted from the original sources, in Georg Dahm, *Völkerrecht*, Vol. I (1958).

⁴ See, e.g., Edwin D. Dickinson, "International Law: An Inventory," 33 Calif. Law Rev. 506-549 (1945).

⁵ Walter Schiffer, *The Legal Community of Mankind* (1954).

⁶ Hegel, for whose dialectic philosophy the sovereign state was "the reality of the ethical idea," came to the conclusion that international law cannot even be thought, that it is "*denk unmöglich*." The influence of Hegel's glorification of the sovereign state finds expression in recent decades in the science of international law of the

The modern "neo-realists" go farther. They⁸ cast international law aside as "sterile," as "largely irrelevant in international affairs"; they condemn the "moralistic-legalistic" approach in foreign policy and emphasize the "national interest." It is hardly necessary to state that this approach is untenable. As history has shown from the beginning, law is indispensable for the living together of men; and this is true, too, on the international level.

Theoretically it is easy to state the conditions for a strong and vigorous international law: centralization of the now primitive, highly decentralized legal order, an international legislature, international courts with compulsory jurisdiction, and so on. But an international community, thus relatively strongly centralized, would constitute what we call today a sovereign state. This is the ultimate goal of the adherents of the idea of the world state. It is not to be wondered that the number of adherents of the world state has recently relatively increased. They tend also toward the end of international law, although in a very different way from that of the "neo-realists"; they would replace international law by "world law," that is, by the municipal law of the world state. This tendency is now prominently represented by the book of Clark and Sohn.⁹ The authors propose complete disarmament by stages and under strict inspection, the establishment of an International Peace Force and certain other World Authorities. The guiding star is the maintenance of international peace; that is why the powers of this World Federal State shall be "strictly limited" to make possible the carrying out of this one goal—peace. From a technical point of view the book is excellently done, even if some fallacies in basic presuppositions can be shown;¹⁰ it has had many laudatory reviews and will be published in a number of translations. But has it any chance of being accepted by the whole world now, within the foreseeable future? We do not believe that there are many who are convinced of that. It is exactly with regard to a certain minimum chance of realization that the dividing line between proposals *de lege ferenda* and utopias can be drawn.¹¹

III

The disillusionment in 1945 led to widespread dissatisfaction not only with the international law then in force, but with the whole "traditional" international law. The phrase was coined that what was necessary was a "re-thinking of international law," a "complete reconstruction of inter-

totalitarian states, whether Fascist or Communist. But there were always deniers, whose denial was based merely on an analytical critique: e.g., Austin.

⁷ Likewise, the doubts of the Neo-Thomist scholar, Jean Dabin, as to whether international law is really law in the full sense, stem from an analytical critique.

⁸ See Hans Morgenthau, *Politics among Nations* (1948).

⁹ Grenville Clark and Louis Sohn, *World Peace through World Law* (2nd ed., 1960).

¹⁰ See Professor Lissitzyn's book review in 1959 *Cornell Law Q.* 293-295.

¹¹ That is why the occasional remark by W. Friedmann, that the book is an exercise in drafting rather than a contribution to contemporary international law, can be justified.

national law." This dissatisfaction with the "traditional international law" was often coupled with a dissatisfaction with the whole "traditional" science of international law. This science, wrote Professor Percy E. Corbett¹² from his present "neo-realistic" point of view, must have a new approach, a sociological approach, better connected with the forces determining world political activities and must be less inclined "to imprint the elegant patterns of law upon the unruly interactions of governments." The late Judge Alvarez even blamed the unsatisfactory status of international law on "faulty study" by the science of international law, not connected with the "*vie actuelle des peuples*." On the other hand, the burden of reconstructing, of creating new international law is put on the shoulders of the science of international law. A radical change, not only of international law, but also of the science, study, research, and teaching of international law, is postulated.

For some even a reconstruction is not enough; what is necessary is the creation *ex novo* of a new international legal order. The very name "international law" is attacked. Some speak of the "World Rule of Law." Others demand that the name "international law" be as rapidly as possible replaced by the term "World Law," which allegedly is different from the narrower international law and which, we are told, is "a new field of law." It seems clear to us that the quality of international law does not depend on its name. International law, like common law, is not a static, but a dynamic, legal order. There is no dogma that international law is "the law between sovereign states"; this was an adequate definition for the international law of an earlier period, but it is no longer true for present international law. On the other hand, the "law between the sovereign states" is still a very important part of international law. Sovereign states are no longer the only members, but they are still by far the most important members of the international community. The tendency to ignore the states is strictly unrealistic.

There is at the present time important literature on the concept of the "Rule of Law."¹³ The Rule of Law is the guiding star, the highest value, for the International Commission of Jurists¹⁴ which is composed of individual lawyers of the democratic countries. Its ideal is the dignity of man and his protection in this dignity by law. It takes, therefore, a fighting attitude against the violation of human dignity, primarily by Communist states but, as the fight against the "apartheid" of the Union of South Africa shows, if necessary, also by non-Communist states. It has proclaimed its ideas in three Congresses of Jurists, held on three

¹² The Study of International Law (1955).

¹³ See the special number: Post-War Thinking on the Rule of Law, 50 Mich. Law Rev. 483-613 (1961). W. B. Harvey (*ibid.* 487-500) distinguishes three concepts: the constitutional (A. V. Dicey), the American (due process of law), and traditional natural law. See also W. W. Bishop, "The International Rule of Law" (*ibid.* 553-574). See further, *e.g.*, Judge Robert N. Williams, "World Rule of Law," 63 W. Va. Law Rev. 118-129 (1961); W. McClure, World Legal Order (1960).

¹⁴ See its pamphlet: Basic Facts (1961). It publishes the Journal, The Bulletin, Newsletters, as well as special monographs.

continents: "The Declaration of Athens" (1955); the "Declaration of New Delhi" (1959) and the "Law of Lagos" (1961).¹⁵

The movement "World Peace through Law" was initiated by Charles S. Rhyne, a former President of the American Bar Association and Chairman of the Special Committee on World Peace through Law,¹⁶ first appointed in 1958. The idea is to explore what lawyers can do of a practical, concrete character to advance the rule of law for achievement of world peace. Like the International Commission of Jurists, it relies on private individual lawyers; it shows the same respect for the Rule of Law. But there is an important difference: it tends toward an advancement of international law as such; its dominating goal, its supreme value, as for the book by Clark and Sohn, is peace. Like the International Commission of Jurists it works through conferences of jurists. First a series of regional conferences were held in the United States, followed by four continental conferences to culminate in a world conference. The first continental conference, attended by lawyers of the Western Hemisphere, took place at San José, Costa Rica, in June, 1961. The resolution there adopted—the "Consensus of San José"—asks for compulsory jurisdiction of the International Court of Justice and expansion of its jurisdiction so as to embrace all legal questions arising from commercial or private matters. A consensus of universal principles was adopted, on which a structure of world law can be built. There must be a struggle of lawyers to obtain the collaboration of governments for drafting treaties to create an international legal system. It is fully recognized that the task will be hard and long.¹⁷ The second of these conferences was held at Tokyo in September, 1961, the third at Lagos, Nigeria, December 3–6, 1961. The last conference will be held in Rome in April, 1962.

The idea of "World Law"—not in the sense used by this writer as the municipal law of a world state—is often met. It is interesting to note that Dean Roscoe Pound,¹⁸ recognizing that a world state seems hardly attainable at this time, has recently voiced his belief that a world law for world relations is attainable. Based on his distinction between "law" and "laws," he denied that a universal legal order presupposes a universal political order and sanctions. He considered that there exists a world regime of due process of law, a generally recognized and received body of principles to which men are expected to adhere in international relations, without any political super-organization behind them.

At the Duke Law School there is a "World Rule of Law Center." Its

¹⁵ It has also published Reports on the Rule of Law in the United States, Italy and the Federal Republic of Germany (1958), three Reports on Hungary, two on Tibet, and one against apartheid in the Union of South Africa. See also Dudley B. Bonsal (American member of the International Commission of Jurists), "The Judiciary and the Bar," 40 Texas Law Rev. 2–17 (1961).

¹⁶ We may recall the old French Association: "La Paix par le Droit."

¹⁷ On the Rule of Law and "World Law," see also the special number: Next Steps in Extending the Rule of Law, 30 Notre Dame Lawyer (1961).

¹⁸ Roscoe Pound, A World Legal Order (Fletcher School of Law and Diplomacy, 1959).

Director, Arthur Larson, has published a *Design for Research*.¹⁹ His problem is nothing less than to *create* a world legal order; for him "world law" is a new topic, a "new and very important field of law"; world law is here identified more or less with "transnational law." His principal object is peace, the avoidance of nuclear war. World law, he states, is wider than international law; it must be universal; it must be based on all legal systems. While the philosophy of world law is not to be neglected, we need first of all "activist," practical projects. The great responsibility of science and research for obtaining this world law is proclaimed. The "Design" contains in 233 pages the outline of 111 research projects on everything, from the "marshalling of existing materials on the body of world law" to "educational requisites to support world law." For the new world law we need a new casebook, a new treatise, a new full course on world law. Enthusiastic innovators must create not only new names—world law—but also speak in new phraseology; we need "pilot studies" for a successful "break-through" toward "world law."

IV

The late Judge Alejandro Alvarez²⁰ proposed that the International Court of Justice directly apply the "new" international law, a proposal to make the Court a legislator, a proposal in which his colleagues could not follow him. There are many "wishful thinkers" who try to persuade themselves and others that, *e.g.*, there is already a working system of collective security in the United Nations, that the United Nations is an adequate means for maintaining international peace. There are excellent international lawyers who do not want to create an international legal system *ex novo*, because, in a mood of generous over-optimism, they over-estimate the present law. Thus, García Amador,²¹ a leading Latin American international lawyer, is convinced that international law, even if it has not yet reached the fullness of its development, has nevertheless already made enormous progress. He teaches that contemporary international law definitely guarantees the international protection of human rights, that the individual is the subject par excellence of international law. Hence his proposals for the responsibility of states in the International Law Commission; he holds that both the "international minimum standard" and the Latin American principle of "equality of foreigners with citizens" are obsolete under *present* international law; the individual is protected as such, not as a national. The *Nottebohm* Judgment has shown again that this is certainly not the international law actually in force.

Dr. Jenks is a man of great knowledge, of vast experience in international organizations, of strong capacity for work, of lovable enthusiasm,

¹⁹ Arthur Larson, *Design for Research in International Rule of Law* (1960, mimeo.); now in printed form (1961, pp. 111).

²⁰ See his dissenting opinions as a Judge of the International Court of Justice; and his last book, *Le Droit International Nouveau* (1960).

²¹ F. V. García Amador, *Introducción al Estudio del Derecho Internacional Contemporáneo* (1959).

a brilliant writer. But there is a certain over-optimism in his work, and for that, as well as for certain methods, applied or proposed, he has been criticized.²² He already sees in *present* international law the "Common Law of Mankind," although admittedly only in an early stage of its development. He hardly speaks of the great political crises of today, some of which at this time seem to defy a solution by peaceful means; he skillfully uses the fine British art of understatement; his proposed "multi-cultural" method, so his critics say, poses not only an endless task, but one which is not appropriate. The over-optimism of others is already expressed by their diagnosis of the present crisis of international law as a mere "crisis of growth."

"Re-thinking international law" puts the accent on the future. Hence the debate on the correct methods of our science. There is nowadays a general attack on analytical jurisprudence; it has come from two sides: natural-law and sociological, "realist" jurisprudence. Spanish international lawyers want to reconstruct international law by a "value-oriented" science, going back to the foundations of Suárez. There is a general revival of natural-law theories.²³ But the principal attack comes from the sociological side, from the postulate of the "functional" approach. This writer has often shown that this attack is not justified. On the one hand, the analytical approach will always be indispensable in order to know and present actual law systematically; that will always be the first task of the science of law. On the other hand, the analytical method by no means excludes sociological-historical investigations, nor the valuation from the point of view of ethics. To the contrary, they are very necessary to complete a full understanding of the law in force; but these are different investigations; they have to be made by different methods; they never can substitute for the analytical method. It is also clear that the international lawyer is entitled to make proposals *de lege ferenda* for new law. But that is a political task. Further, such proposals must start from the law actually in force; politics of law necessarily presupposes a theory and a science of law.

These methodological problems are very pertinent, if we consider the pattern of "re-thinking international law" as presented by Professor McDougal.²⁴ He stands and falls theoretically with "American legal realism." "Law is a decision-making process." What he has added is

²² C. Wilfred Jenks, *The Common Law of Mankind* (1958). As to critical review articles, see R. A. Falk and S. M. Mendlowitz, "Some Criticisms of C. W. Jenks' Approach to International Law," 1961 *Rutgers Law Rev.* 1-31; Julius Stone's review article in *International Studies* (New Delhi, India), 1960, pp. 414-441.

²³ See this writer's editorial in 55 *A.J.I.L.* 951-958 (1961). We read also in J. M. Hendry's "Canada and Modern International Law," 39 *Can. Bar Rev.* 59-77 (1961): "Our goal is the establishment of the international Rule of Law." (p. 63.) It needs a value-oriented jurisprudence: "Aiding our quest for a new international legal order is the revival, in some form, of natural law doctrines." (p. 62.)

²⁴ Cf. Lasswell and McDougal, in 52 *Yale Law J.* 203 ff. (1943); McDougal, 56 *ibid.* 1345-1355 (1947); *idem*, in 1 *A. J. Comp. Law* 24-57 (1952); *idem*, "International Law, Power and Politics: A Contemporary Conception," 82 *Hague Academy Recueil des Cours* 137-258 (1961).

no longer to restrict himself exclusively to the decisions of the courts, but also to take into consideration the decisions of many other "decision-makers." He is glad to state that "legal realism" has brought an end to a frightful confusion in legal thinking. The "verbal propositions, known as law" can only be meaningfully understood if they are put into the continuous community process. With the help of a new jargon, partly taken from the Lasswellian vocabulary, he asks for an end to the destructive phase of legal learnedness and for a creative science of international law. A science, he holds, which is nothing but scientific does not suffice; it must apply not only the normal, but also other integrated and interrelated methods. He feels that in this shrinking world more and more men demand common values, transcending national frontiers. Fortunately, we need today no longer torture ourselves with circuitous deductions from metaphysics; we know today how to verify values. We must study with precision the variable factors of environment which influence human behavior all over the world—a task no less endless than Dr. Jenk's multicultural approach. We must adopt methods for classification of goal values, for description of historical and contemporary trends in the realization of values, critical perfection of trends into the future, imaginative invention and evaluation of alternatives of policies by which goal values can be most fully attained. His is a contemporary and an American concept as to contents. We must maintain a position of power and make such use of our power as to achieve a compromise with rival ways of life which diminishes the anti-democratic elements in them. We need a new understanding of law as an instrument for community values. For all that we need a "policy-science" and, in the field of teaching, law students must be stimulated to think of themselves as "policy-makers." He is a policy-maker, a strategist, a protagonist of—again a new name—Public World Order of Human Dignity.

Professor McDougal is a man of great gifts, of a great capacity for work and of no small self-confidence. His writings are interesting and valuable from many points of view. But his theoretical basis has all the faults of American "legal realism." The latter was certainly by no means without merits, but as a movement it is already over: "Its premises were shaky and its promises overstated."²⁵ First, sociological statements as to facts are not rules of law. Sociological statements connecting facts with facts on the basis of the principle of causality state what is. Norms of law prescribe what ought to be. It is significant to compare the attitude of Professor McDougal with that of Judge Charles De Visscher.²⁶ The latter attacks theory, stresses sociological conditions and their importance as the substratum of law or as necessary pre-conditions for making possible a reform of the law. But in spite of his attacks on Kelsen, in spite of the emphasis put on sociological considerations, he is far from confusing a

²⁵ Grant Gilmore, "Legal Realism: Its Cause and Cure," 70 Yale Law J. 1037 (1961).

²⁶ Charles De Visscher, *Theory and Reality in Public International Law* (English trans., 1957). See this writer's book review in 70 Harvard Law Rev. 1331-1335 (1957).

sociological statement of facts with a legal rule; he always remains a normative jurist and, contrary to McDougal's anti-metaphysical attitude, close to the Catholic natural law. Second, just as sociological statements or predictions are not rules of law, thus Professor McDougal's "goal values" are not values, but only factual preferences of behavior. Third, law is not fact, law is not identical with policy. Finally politics of law is, as the name indicates, a part of politics; it is not identical with the science of law. The mistake is to *identify* his "policy science," that is, politics of law, with the science of law.

"Re-thinking international law" covers, as we have seen, innovations in international law and its science, in the study, research and teaching of international law. Contrary to many earlier complaints about the relative neglect of international law in American law schools, international law is now being taught in an increasing number of law schools and is being made obligatory. Introductory courses and advanced courses on international law, as well as seminars, are being offered. The reasons for this increase lie not only in the general world situation and in the particular position of the United States, but also stem partly from the particular, professional character of the American law school. It has been recognized and expressed in many recent articles that international law is becoming more and more *necessary* for the practicing lawyer, particularly in a metropolitan practice. The practicing lawyer is no longer seen exclusively as handling his client's case in court, but also as a counselor, adviser, drafter, and negotiator out of court.

The teaching of international law in American law schools has not only increased, but this teaching has also been expanded into what is now known as "International Legal Studies." This expansion is generously subventioned by the Ford Foundation through grants to leading law schools. At the same time the American Society of International Law has greatly expanded its activities and, in its regular and many new regional meetings, also treats, apart from international law and international organization, a great number of topics belonging to "International Legal Studies," such as organizing business abroad, legal aspects of foreign investment, problems of international taxation, extraterritorial effects of antitrust laws, legal problems of the American manufacturer in the European Common Market, and so on. As for the contents and methods of this new branch of "International Legal Studies,"²⁷ Dean Griswold stated a few years ago²⁸ that they will continue to be based on international law and international organization, but that they will go farther, although exclusively devoted to legal problems. They will include also comparative law and conflict of laws, and the leading aspects of international transactions of the American Government, American corporations and citizens.

²⁷ Milton Katz, "International Legal Studies: A New Vista for the Legal Profession," 42 ABA Journal 53 (1956); David F. Cavers, "The Developing Field of International Legal Studies," 47 Pol. Sci. Rev. 1056-1075 (1957); John B. Howard, "International Legal Studies," 1959 Univ. of Chicago Law Rev. 577-596.

²⁸ Report on Harvard School for 1954-55, pp. 1-11.

This corresponds to "transnational law." Judge Philip C. Jessup, a great scholar in the science of international law, devoted some of his talents to explorations on the periphery of this science and arrived at certain proposals *de lege ferenda*.²⁹ In a study dealing with particular cases, where no easy answer was at hand to solve the problems of jurisdiction and of what law governs, he suggested a possible use not only of international, but also of municipal law and conflict of laws, and spoke tentatively of "transnational law." But it is not a question of generally mixing up all types of law; the problem discussed by Judge Jessup arose in very particular and unusual cases. It is also restricted now to legal problems posed by international economics. This development concerning "transnational law" is by no means new or unique. On the Continent Erler³⁰ had emphasized so-called "international economic law." In problems of international economics, he pointed out, municipal laws are closely interwoven with international law; there is also a strong interconnection here between public and private law, both municipal and international private law.

For this "transnational" law we already have a new casebook by Katz and Brewster.³¹ The sophisticated authors skeptically state that such phrases as "international legal order" or "international community" do not necessarily mean that these things do exist in fact. Being skeptical of the existence of an international community or of what it consists, they start their inquiry "with the practical everyday experience of individuals, business corporations and governments which engage in productive transactions spanning national boundaries."³² The authors concentrate on "foreignness" and how that affects "a lawyer's job." Each problem is studied from the angle of opportunities and risks under the foreigner's own municipal law, under the foreign law and under international law. It is an interesting book and contains many useful cases and materials. The authors are fully justified in stating that this book is a departure from the familiar teaching materials in the international field. On the other hand, it is certainly not a casebook on international law; nor do the authors make any such claim; to the contrary, they themselves declare that "they do not reach the actual and potential role of international law in providing a framework for international governmental relations and settling international disputes which threaten the peace."³³

V

The preceding remarks are restricted to the science of international law in different countries of the democratic Occidental world. But in order to see the change in full depth it is necessary also to examine the science of international law outside of the democratic Occidental world. It is not

²⁹ Philip C. Jessup, *A Modern Law of Nations* (1948); *Transnational Law* (1956); *The Use of International Law* (1959).

³⁰ G. Erler, *Grundprobleme des internationalen Wirtschaftsrechts* (1956).

³¹ Milton Katz and Kingman Brewster, Jr., *The Law of International Transactions and Relations. Cases and Materials* (1960).

³² *Ibid.* 3.

³³ *Ibid.* 4-5.

possible here to go into any details. Only a few words will be said in order not to leave the picture incomplete.

There are, first, the countries of the totalitarian Communistic regime, whether or not they belong to the Occident. The Soviet science of international law is the leading one in this group. It has been studied often by writers of, or living in, countries of the democratic Occidental world. Although there are outstanding international lawyers in the Soviet Union who, like Professor Tunkin, have a perfect knowledge of the "classic" law of nations and are fully acquainted with the science of international law in the different languages of the democratic Occident, the ideological basis, the political goals and concepts, the fact of being bound by the "party line," the attack against rules of international law as having been made by the "capitalists," all that is reflected even in questions of what looks to be a problem of theoretical construction.³⁴

There are, second, the countries of non-Occidental civilization, even if they are democratic. Here belong particularly the many new states of Asia and Africa which have become independent since 1945. The Indian science of international law may be named as representative. Even this development is not without precedent. The Latin American Republics, although now independent for one and a half centuries, overwhelmingly Catholic, and emphasizing with pride their belonging to the Occidental culture, have, through their statesmen and international lawyers, developed for a hundred years a series of "doctrines" all destined to weaken norms and institutions of general international law, as a protest and defense of the weaker states against the powerful ones, first of Europe, later of the United States. And they have done so with considerable success, as the development of Panamericanism and now the Charter of Bogotá prove. It is therefore not to be wondered if Indian international lawyers invoke, *e.g.*, the Calvo clause.

These new states of non-Occidental culture attack certain norms and institutions of general international law as having been made by "colonialist" Powers of Europe exclusively in their own interest—rules to which these countries have never consented, which belong only to the "general" customary Western, but not to "universal" international law and are, in consequence, not binding on them. An extremely interesting example of this approach is the study by Judge Guha Roy dealing specifically with the diplomatic protection of citizens abroad.³⁵ It is also instructive to study the speech made recently by the Indian representative on the Security Council on the occasion of the incorporation of Goa by force into India.³⁶ The defense and accusation, based on general inter-

³⁴ As a recent example, the defense of the obsolete and fictitious construction of international general customary law as *pactum tacitum*, a construction so dear to nationalistic writers, some time ago: G. I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," 49 Calif. Law Rev. 419-430 (1961).

³⁵ S. N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" 55 A.J.I.L. 863-891 (1961).

³⁶ The New York Times, Dec. 19, 1961. We speak in the text only of the Indian arguments against Portuguese rights under general international law. That the Indian

national law, by the Portuguese representative was for the Indian representative only an "echo of the past." "Who gave Portugal," he asked, "sovereign rights for any part of India they occupied illegally and by force? Who gave them that right? Not the Indian people." And coming to the point of the science of international law, he remarked:

There can be no question of aggression against your own frontier . . . and if any narrow-minded legalistic considerations, considerations arising from international law, were written by European international law writers, these writers are, after all, part of the atmosphere of colonialism.

The writer began this comment in the philosophical mood of "being amazed" at the change in international law and its science between 1911 and 1961. The change is indeed great. But it is probable that the change will be much greater and more radical fifty years from now.

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representative defended also the taking of Goa by force, "Charter or no Charter, Council or no Council," is of course a very different matter, for the use of force, except in self-defense against an armed attack, is illegal even for enforcing a right. And here the Indian representative could not refer to a law made by the "colonialists." The U.N. Charter was drafted with the collaboration of India and was voluntarily ratified by India.

NOTES AND COMMENTS

COLLECTIVE SECURITY DISTINGUISHED FROM INTERVENTION

In an era of propaganda warfare it is dangerous to condone the misuse of words. Words with a well-defined legal meaning, such as "intervention," should not be loosely used in a non-technical sense outside the context in which they have been developed. This is particularly true in international relations, where Communist conspirators have developed a technique of misusing words in order to conceal, instead of reveal, truth.

Intervention and collective action are as different as night and day. To confuse them is misleading and can be dangerous. Nevertheless, some diplomats and politicians erroneously or intentionally use the term intervention when they mean collective security action.

The central idea of intervention is coercion—a dictatorial interference by one state in the affairs of another. A government takes the law into its own hands as party, judge, and enforcing agency. It is not a peaceful mode of negotiation, but rather a primitive and uncontrolled method of achieving self-help, usually by a greater Power against a weaker Power. In the absence of lawful means of redress and of effective law enforcement, intervention may occur and exact more than justice warrants.

Collective security action, on the other hand, is the antithesis of intervention. It is a process whereby the international community acts to enforce the law. The organized community acts according to law to sustain international order by peaceful procedures and sanctions. The central idea of collective security action is that the offending state is to be persuaded to observe its international obligations peacefully. A primary purpose of developing collective security is to provide rational and just procedures and sanctions that eliminate justification for intervention. It is apparent, accordingly, that any attempt to associate intervention with collective security action breeds confusion and a reversion from international peace through collective security to chaos.

If action taken by an international organization should exceed the authority of the organization, there are ways to deal with such a situation without inaccurately calling it intervention. For example, the action taken may be ratified by the members of the international organization or community. In the event of failure of ratification, the action should be characterized as an exercise of excess of power, and means found to confine international officials to authorized action. In no event should it be mis-called intervention and thus confused with all the evils of that primitive type of action.

When the aggressive activities of states threaten the peace and become matters of international concern, community action is required to maintain order. This forms the basis for evolutionary growth of the inter-

national legal order and police power. This tendency must be encouraged in a world threatened by unbridled national policies.

Notwithstanding the foregoing, when the Charter of the United Nations was negotiated, this infant international organization was solemnly but naïvely advised that

nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. (Art. 2, par. 7.)

This new international peace institution dedicated to maintaining justice and international law is told, before it has any power or police force at its disposal, that it is not to intervene. This is obviously bad drafting and the use of a technical word in a loose popular sense.¹ It is a vote of no confidence before the organization is born. It amounts to suggesting that the United Nations, a worldwide international organization, is capable of unilateral dictatorial interference on behalf of one nation in the affairs of another. It assumes that nations not parties to a dispute will not exercise their restraining voting power in the community's interest. Since the purpose of Article 2, paragraph 7, is to limit the sphere of action of the United Nations to the specific powers granted in the Charter, the appropriate way to achieve this objective would be to provide in the Charter that all powers not granted to the United Nations are reserved to the states and the people. This is implicit, since the Charter grants only specified limited powers.

When the Charter of the Organization of American States was negotiated in 1948, this blunder in the 1945 Charter of the United Nations was not repeated. The American Republics had had practical experience with international organization for peace since 1889. At the Fifth Meeting of Consultation of Ministers of Foreign Affairs in August, 1959, however, the Mexican Delegation proposed that the Charter of the Organization of American States be interpreted by a mere declaration, rather than a formal amendment, to mean that the Organization of American States was forbidden to intervene in the domestic affairs of its members.² Fortunately,

¹ In the course of discussion at San Francisco, it was emphasized that this was not a "technical and legalistic formula." See statement of U. S. delegate (Mr. Dulles) in Committee I/1, U.N.C.I.O., Summary Report of Seventh Meeting of Committee I/1, Doc. 1019, 1/1/48, pp. 1-2. 6 U.N.C.I.O. Docs. 507-508; Goodrich and Hambro, *Charter of the United Nations* 118 (2nd ed.).

² The text of the Mexican proposal, as set forth in Doc. 41 of the record of the 5th Meeting of Consultation of Ministers of Foreign Affairs, reads:

"WHEREAS:

"The categorical reaffirmation in the Charter of the Organization of American States of the principle of non-intervention, on the part of one state or a group of states, in the internal or external affairs of any other state has been a valuable contribution in achieving the purposes of the Organization;

"Among the principles set forth in the Charter of the United Nations there is also one that expressly prohibits that Organization from intervening 'in matters which are essentially within the domestic jurisdiction' of its members;

"Although the Charter of the Organization of American States does not contain a similar provision, there is no doubt that that principle also applies to the Inter-American

the Foreign Ministers sensed danger and disposed of the Mexican proposal for the time being by referring it to the Inter-American Juridical Committee, hereinafter referred to as the Committee, for a study of the juridical aspects.

At the special meeting of the Committee in October, 1959, the Mexican member of the Committee, as reporter, submitted a draft report for comment. The draft discussed reasons for and against the proposal, concluding that it should be acted upon favorably. While some members proposed favorable action at the 1959 special meeting of the Committee, no definitive action was taken. At the 1960 meeting of the Committee, the Mexican member was called away by his government to attend the Sixth Meeting of Consultation of Ministers of Foreign Affairs at San José. It accordingly became necessary to appoint another reporter on the Mexican proposal. A subcommittee, rather than an individual, was appointed.

The Committee, in adopting the report of this subcommittee,³ decided:

1. That the Charter of the Organization of American States could not be interpreted by any organ of the Organization by a mere declaration of its meaning. The Charter is not a fluid document that means what one wants it to mean from moment to moment.

2. That in any event the Charter of the Organization of American States should not be changed even by an appropriate amendment so as to forbid the Organization of American States from intervening in the domestic affairs of its members. The Committee pointed out the incongruity of such a provision with the spirit and purposes of this regional organization.

organization, as may be inferred from the fact that the Charter itself, among other things:

"a. Reaffirms that 'the fundamental rights of States may not be impaired in any manner whatsoever.';

"b. Proclaims that 'within the United Nations, the Organization of American States is a regional agency', therefore its activities must be compatible with the principles of the United Nations;

"c. Provides that none of the provisions 'shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations'; and

"Nevertheless, the importance of the principle in question is such that it deserves to be expressly confirmed on the Inter-American level, just as it is confirmed on the international level by the Charter of the United Nations,

"The Fifth Meeting of Consultation of Ministers of Foreign Affairs

"DECLARES:

"The Organization of American States shall not have power to intervene in matters that are essentially within the domestic jurisdiction of its members, unless this principle contravenes the application of the measures and procedures provided in Chapter V of the Charter of the Organization, and defined in the Inter-American Treaty of Reciprocal Assistance."

³Inter-American Juridical Committee, Opinion on the Legal Aspects of the Draft Declaration on Non-Intervention presented by the Mexican Delegation. Pan American Union pub. OEA/Ser.I/VL2, CIJ-58.

The danger underlying the proposal was that, if adopted, it would have enabled a state to assert before the Security Council of the United Nations that the Organization of American States, in taking collective security action, was "intervening" in the domestic affairs of a member state. This would have formed a technical basis for bringing the Organization of American States' action before the Security Council for review. This regional organization's action to preserve peace and security in the Western Hemisphere could thus have become subject to a Soviet veto.

The present situation in Cuba clearly illustrates the necessity of distinguishing intervention from collective security. The intervention of Communist nations in Cuba has destroyed its independence as well as its economic and political institutions. From Cuba as a base of operations, the independence and institutions of other Latin American Republics are seriously threatened. The need for collective security action by the Organization of American States is apparent to stop foreign intervention and maintain the principal objective of that Organization. This example makes it abundantly clear that it is sophistry to confuse intervention with collective security.

A former Foreign Minister of Costa Rica and Ambassador to the Organization of American States, Dr. Gonzalo Facio, makes the following distinction:

Non-intervention is and must continue to be one of the fundamental principles in international relations. What we cannot accept is the abuse made of this principle by all persons who wish to maintain a free hand within their own frontiers to continue violating with impunity the obligations they have undertaken, not only on the basis of their own domestic law, but also American international law. . . . It is well to reaffirm our faith in the principle of non-intervention as we understand it in its true and unequivocal sense, which does not in any manner make it incompatible with collective legal action destined to maintain peace in the Hemisphere, to demand respect for Human Rights, or to defend the effective exercise of representative democracy.*

The Inter-American Juridical Committee has performed a useful service in its analysis and report on the legal aspects of this problem. Let us hope that the Organization of American States will maintain a clear distinction between intervention and collective security action and that means will be found to save the United Nations Organization from further confusion of these two entirely different types of action. If international organizations such as the United Nations and the Organization of American States are to evolve and fulfill their function of preserving world peace through the rule of law, road-blocks must not be thrown in the way of their progress by a confusion of the use of legal terms.

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* "Impulso democrático al Sistema Interamericano," 10 Combate 48-56 (1960).

* Opinions expressed herein are personal.

THE VALIDITY OF FOREIGN CONFISCATIONS: AN ADDENDUM

The present author has recently argued at some length in this JOURNAL: (1) that acts in violation of international law are not void under the internal law of the actor state; (2) that international law does not regulate the "property" side of territorial expropriations, but merely imposes, in appropriate cases, an *obligatio* to offer monetary compensation; and (3) that the standard remedy for "illegal" expropriations is monetary compensation, not restitution.¹ Some of these conclusions have incurred extensive criticism from eminent authority.² The purpose of the present comment is not to re-try the issue; especially since kindred questions are presently *sub judice*,³ perhaps we should rest on our previous pleadings. However, in view of continued interest in the controversy—evidenced, for instance, by this year's topic for the National Moot Court Competition—it is felt that attention should be called to some further evidence on the thinking of the United States State Department in this matter.

1. The State Department has recently published the *American Republics* volume of *Foreign Relations, 1940*, which contains a wealth of materials on the Mexican oil expropriations of 1938.⁴ It will be remembered that, while the United Kingdom and The Netherlands demanded of Mexico the restitution of the oil companies, the United States was content to request compensation.⁵ But there remained the *curiosum* that the United States, in its note to Mexico of April 3, 1940, strongly reiterated that

in the opinion of the Government of the United States the legality of an expropriation is contingent upon adequate, effective and prompt compensation.⁶

Did this mean, as the present author contended, that the word "legality" as used here was merely intended to bolster a claim to compensation, but

¹ Baade, "Indonesian Nationalization Measures Before Foreign Courts—A Reply," 54 A.J.I.L. 801, 830 (1960).

² Domke, "Foreign Nationalizations," 55 A.J.I.L. 585, esp. 611-615 (1961); Wortley, "Indonesian Nationalization Measures—An Intervention," *ibid.* 680; Mann, "Völkerrechtswidrige Enteignungen vor nationalen Gerichten," 1961 Neue Juristische Wochenschrift 705, 708, note 40, where our article cited in the preceding footnote is called "kenntnisreich(..), aber unbefriedigend(..);" this compliment is returned herewith. For equally eminent authority in support of our position, see Raape, *Internationales Privatrecht* 662-663 (5th ed., 1961); Kegel in 5 Soergel, *Bürgerliches Gesetzbuch* 618-619, 633 (9th ed., 1961).

³ An appeal is currently pending in *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (1961), 55 A.J.I.L. 741 (1961). See especially Falk, "Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of *Banco Nacional de Cuba v. Sabbatino*," 16 Rutgers Law Rev. 1 (1962); also Coerper, "The Act of State Doctrine in the Light of the *Sabbatino* Case," 56 A.J.I.L. 143 (1962), and Note, 110 U. of Pa. Law Rev. 122 (1961).

⁴ 5 U. S. Foreign Relations 1940 at 976-1029. See, generally, Wortley, "The Mexican Oil Dispute, 1938-1946," 43 Grotius Society Transactions 15 (1957).

⁵ See Baade, *loc. cit.* note 1 above, at 809-810.

⁶ Now published in full in 5 U. S. Foreign Relations 1940 at 1009-1013; quotation from p. 1010. See also John Bassett Moore's memorandum of March 20, 1940, *ibid.* at 1006-1007.

not to question the validity (as contradistinguished from the "legality") of the expropriation itself?⁷ Or did the United States indeed question the validity of the Mexican expropriations on legal grounds, but content itself with demands for monetary compensation because of political considerations?⁸

It seems that the documents now available might provide a reasonably clear answer to this question. Especially the United Kingdom,⁹ but also The Netherlands¹⁰ repeatedly pressed the United States to establish a "united front" against Mexico, and not to seek any settlement, by direct negotiations or by resort to arbitration, which would in any way prejudice the other two claimant countries' demands for the return of the seized oil companies to their original managements. The United States refused to agree to such a common policy.¹¹ The reason for this refusal to act in concert was expressed with some emphasis by Under Secretary of State Sumner Welles in his conversation with the British Ambassador on February 9, 1940. According to Mr. Welles' memorandum of conversation:

I said that I wanted to make it very clear that there had never been anything remotely resembling a "united front" between the governments of the United States and Great Britain; that while both governments had publicly made known their objection to the pursuit by Mexico of the policy of expropriation without compensation, the course pursued by Great Britain had been devoted very largely to a reiteration of her position that the properties should immediately be restored to the owners, whereas the United States in its representations to the Government of Mexico never questioned the legal right of the Mexican Government to expropriate properties within its jurisdiction, but it insisted that if expropriation were undertaken there was inherent in the exercise of such right by Mexico the corresponding obligation to pay prompt, adequate, and effective compensation for whatever properties might be expropriated.¹²

It is submitted that the passage quoted above establishes the correctness of our previous interpretation of the legal views of the United States in connection with the Mexican oil controversy.

2. In the *Interhandel* dispute with Switzerland, the United States argued:

The disposition of title to property located within a country is manifestly within the domestic jurisdiction of that country unless the country involved has by sovereign act removed the matter from its exclusive domestic jurisdiction.¹³

The present author interpreted this statement to signify the acceptance by the United States of the view that international law does not affect the

⁷ Baade, *loc. cit.* note 1 above, at 810.

⁸ See Wortley, *loc. cit.* note 2 above, at 681.

⁹ 5 U. S. Foreign Relations 1940 at 982-984, 984-986, 988-989, 990-994, 994-996.

¹⁰ *Ibid.* 989-990, 996-997, 1013-1014.

¹¹ *Ibid.* 994-996, 996-997.

¹² *Ibid.* 994, 995.

¹³ Memorandum accompanying the note to Switzerland of Jan. 11, 1957, 86 Dept. of State Bulletin 350, 357 (1957).

validity or the legality of expropriations by the territorial sovereign, but merely imposes an *obligatio* to make compensation subsequent to the expropriation.¹⁴ As far as can be ascertained, this interpretation has not been challenged. It now receives some support, but possibly some significant modification, by the intervention of the United States in the *Bahia de Nipe* litigation.¹⁵ This case has been extensively discussed elsewhere;¹⁶ and comment will here be limited to only one of the several cases consolidated and disposed of by the District Court: the *in rem* proceeding of the United Fruit Sugar Company against 5,000 tons of sugar laden on the vessel and apparently emanating from libelant's properties which were expropriated in Cuba in July, 1960. The District Court rested its decision adverse to this libelant merely on the doctrine of sovereign immunity, adopting the "view that vessels and cargo expropriated by, and in possession of, a foreign sovereign are immune from suit upon a suggestion of immunity."¹⁷ Libelant appealed and ultimately sought a stay from the Chief Justice of the United States, pending application for a writ of certiorari to the United States Supreme Court.

At this point, the Solicitor General of the United States filed a lengthy memorandum in opposition to the application for a stay. The views expressed therein are expressly stated to be those of both the Department of Justice and the State Department. The memorandum, *inter alia*, contains the following statement:

Petitioner, in effect, seeks redress in this proceeding for the expropriation of its property allegedly owned by it in Cuba. But no such redress is available here. It may be assumed that the confiscation is unlawful under international law, *i.e.*, so far as relations between the Governments of the United States and Cuba are concerned. But that does not mean that Cuba, as between itself and petitioner, does not have valid title to the expropriated property so far as our courts are concerned. . . .

It would not be inconsistent for the State Department to challenge the validity of the Cuban expropriation under international law, and at the same time to accept the validity of the confiscation of American property located in Cuba, so far as our domestic courts are concerned. . . .

The Solicitor General's memorandum then goes on to quote judicial authority for the act of state doctrine.¹⁸

It would seem that the United States is here contending that as between itself and Cuba, both the legality *and the validity* of the Cuban expropriations can be challenged on international legal grounds, but that (a) the libelant is not a proper party plaintiff for such a challenge; and (b) a Federal court in the United States is not a proper forum. If this view

¹⁴ Baade, *loc. cit.* note 1 above, at 810-811.

¹⁵ *Rich v. Naviera Vacuba, S. A.*, 197 F. Supp. 710 (E. D. Va., 1961), *aff'd per curiam*, 295 F. 2d 24 (4th Cir., 1961), reprinted below, p. 550.

¹⁶ Rabinowitz, "Immunity of State-Owned Ships and Barratry," 1962 *Journal of Business Law* 89.

¹⁷ 197 F. Supp. 710 at 724.

¹⁸ Extracts from the memorandum are reprinted in Rabinowitz, *loc. cit.* note 16 above, at 92.

ultimately prevails in litigation in the United States involving claims arising out of Cuban expropriations,¹⁹ the act of state doctrine will once more obviate the necessity of dealing with the issues outlined at the beginning of this note. If not, we will perhaps witness extensive disputations on the distinction between international and "domestic" illegality and invalidity, and quite possibly between internationally and domestically valid titles. Whatever the outcome, there now appears a pressing need for the development of a sound theory of the nullity of jural acts in international law.²⁰

HANS W. BAADE

TITLE TO CONFISCATED FOREIGN PROPERTY AND PUBLIC INTERNATIONAL LAW

In a recent well-documented article Domke¹ has criticized this writer for not having cited a single case for a proposition contained in the writer's book, *Internationales Konfiskations- und Enteignungsrecht*.² Domke agrees that the taking of foreign-owned private property without adequate compensation is a violation of international law, but takes issue with this writer for having written in 1952 that:

according to preponderant case law . . . such violation of international law does not generally entail the nullity of the particular confiscation.³

Domke is right concerning the absence of supporting cases on the pages quoted by him. However, on other pages of the book some cases are quoted which may bear out the above statement, at least to a certain extent. Certain objections, of course, may be found against most of these cases. Some are decisions by U. S. courts,⁴ and the act of state doctrine

¹⁹ Such a development seems not unlikely; see *Pons v. Republic of Cuba*, 294 F. 2d 925 (App. D. C., 1961), certiorari denied, 368 U. S. 960 (1962).

²⁰ See Baade, *loc. cit.* note 1 above, at 808-807; Urbanek, "Die Unrechtsfolgen bei einem völkerrechtsverletzenden nationalen Urteil; seine Behandlung durch internationale Gerichte," 11 Österreichische Zeitschrift für Öffentliches Recht 70 (1961). Apart from some brief discussions of the nullity of arbitral awards, no English-language materials on this subject could be discovered.

¹ Domke, "Foreign Nationalizations," 55 A.J.I.L. 585, 612 (1961).

² Tübingen, 1952. An English outline of this book was published under the title, "Extraterritorial Effects of Confiscations and Expropriations," in 49 Mich. Law Rev. 851-868 (1961). For recent statements of the writer's views on the subject in general, cf. his reports of the Int. Law Ass'n. Committee on Nationalization and Foreign Property (Int. Law Ass'n., 48th Conference, Report 184 ff., and 49th Conference, Report 218 ff.), as well as his mimeographed lectures on "Le régime des investissements en droit international" (Paris, 1961).

³ Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht* 36 and 43 (1952).

⁴ *Ricaud v. American Metal Co.*, 246 U. S. 304 (1918), Seidl-Hohenveldern, *op. cit.* 37; *Banque de France v. Equitable Trust Co.*, 33 F. (2d) 202 (S.D.N.Y., 1929), *Banque de France v. Chase National Bank*, 60 F. (2d) 793 (C.C.A. (2d)), Ann. Dig. 1929-1930, No. 22 (also involving the risk of double jeopardy), Seidl-Hohenveldern, *ibid.* 21, note 21; *Shapleigh v. Mier*, 83 F. (2d) 673 (1936), 299 U. S. 468 (1937), 31 A.J.I.L. 528, 529 (1937), Seidl-Hohenveldern, *ibid.* 37.

has been explained by eminent authorities⁵ as being a product of U. S. constitutional law. Moreover, the passage concerned may have been an *obiter dictum*⁶ or the issue may not have been raised before the court, the subject matter, moreover, being rights held by foreigners (creditors,⁷ holders of life insurance policies⁸) under contracts governed by the law of the confiscating state (but why should the taking of such rights be less objectionable under international law than the taking of tangible property?). The case may have concerned a company nominally a national of the taking state, although the home state of the dominant shareholders protested that the taking concerned constituted a violation of international law.⁹ Lastly, the decision may have been influenced by special treaty obligations between the taking state and the state of the forum.¹⁰ Yet all these cases have one feature in common—the taking was not considered a nullity.

However, there were other cases, also quoted in the above-mentioned book,¹¹ where confiscated property was restored to its owners after the assets concerned had been brought outside the taking state. The author has drawn attention to the fact that the (pre-confiscation) foreign ownership or control of the assets concerned may have influenced this outcome.

It will not lead far to count heads to see which of these views is really predominant. Both have been adopted by courts in various countries. In any case it is desired to dispel any attempt to construe the reference to "preponderant case law" as admitting the existence of a rule of public international law *obliging* a state to respect the acts of another state, even if these acts are contrary to international law. The writer has stated more than once,¹² that he very strongly rejects the view that a state would

⁵ Mann, "Völkerrechtswidrige Enteignungen vor nationalen Gerichten," 1961 Neue Jur. Wochenschrift 708; Verzijl, "The Relevance of Public and of Private International Law respectively for the Solution of Problems Arising from the Nationalization of Enterprises," 19 Zeitschrift für ausl. öff. Recht u. Völkerrecht 547 (1958).

⁶ Poortensdijk v. Latvian Soviet Republic, Ann. Dig. 1919-1942, No. 75, Seidl-Hohenveldern, *op. cit.* 48, note 14.

⁷ In re Russian Bank for Foreign Trade, [1933] 1 Ch. 745, Seidl-Hohenveldern, *ibid.* 37.

⁸ Perry v. Equitable Life Assurance Society (K. B., 1929), 45 T.L.R. 468, Seidl-Hohenveldern, *op. cit.* 88, note 3.

⁹ District Ct. Rotterdam, July 31, 1939, Dairs and Co. v. El Aguila, Ann. Dig. 1919-1942, No. 7, p. 19, Seidl-Hohenveldern, *ibid.* 46.

¹⁰ Landgericht Hamburg, June 18, 1924, Caucasian Licorice Co. v. Katz, 84 Niemeyers Zeitschrift für Int. Recht 465 (1925), Seidl-Hohenveldern, *ibid.* 18 (Rapallo Treaty).

¹¹ Trib. Comm. Marseille, April 23, 1925, 1925 Clunet 391, and Court of Cass. (Req.), March 5, 1928, 1928 Clunet 674; Etat Russe c. Ropit, Court of Cass. (Civ.), March 14, 1939, 1939 Clunet 615; Potassas Ibericas c. Bloch, Seidl-Hohenveldern, *ibid.* 49-50.

¹² Seidl-Hohenveldern, "Communist Theories on Confiscation and Expropriation. Critical Comments," 7 A. J. Comp. Law 557 (1958); *idem*, "Ausländische Nationalisierungsmassnahmen und ihre Beurteilung durch deutsche Gerichte," 5 Aussenwirtschaftsdienst des Betriebsberaters 273 (1959); *idem*, Report of the International Committee on Nationalization, Int. Law Ass'n., 48th Conference, Report 203 (New York, 1958).

violate international law if its courts permitted an owner to recover an object of which he had been dispossessed by an act of state of the situs of the property.

Thus, the writer's position is similar to that of Niederer,¹³ approvingly quoted by Domke. Where Domke and he differ is the reason on which we would like to see such decisions based. This writer would like to see the non-recognition of such confiscations based on considerations of public policy. Domke asserts that a rule of international law would make such non-recognition obligatory on the courts. This, it is believed, goes too far. This attitude would imply that the home country of the owner concerned would be authorized to accuse a third country of a denial of justice, if that country's courts should refuse the owner's claim for restitution.¹⁴ Apart from that latter consideration, it matters little if a decision is based on considerations of public policy (and the upholding of due respect for international law may be a very cogent reason justifying recourse to the public policy clause)¹⁵ or on international law itself.

In respect to Cuban sugar and other United States assets seized in Cuba, a good case certainly can be made for an international legal duty of non-recognition of Castro's titles. That case would not only rest on the illegality under international law of the taking of foreign property without compensation, but also on the fact that Castro declared his measures to constitute reprisals. The Indonesian measures under review in the *Bremen Tobacco* case were also alleged to be reprisals. In a note on that case¹⁶ this writer did draw certain conclusions from this fact which, however, have gone unnoticed in the discussion of that case. A translation of that passage follows:

Whatever may have been the reasons for the Dutch-Indonesian dispute concerning Western New Guinea, the German Federal Republic is no party to that dispute. In respect to this dispute her situation corresponds to that of a neutral in time of war. In my previous note¹⁷ I wanted to provoke a discussion on the question whether it would be possible to push this analogy to the point that also in case of reprisals the measures adopted by the parties to the dispute shall have no effects whatsoever on neutral soil. I must admit, however, that I know of no precedent for this proposition. (Yet the difficulties

¹³ "Der völkerrechtliche Schutz des Privateigentums," Festschrift für Hans Lewald 547, 552 (1953); *idem*, "Einige Grenzfragen des ordre public in Fällen entschädigungsloser Konfiskation," 11 *Annuaire Suisse de Droit International* 91, 98 (1954).

¹⁴ No such accusations were brought against the country of the forum where citizens of third states (citizens neither of the forum nor of the taking state) failed for one reason or another to have their property restored to them. At least, the writer has never heard of any such protests by France against the U. S. (*cf.* note 4 above), by the U. K. against Germany (*cf.* note 10 above) or Italy and Japan (The Anglo-Iranian oil cases), or by The Netherlands against the German Federal Republic (*Bremen Tobacco* case, Oberlandesgericht Bremen, Aug. 21, 1959, now fully reported in 9 *Archiv des Völkerrechts* 818-863 (1961)).

¹⁵ De Nova, Note on Trib. Rome, Sept. 13, 1954 (*Anglo-Iranian Oil Co. v. SUPOR*), 47 *Revue Critique de Droit Int. Privé* 541 (1958); Seidl-Hohenveldern, *Int. Law Ass'n.*, 48th Conference, Report 134 (1958); 49th Conference, Report 224 (1960).

¹⁶ 1959 *Aussenwirtschaftsdienst* (cited note 12 above) 276.

¹⁷ *Ibid.* 107.

experienced in finding a case similar to the measures concerned may be due to the fact that these measures may have possibly exceeded the limits set by international law for permissible reprisals.)

In case we regard the Indonesian measure exclusively as a reprisal—thus disregarding the further motives indicated in the preamble of the Indonesian Nationalization Law Nr. 86/1958 (promotion of the general welfare and of the security of Indonesia)—then, on the strength of the thesis mentioned above the Courts of States not parties to the international dispute concerned will be prevented from recognizing such reprisals just as much as they are prevented from recognizing prohibitions under Trading with the Enemy Acts¹⁸ or titles to property acquired as war-booty.¹⁹ This rule would apply even if under international law there may have been legitimate reasons for adopting such reprisals.²⁰

IGNAZ SEIDL-HOHENVELDERN

OTHER LEGAL ASPECTS OF THE BERLIN CRISIS

In his editorial comment, "Some Legal Aspects of the Berlin Crisis,"¹ Professor Quincy Wright questions the legal soundness of the Western position with respect to the Four-Power status of Berlin. In essence, these are his arguments: (1) There is no ground for legal objection to Soviet recognition of, and conclusion of a treaty of peace with, East Germany. (2) The 1945 agreements have been violated by all the parties, "notably by the West," in recognizing the German Federal Republic, making treaties with it, arming it, and admitting it to NATO: "The West can hardly invoke these agreements against the Soviet Union. The latter would seem to have as much right to recognize and make peace with East Germany as the West had to recognize and make peace with West Germany." (3) If East Germany should be recognized as a fully sovereign state, West Berlin, having never been considered a part of East Germany, would remain an enclave within its territory. (4) Access of the Western Powers to West Berlin ("at least civilian") constitutes a servitude which East Germany would be obliged to respect if it became independent. (5) Soviet responsibility in regard to access to West Berlin would end. The Western Powers would have to argue the case with East Germany. (6) In the long run, East Germany's interest in eliminating West Berlin's special status is likely to prove no less than India's interest in eliminating the Portuguese enclaves. Therefore, the Western Powers will have difficulty in maintaining

¹⁸ Swiss Fed. Trib., April 17, 1916, "*La Nationale*" c. Biermann, BGE 42 II 179, 184; Swedish Supreme Court, Oct. 16, 1944, *Hopf Products Ltd. v. Paul Hopf and Skandinaviska Banken AB*, Ann. Dig. 1943-1945, No. 16. Cf. also Seidl-Hohenveldern, "Feindhandelsverbote im internationalen Privatrecht," 4 *Jahrbuch für intern. Recht* 63 ff. (1952-1953).

¹⁹ Swiss Fed. Trib., June 24, 1948, Ann. Dig. 1948, No. 196, and Sept. 21, 1948, Ann. Dig. 1948, No. 177; Austrian Supreme Court, July 20, 1955, 45 *Rev. Crit. de Droit Int. Privé* 479 (1956).

²⁰ These considerations will be enlarged in an article on "Reprisals and the Taking of Private Property," in the special issue of the *Netherlands Review of International Law* to be published in honor of Professor Kollwijn.

¹ 55 A.J.I.L. 959 ff. (1961).

their rights. Other solutions, "perhaps a return to the Potsdam Agreement providing for a disarmed and neutralized Germany, should be considered."

With due respect to the outstanding authority of the author, I submit the following objections to his views:

1. East Germany is not a *de facto* state, recognition of which is permissible. Only recently, the East German party leader, Walter Ulbricht, publicly made two very revealing confessions: he conceded (in an article published in Moscow's *Pravda* on December 30, 1961) that the wall in Berlin was necessary to prevent the flight of trained manpower "from the Socialist camp to the Imperialist camp." He admitted further that the existence of his Communist regime depended on the presence of the Soviet Army in East Germany.

Both admissions—which, of course, confirm only well-known facts—virtually exclude the assumption that East Berlin is a "*de facto* state." A regime compelled to wall in its subjugated population in order to prevent them from fleeing, and depending on foreign troops in order to crush and prevent rebellion, does not have the minimum of effective authority which international law requires to make recognition permissible. If international law should be formalized to such a degree as to ignore facts of such fundamental importance, it would degenerate to a set of abstract rules far remote from reality and deprived of moral authority as well as of practical reasonableness.

Up to now, there is no government outside the Sino-Soviet bloc which recognizes East Germany as a *de facto* state. If it is not a *de facto* state, recognition is not permissible, but is at the least premature. Such premature recognition constitutes an illegal intervention.

As the Soviet concept of a German peace treaty requires signature by two separate German governments and thus implies recognition of East German sovereignty, it is a concept which cannot be justified by international law.

2. Being an international lawyer as well as an official representative of the West German Government, I deeply regret the inability of an outstanding American colleague to see any legal difference between West Germany and East Germany as far as recognition is concerned. Nobody doubts that West Germany is a *de facto* state. Even the Soviet Union does not dispute this fact. There are few who doubt that it is also a *de jure* state. Many nations even recognize West Germany as the only government legitimately entitled to speak for the German people as a whole.

Western Governments did not conclude a peace treaty with West Germany. The contractual arrangements mentioned by the author (the arrangements of May 26, 1952, never entered into force; a considerably revised version of the arrangements forms part of the "Paris Treaties" of October 23, 1954), did not "constitute a peace treaty for all practical purposes," as he believes. They cautiously avoided dealing with the central issues of a peace treaty: termination of the state of war, frontiers,

reparations. The latter two questions were expressly reserved in order to await a peace settlement.

As to the Four-Power Agreements of 1945 (the Berlin Declarations of June 5, 1945, and the Potsdam Agreement), there can be no doubt that it was the Soviet side which sabotaged and destroyed the arrangements for a joint occupation, and began to arm the East German Communists. When negotiations on the rearmament of West Germany started in May, 1951, there was already a large military force of the East German regime in existence. It was not labeled an "army," but a *Kasernierte Volkspolizei* (garrisoned people's police); but once again: Is it the formal label which counts exclusively in international law?

During the 1959 Foreign Ministers' Conference, the speaker for the East German Advisory Delegation, Dr. Lothar Bolz (labeled as "Foreign Minister"), boasted that the "German Democratic Republic," being an ardent protagonist of "peace" and "disarmament," had reduced its armed forces by 1956 to 90,000 troops. He only mentioned regular army units and was silent about the militarized police units and workers' militia. But even if one compares only the regular army units: there were less than 10,000 in West Germany at that time. The West Germans would scarcely have accepted the very unpopular idea of rearmament, had there not been this strong and threatening military force in East Germany.

Knowing these facts, Soviet protests for many years did not question the continuing validity of the other basic agreements of 1945, particularly the arrangements on Berlin, access to Berlin, and common Soviet-Allied responsibility for Germany as a whole, and a peace settlement. It was in November, 1958,—more than 4 years after the signature of the Paris Treaties—that Khrushchev suddenly doubted the validity of the Berlin arrangements and Western occupation rights in that city.

3. If East Germany were to be recognized as a sovereign state, West Berlin would remain an "enclave." But whose territory would this enclave be? The Supreme Constitutional Court of the Federal Republic, in accordance with the Basic Law of the Federal Republic and the Constitution of West Berlin, considers Berlin a *Land* (state) of the Federal Republic, its constitutional right as a *land* being suspended by virtue of occupation law. The three Western Governments do not agree with this view. If they maintain this view, and if East Germany is recognized as a sovereign state, West Berlin can only be considered to be a separate international entity. The concept of Germany as a whole, definitely destroyed, would be replaced by a concept of three separate German entities. Dismemberment of Germany would be complete. The political and psychological consequences of a Western policy which promised unity and would bring about dismemberment are not discussed in Mr. Wright's article; accordingly, I abstain from discussing them here.

4. Whether the Indian-Portuguese case on access to the enclaved Portuguese territories of Dadra and Nagar-Aveli and the findings of the International Court of Justice in that case provide a sound legal basis for the

Berlin access problem, I do not want to discuss. After the Indian invasion of the remaining Portuguese enclaves in India, the moral and psychological impact of this legal basis seems to be weak indeed. But there is one point in Professor Wright's argumentation which I do not understand. Why does he feel that "at least civilian access" is to be respected by the East Germans? The presence of the Western forces in Berlin rests on the right of belligerent occupation (neither "conquest" nor "surrender," *viz.*, the capitulation of the German High Command is a correct definition of the legal basis for the Western position in Berlin). Free access of the occupation forces is an integral part of those rights. As the occupying Power is responsible for law and order and the restoration of public life in the occupied territory, the right of free civilian access derives from this obligation to protect some basic rights of the civilian population. What title has Mr. Wright in mind, which he seems to regard as legally better founded?

5. The Soviet Union is not bound to stay indefinitely as an occupying Power. Without any doubt, it cannot be prevented from terminating its occupation in Berlin and Germany and from withdrawing its forces, permitting the Germans to form a government of their own. But this is not what the Soviet Union is going to do. It wants to retain its forces in East Germany and around Berlin, supporting a Communist puppet government which is clearly prepared to grant treaty rights for the stationing of Soviet forces. The termination of the occupation regime is only a very thin pretext for removing the Western forces from Berlin. At the same time, the Soviets request the right to station in West Berlin a Soviet contingent which, of course, can only be stationed there on the basis of continuing occupation rights.

Again the question arises, whether international law is bound to accept every faked pretext at face value. I believe it is not, and it is a sound legal position to hold the Soviet Union responsible as long as they actually exercise occupation functions, whatever may be the label they use.

6. "Return to the Potsdam Agreement" is a fantastic suggestion. First of all, Potsdam provided for a "disarmed," but not for a "neutralized" Germany. Second, it provided for a type of Four-Power control machinery which turned out to be a tragic illusion. Third, its most deplorable defect was the absence of any clear decision on the political future of Germany. It is difficult to understand how the Potsdam policy, which caused the division of Germany, should now, 17 years later, by virtue of a strange miracle, lead to a solution whereby "the two Germanies would probably tend to come together and a united Germany would probably have a Western orientation." For many years "Return to Potsdam" has been a declared aim of Soviet policy. The Kremlin knows why it advocates this line, and the Germans know why they firmly reject this line.

WILHELM G. GREWE

DE JURE NATURAE ET GENTIUM

The doctrinal approach of international lawyers of the seventeenth and eighteenth centuries has been viewed by some as rigid:

One school, eliminating the natural law of nations altogether, were strict positivists; others, dominated by the "classic" law of nature, the *droit de la raison*, eliminated the voluntary law of nations . . .¹

It is difficult to agree with this view, for much more than mere lip-service was paid to theories of natural law by such strong "positivists" as Rachel and Textor, and, despite the views of Professor Brierly and Dr. Kunz,² Vattel is frequently considered a "naturalist" rather than a "positivist" theorist.³ The mere fact of disagreement on the point among eminent modern writers would seem to indicate that no strict division of exclusive schools of thought should be considered to characterize seventeenth and eighteenth-century approaches. In Sir Hersch Lauterpacht's view, "the majority of the authors of the seventeenth and eighteenth centuries were Grotians," among whom he finds Wolff and Vattel!⁴ The works of Wolff and Vattel, read by at least one practicing international lawyer, seem to indicate their feeling as to "rules" of international law being deducible from an examination of the needs of the international society with which they were familiar, rather than an express or implied "acceptance" of those rules by states. Most obvious examples of this sort of deduction (or induction, in an epistemological sense) can be found in their respective discussions of commerce.⁵ It is hard to imagine these passages being written by people who had reduced natural law "to little more than an aspiration after better relations between states" or who "retained natural law only in appearance";⁶ with regard to these parts of the works of Vattel and Wolff, at least, Lauterpacht's classification seems the more compelling. It is true, of course, that one can derive the "rules" of law which Vattel and Wolff state by reasoning through a more "positivist" channel, but then there is little in the way of "rules" which in practice cannot be derived equally well and from the same objective position by a "naturalist," a "positivist" or a "Grotian."⁷

Clearly it is the rationale of "rules" of international law and the application of those "rules" to a new set of facts that reveal notable distinctions between "positivist" and "naturalist" legal philosophers. If

¹ J. L. Kunz, "Natural-Law Thinking in the Modern Science of International Law," 55 A.J.I.L. 951 at 952 (1961).

² *Ibid.*; J. L. Brierly, *The Law of Nations* 38 (5th ed., Oxford, 1955).

³ Cf. A. Nussbaum, *A Concise History of the Law of Nations* 156 *et seq.* (rev. ed., New York, 1954).

⁴ 1 Lauterpacht-Oppenheim, *International Law* 98 (8th ed., London, 1955).

⁵ E. de Vattel, *Le Droit des Gens*, Book II, Ch. 24 *et seq.* (p. 121 *et seq.*) (ed. 1758, C. G. Fenwick, trans., Washington, 1916); C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, Ch. 1, § 58 (p. 37) (ed. 1764, J. H. Drake, trans., Oxford, 1934).

⁶ Kunz, *loc. cit.*; Brierly, *op. cit.*

⁷ Cf. L. Le Fur, "Le Droit Naturel ou Objectif s'Etend-il aux Rapports Internationaux?", 6 *Rev. de Droit Int. et de Lég. Comp.* 59 at 67 (3e sér., 1925).

one would seek to classify a legal writer in these terms, a meaningful test would appear to be to take a particular doctrine of law, *e.g.*, *rebus sic stantibus*, and see whether the "rule" is derived from a construction of the will of the contracting parties⁸ or from a construction of events which "objectively" generate a right or duty (in this case, a right to renounce a treaty obligation unilaterally, or even a right to consider the treaty null).⁹ It is conceivable, although surely difficult to allege with assurance, that these differences in approach may yield differences in result which depend to some measurable degree on the theoretical divergences.

In the sense that all processes of thought are based on certain habits and assumptions, such as the assumption of the validity of our intuitive connection of cause and effect,¹⁰ there exist grounds on which all legists may be considered by others so inclined to show significant traces of "naturalist" thought in their work.¹¹ However, the reasoning of a lawyer, no matter how grounded in "naturalism," cannot by definition arrive at a conclusion of international law which is not "recognized" or "accepted" as law by states.¹² Of course, there is nothing to prevent the theoretical "positivist" from examining what he would consider to be a question of the ethical foundation of law or a question of what ought to be the law for ethical reasons. Treaties can then be drafted to embody the results of this sort of study in the *corpus* of international law. Similarly, there is nothing to prevent the "naturalist" from defining "law" to include

⁸ As in W. Burckhardt, "La Clausula Rebus Sic Stantibus en Droit International," 14 *ibid.* 5 at 29 (1933); J. L. Brierly, *op. cit.* 262-264.

⁹ See C. G. Ténékidès, "Le Principe Rebus Sic Stantibus—Ses Limites Rationnelles et Sa Récente Evolution," 41 *Rev. Gén. de Droit Int. Pub.* 273, esp. 280 (1934).

¹⁰ D. Hume, *The Treatise of Human Nature*, Book I, Part III, § 3, reprinted in C. W. Hendel (ed.), *Hume Selections* 28 ff. (New York, 1955).

¹¹ Cf. A. Verdross, "Les Principes Généraux du Droit Applicables aux Rapports Internationaux," 45 *Rev. Gén. de Droit Int. Pub.* 44 at 45 (1938).

¹² Art. 38(1) of the Statute of the I.C.J., which is taken in substance from Art. 38 of the Statute of the old P.C.I.J., provides that the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- "a. international conventions, whether general or particular, establishing rules *expressly recognized* by the contesting states;
- "b. international custom, as evidence of a general practice *accepted* as law;
- "c. the general principles of law *recognized* by civilized nations;
- "d. subject to the provisions of Article 59 [which relates to the precedent value of Court decisions], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." (Emphasis supplied.)

With the decisions and teachings reduced to the place of a "subsidiary means for the determination of rules of law," it is difficult to see much scope for the Court to apply rules of international law other than those somehow accepted by states. Although there has been some doubt as to the extent to which the phrase "general principles of law" means "natural law," it is believed that the reference to principles of municipal law really represents a reference to a form of state practice which, to a "positivist," would merely indicate an "implied acceptance" by all members of the international community of general principles recognized by those members in their own juridical systems. See H. W. Briggs, *The Law of Nations* 48 (2nd ed., New York, 1952).

these studies,¹³ as long as this definition of "law" is not applied in such a way as to undermine the utility of language for meaningful communication. If the sources of law as laid out in the Statute of the International Court of Justice¹⁴ are kept in mind in general discussion, parochial definitions can make no difference; all but the most adamant "naturalist" must still find what is the law by examining state commitments, practices, and attitudes. Thus, there has been no "resolution" of the old "conflict" between "naturalists" and "positivists," unless by the general acceptance of Article 38 of the Statute of the Permanent Court of International Justice.¹⁵ But a refinement of definition has apparently removed whatever theoretical points of conflict may have been supposed to separate the two schools of international law theory.

Looked at in this way, there has been no revival of "naturalist" jurisprudence, but only a growing shift in the interest of some leading publicists from the collection of precedents and the formulation of rules, to the examination of social, psychological or philosophical aspects (depending on the publicist) of what used to be called positive law. Yet, in this growing field of research, more akin to what has traditionally been regarded as moral philosophy or ethics than what has traditionally been regarded as "law," conflicts of view which appear to reflect the old "naturalist"- "positivist" conflicts have already begun to appear.¹⁶ In the search to discover the basis of obligation in international law (to borrow Professor Brierly's phrase) the assumption of a need for express or implied "consent" may well result in the formulation of theories as to what should

¹³ See, e.g., N. Politis, "Les Transformations du Droit International," 1 *Revue de Droit International* 57 at 64 (1927).

¹⁴ Note 12 above.

¹⁵ The formulation in the Statute of the P.C.I.J. said: "The Court shall apply:-

"1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
 "2. International custom, as evidence of a general practice accepted as law;
 "3. The general principles of law recognized by civilised nations;
 "4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

The final paragraph of this article is repeated verbatim in the Statute of the present Court. Since agreement of the parties is necessary before the Court can decide a case *ex aequo et bono*, it is believed that this provision cannot be read to derogate from the basically "positivist" definition of international law which the two Statutes set out. Furthermore, it seems clear that the power of the Court to decide cases *ex aequo et bono* was distinguished from the power of the Court to apply international law; the two bases of decision should therefore not be confused.

It is not proposed at this time to trace further the development of the modern definition of international law.

¹⁶ Compare, e.g., K. Wolff, "Les Principes Généraux du Droit Applicables dans les Rapports Internationaux," 36 *Hague Academy Recueil des Cours* 483, esp. 494 (1931); and N. Politis, "Le Problème des Limitations de la Souveraineté et la Théorie de l'Abus des Droits," 6 *ibid.* 5, esp. 111 (1925).

be the law, which differ substantially from those theories formulated on the basis of "reason," sociological research or other postulates as to relevant material and techniques. But in this search, the resurgence of "natural law" may be much less than appears to some observers, for the gulf between studies of what ought to be the law and studies of what is conceived to be the law is not logically bridgeable by a mere similarity in professional jargon. International law in practice is still "positivist," insofar as the old classification terms are concerned.

ALFRED P. RUBIN

AMERICAN SOCIETY OF INTERNATIONAL LAW RESEARCH FELLOWSHIPS

The American Society of International Law is offering a small number of research fellowships for (1) studies of the legal aspects of space activities and (2) studies of the international legal problems of federalism. Study programs in these two areas are among the new activities financed by the recent grant of \$500,000 from the Ford Foundation.

Those receiving research fellowships will have the benefit of consultations with the Society's advisory groups composed of scholars, government officials, and practicing lawyers. It is expected that most scholars will pursue their studies at their own universities or other institutions. There are no upper or lower limits on the age of applicants. Preference will be given, however, to individuals whose background indicates an ability to make a significant new contribution to knowledge and thought.

The stipends, ranging in amount from \$2,500 to \$10,000, will vary with the age and experience of the applicant and the nature and duration of the study he undertakes. It is expected that in most cases the fellowships will supplement funds provided by the applicant's own institution.

The first deadline for applications for fellowships on space activities was March 15; for fellowships on federalism studies, April 15. The initial awards will be announced about a month after the deadlines. Further applications, however, may be received and reviewed at dates to be announced later.

Further information and application forms may be obtained by writing to: Study Programs, American Society of International Law, 2223 Massachusetts Avenue, N.W., Washington 8, D. C.

E. H. F.

PUBLIC REPORT OF THE ADVISORY COMMITTEE ON "FOREIGN RELATIONS," 1961

The Advisory Committee on the *Foreign Relations of the United States* held its fifth annual meeting in Washington on November 3-4, 1961.¹ The Committee met with Mr. G. Bernard Noble, Director of the Historical Office, and members of his staff, including the staff of "Foreign Relations." It was welcomed by Mr. Roger Tubby, Assistant Secretary of State for Public Affairs, and had the opportunity to discuss special matters with other officers of the Department of State. Under Secretary Chester Bowles and Presidential Assistant Arthur Schlesinger, Jr., also attended certain sessions of the Committee.

A Crisis of Major Proportions

At its fourth meeting in November, 1960,² the Committee had recognized that *Foreign Relations* was "faced with a crisis of major proportions." Taking note of "the fantastic expansion of materials in the archives of the State Department during the war and post-war years, an expansion which reflects the enlarged role of the United States in world affairs," the Committee then recommended that the Historical Office prepare for the next meeting of the Committee a statement of the problems which the publication of *Foreign Relations* for the years 1945 to 1950 would face and what steps, including the establishment of priorities, might be taken for keeping publication within limits set by reasonable estimates of staff and money.

In response to this request, members of the staff of *Foreign Relations* prepared statements in which they undertook to define the problems that they saw arising in the areas for which they were responsible, in the preparation of volumes for the period 1946-1950. These statements were of great help to the Committee in its discussions and recommendations. In addition, the Committee had the benefit of a report by Mr. Berdahl, one of its members, on a consultantship which he had been asked by the Historical Office to undertake for the period June 20-August 31, 1961. This report was extremely helpful in acquainting members of the Committee with the problems which face the staff of *Foreign Relations*, and the Committee owes much to the judgments which Mr. Berdahl formed on the basis of his direct contact with the work of the Historical Office.

Full appreciation of the dimensions and complexity of the task which

¹ The Advisory Committee is composed of three members representing the American Historical Association (Dexter Perkins, Professor of History Emeritus, Cornell University; Fred H. Harrington, Vice President, University of Wisconsin; and Richard W. Leopold, Professor of History, Northwestern University); two representing the American Political Science Association (Clarence A. Berdahl, Visiting Professor of Government, Southern Illinois University, and Leland M. Goodrich, Professor of International Organization, Columbia University); and two representing the American Society of International Law (Philip W. Thayer, Professor of International Law, School of Advanced International Studies, The Johns Hopkins University, and Robert R. Wilson, Professor of Political Science, Duke University). Mr. Perkins is chairman of the Committee but was unable to attend this meeting, being in India. Mr. Goodrich served as Acting Chairman at the 1961 meeting.

² See Report of the Committee, in 55 A.J.I.L. 969 (1961).

face the staff of the Historical Office in the preparation of the *Foreign Relations* volumes for the postwar years requires some reflection on the revolutionary changes that have taken place in the conduct of the foreign relations of the United States during the past half-century. The years between the two World Wars were a period of relative isolation for the United States except for its relations with the Far East and Latin America. With World War II this situation changed radically, however; the conduct of our relations with foreign countries became subordinated to the exigencies of war. The President and his military advisers assumed large if not exclusive responsibilities which normally would have been carried by the Department of State. While the number of *Foreign Relations* volumes needed to give the record of major foreign policy decisions within the range of the Department of State's responsibilities during the war years did increase over the prewar period, aside from the special top-level conference series, the increase was not great.

The postwar period presents an entirely different situation. The Department of State has again moved into its natural function as the agency primarily responsible for the conduct of foreign relations. Discussions regarding peace settlements with the Axis Powers and with Austria were prolonged and highly complicated. The "cold war" has had diplomatic repercussions not only on our relations with the Soviet Union and other Communist states but also upon our relations with other countries in all parts of the world. The number of countries with which we have bilateral relations has increased greatly, as evidenced by the fact that the membership of the United Nations has increased from 51 at the beginning of 1946 to 104 at the end of 1961. Whereas, before World War II the participation of the United States in international conferences was occasional, in the postwar years diplomacy through international conference has become the normal procedure. During the fiscal year 1946 the United States participated in 171 conferences and by fiscal 1950 the number had increased to 302. And the fact that matters are increasingly dealt with through international conferences does not exclude the handling of these same matters through normal diplomatic channels. The establishment of the United Nations and the active participation of the United States in it have created an entirely new level of international relationships which cut across, and to some extent duplicate, normal diplomatic relations. With the assumption by the United States of wide military and economic responsibilities and active participation in a variety of international organizations, including specialized and regional organizations, other agencies of the Government have become involved in the conduct of foreign relations and the formulation of policy.

The extent to which foreign policy documentation of the postwar period has expanded is illustrated in quantitative terms by estimates of the staff of the Historical Office of the number of volumes which will be required to give the record of United States foreign relations for the year 1945. If the same coverage and standards of document selection are used for that year as for the preceding war years, it is estimated that the number of

volumes required will be 18 to 20, an increase of 200 percent from 6-7 volumes required for the war years. For the years 1946 to 1950, there is little likelihood that any reduction will be possible; if anything, an increase is indicated.

The Need of Greater Selectivity

The preparation and publication of twenty volumes per year would result in increased costs which Congress in all probability would be unwilling to accept. Without necessary appropriations and additions to staff, the publication of the series would rapidly fall farther and farther behind. The present time gap between the event and publication, which is now approximately twenty years—longer than most scholars think desirable—would be rapidly extended, possibly by as much as two years each year, with no hope of reversing the trend. This rapid and seemingly irreversible increase in the time lag would no doubt result in growing demands for the publication of special compilations of documents on special topics and meetings which would further lessen the interest in, and value of, the *Foreign Relations* series once it appeared. Even if money and staff are made available to publish twenty or more volumes per year with at least a twenty-year interval between currency and publication maintained, there is the question whether the consumers—libraries and scholars in particular—would not find such a number of annual volumes unwelcome from the point of view both of expense and space required.

The members of the Advisory Committee are forced to the conclusion that for the years following World War II and as far ahead as they can see, *Foreign Relations* must be prepared on a more selective basis than in the past. While it is impossible, and unwise, to attempt to set any quantitative limit on the number of volumes per year, the Committee feels that the number of annual volumes should not exceed ten to twelve, including special conference volumes. The time has passed, if it ever existed, when the serious scholar, working on any aspect of United States foreign relations, can be satisfied with what he finds in the published volumes of *Foreign Relations* alone. He should be greatly assisted by *Foreign Relations* in his search for documentation on the basic lines of policy and supporting considerations. But for the detailed refinement which the scholar needs, it will be necessary to go, even as in the past, to the files of the Department of State.

Keeping the number of volumes per year within the suggested limits in the face of the growing mass of documentation obviously requires the establishment of clear principles of inclusion and exclusion, and their rigorous application. The Committee does not believe that *Foreign Relations* should be made less comprehensive than in the past. It should continue "to give a comprehensive record of the major foreign policy decisions within the range of the Department of State's responsibilities." The Committee does not feel that there should be any narrowing of the area to be covered, either geographically or topically, though in some instances it may be possible to organize material under more inclusive headings. The

Committee is convinced of the desirability of ranging widely, even outside the Department records, for documents which are important in explaining policy. The guiding principle of selection must be the importance of the document in explaining policy.

The Committee does not believe that it is necessary for the volumes of *Foreign Relations* to tell the complete story of United States foreign relations. Rather, their function is to make available the documents that are necessary to the telling of the story. In this connection, it would seem to the Committee that much less emphasis should be placed on factual background than in the past. Furthermore, if important policy statements are readily available elsewhere (for example, statements of United States representatives in the United Nations Security Council and the General Assembly appear in the *Official Records* of those organs and are usually given in the Department of State *Bulletin*), the full texts need not be reproduced in *Foreign Relations*; instead, appropriate references can be given, with perhaps a brief note giving the general purport of the statement. These suggestions are given only to illustrate how, in the Committee's judgment, *Foreign Relations* can be kept within the suggested limits without serious detracting from its usefulness.

The Need for Increased Staff

It must not be concluded from what has been said above that the need of the Historical Office for an increased *Foreign Relations* staff will be any less great in the future; indeed, it will be much more so. In its report for 1960, the Committee associated "itself wholeheartedly with the request of the Office for additional personnel." Not only was this increase not authorized, but to make matters worse, two staff positions have been lost because of budgetary stringency. Thus the Office finds itself in the impossible position of having to perform a greatly increased task with a slightly reduced staff.

If the recommendation of the Committee is accepted that *Foreign Relations* cover the same ground as previously, that the same categories of documents be searched for material to be included, but that greater selectivity be applied to keep the number of volumes within suggested limits, obviously the demands upon the staff of *Foreign Relations* are going to be much heavier than ever before. The work of going through the mass of documentation for a given year for the purpose of locating material that should be considered for inclusion will in no sense be less arduous. The actual job of selection and determining what use is to be made of such material as has been tentatively assembled will be even more difficult, more time-consuming, and more demanding of good judgment.

There are at present twelve professional staff members working on *Foreign Relations*. This number is wholly inadequate for the job to be done. In the judgment of the Advisory Committee, it should be at least doubled. Only then will the possibility exist of maintaining the high standards which have been set in the preparation and publication of *Foreign Relations* while

at the same time keeping the time gap between occurrence and publication from exceeding the twenty-year period.

Equally important is the quality of the *Foreign Relations* staff. The members of the Advisory Committee have been favorably impressed by the present staff in this respect. Without exception they are men and women whose competence in research cannot be questioned and who would rank high in comparison with productive scholars in the best American universities. However, because their interest is in research and they do not, generally speaking, have supervisory functions to perform, their opportunities for promotion are limited. In the judgment of the Committee it is highly important, in the interest of recruiting a staff of high quality, of retaining experienced staff members, and of keeping morale at a high level, that adequate salaries be paid and that adequate salary increases be provided in recognition of good work done. In recruiting staff members, the Office must compete with the better colleges and universities in the opportunities and advantages that it offers. The salaries and other perquisites of staff members must therefore compare favorably to those which might be obtained at our better colleges and universities if scholars of the desired quality are to be attracted.

The Problem of Clearance

The problem of clearance is still a matter of central importance and tends to become increasingly so as time goes on. Not only do the relations of the United States become more complicated and heavily documented as one moves into the postwar period, but, in addition, these relations become more delicate and more likely to be influenced by making public what has been said or done within the fairly recent past. Difficulties of clearance arise within the Department of State and also in relations with other agencies of the Government with respect to documents originating in these agencies. In its 1960 report, the Committee suggested appropriate executive action to enlist the co-operation of the various agencies in expediting decisions on questions of clearance. On September 6, 1961, President Kennedy addressed a letter to the Secretary of State, the Secretary of Defense, the Secretary of the Treasury, and the Administrator of the General Services Administration³ emphasizing the importance of *Foreign Relations* to the achievement of "an informed and intelligent citizenry," and urging all agencies to collaborate actively with the Department of State in the preparation and publication of "the record of our diplomacy." In his letter the President made it clear that in his opinion the twenty-year lag was too long and that the presumption should be, unless a clear case was made to the contrary on the grounds of national security and effect on friendly relations with foreign nations, that clearance should not be denied any document fifteen or more years old. The Committee welcomes this as a clear and sound statement of executive policy.

The Committee continues to feel that there is a tendency on the part of

³ Reprinted in 56 A.J.I.L. 158 (1962).

policy officers in the Department to object to the publication of documents even when the contents are already well known. While it is undoubtedly true that publication by the Government carries greater significance than publication under private auspices, the special significance of Government publication often arises from the fact that clearance has earlier been withheld with the result that publication then becomes an event of special significance. For this reason the Committee repeats the view it has earlier expressed that the publication of *Foreign Relations* should, insofar as possible, be placed on a regular chronological basis. The publication of documentary material relating to persons now living, or bearing on matters still the subject of negotiation or consideration, would lose much of its special significance if it was incidental to the orderly unfolding of the historical record in accordance with a predetermined and closely followed schedule.

For similar reasons, the Committee feels that it is unwise to undertake the preparation and publication of special series such as the China volumes outside of regular chronological order. Not only does this lead to possible duplication when the year-by-year volumes are prepared, but also, as in the case of the China volumes, it is likely to lead to clearance problems of special difficulty due to the special nature of the undertaking. The Committee continues to feel, as stated in its 1960 report, that the delay in the publication of the China volumes is unfortunate. It does not believe, however, that these volumes should be published out of chronological order simply because clearance can be obtained for some and not for others; unless clearance for the earlier publication of the whole series in chronological order is obtained, it favors the publication of the volumes of this series along with the volumes in the regular series on an annual basis.

Retirement of G. Bernard Noble

The members of the Advisory Committee have been informed that Mr. Noble will be retiring as Director of the Historical Office at the end of this fiscal year. Mr. Noble has served as Chief, Division of Historical Policy Research, 1946-1953; Chief, Historical Division, 1953-1960; and, since 1960, as Director of the Historical Office. He has in these capacities been responsible for supervising the preparation and publication of *Foreign Relations* during a critical period in the history of the publication. Under his direction, the highest scholarly standards have been maintained. The members of the Advisory Committee wish to take this opportunity to express their deep appreciation of his work and of the complete co-operation that they have received from him in the performance of their advisory duties. His record and that of his predecessors points to the wisdom of having in this post a person of administrative capacity and a scholar of recognized competence and experience in historical research.

LLELAND M. GOODRICH

*Acting Chairman, Advisory Committee
on "Foreign Relations of the United States"*

FIFTY-SIXTH ANNUAL MEETING OF THE SOCIETY, APRIL 26-28, 1962

THE STATLER HILTON HOTEL, WASHINGTON, D. C.

PROGRAM

THURSDAY, APRIL 26, 1962

2:15 p.m.—Federal Room

PANEL I: *Disarmament*Chairman: Charles M. Spofford, *of the New York Bar*Speaker: Roger D. Fisher, *Harvard University Law School*: "Enforcement of Disarmament"Panelists: Richard J. Barnet, *United States Arms Control and Disarmament Agency*; Richard A. Falk, *Center of International Studies, Princeton University*; John T. McNaughton, *Deputy Assistant Secretary of Defense, International Security Affairs*

2:15 p.m.—South American Room

PANEL II: *The Anti-Trust Laws of the European Economic Community*Chairman: Carlyle E. Maw, *of the New York Bar*Speakers: George Nebolsine, *of the New York Bar*: "The Substantive Effect of the Anti-Trust Provisions of the Common Market and Coal and Steel Community Treaties"; Stefan A. Riesenfeld, *University of California Law School*: "The National Anti-Trust Laws of the Community Countries"

8:30 p.m.—Federal Room

Address by the Honorable Arthur H. Dean, *President of the Society*

FRIDAY, APRIL 27, 1962

9:30 a.m.—Federal Room—Business Meeting and Election of Officers

Business Meeting and Election of Officers

2:15 p.m.—Federal Room

PANEL I: *New Developments in Investment Guaranties*

Chairman: To be announced.

Speakers: Aron Broches, *General Counsel, International Bank for Reconstruction and Development*: "International Investment Guaranties—Possibilities and Problems"; Seymour J. Rubin, *General Counsel, Agency for International Development*: "Investment Guaranties—The Agency for International Development"

2:15 p.m.—South American Room

PANEL II: *United Nations Program for the Codification and Progressive Development of International Law—A Critical Appraisal*Chairman: James N. Hyde, *of the New York Bar*

Speakers: Eugeniusz Wyzner, *First Secretary, Permanent Mission of Poland to the United Nations*; Ernest L. Kerley, *Office of the Legal Adviser, Department of State*

Panelists: Maxwell Cohen, *McGill University Law School*; Joyce Guttridge, *Legal Adviser to the United Kingdom Mission to the United Nations*

5:30 p.m.—South American Room and Foyer—Informal Reception

8:30 p.m.—Federal Room

International Aviation Policy: The Warsaw Convention, the Hague Protocol, and International Limitation of Liability

Chairman: Robert Dechert, *of the Philadelphia Bar*

Speakers: Oliver J. Lissitzyn, *Columbia University*; G. Nathan Calkins, Jr., *of the District of Columbia Bar; formerly Chairman, U. S. Delegation to the Hague Conference to Amend the Warsaw Convention*

Panelists: Stanley D. Metzger, *Georgetown University Law School*; George Buschmann, *Counsel and Administrative Assistant to Senator Homer Capehart*

SATURDAY, APRIL 28, 1962

9:30 a.m.—Federal Room

The New Foreign Trade Proposals—Their Implications for International Trade Co-operation

Chairman: Richard N. Gardner, *Deputy Assistant Secretary of State for International Organization Affairs*

Panelists: The Honorable Howard C. Petersen, *Special Assistant to the President for Foreign Trade Policy*; Robert Triffin, *Professor of Economics, Yale University*

9:30 a.m.—South American Room

Student Moot—Assessments Case, International Court of Justice

Judges: The Honorable Green H. Hackworth, *former Judge of the International Court of Justice*, presiding; John G. Laylin, *of the District of Columbia Bar*; third judge to be announced

For the United States of America: Columbia Society of International Law

For the United Arab Republic: Duke International Law Society

For Belgium: Osgoode Hall Law School

6:00 p.m.—South American Room—RECEPTION

7:00 p.m.—Federal Room—ANNUAL DINNER

Presiding: The President of the Society

Speakers: His Excellency James Plimsoll, C.B.E., *Australian Ambassador to the United Nations*; General Alfred M. Gruenther, *President, American National Red Cross*

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of RICHARD B. BILDER, GORDON A. CHRISTENSON, STANLEY L. COHEN, THOMAS T. F. HUANG, SYLVIA E. NILSEN, HERBERT K. REIS, and ALFRED P. RUBIN, under the Chairmanship of ERNEST L. KERLEY, all of the Office of the Legal Adviser, Department of State, with the exception of Mr. Rubin, who is in the Department of Defense.

SOVEREIGN IMMUNITY

Foreign states—foreign governmental agencies and instrumentalities— vessel of Cuban Government entitled to sovereign immunity

The freighter *Bahia de Nipe*, carrying a cargo of sugar destined for a Russian port, was taken over on August 17, 1961, by the master and ten members of the crew and brought into the territorial waters of the United States near Lynnhaven Roads in Chesapeake Bay, Virginia. The vessel was formerly owned by Naviera Vacuba, S. A., and at the time of defection was owned and operated by Consignataria Mambisas, Division de Lineas De Navegacion Mambisas, Flota Del Estado Cubano. Presumably by reason of nationalization by Cuba, this corporation is ultimately controlled by the Cuban Government. (See *Rich v. Naviera Vacuba, S. A.*, 197 F.Supp. 710; 295 F.2d 24 (1961), reprinted below, p. 550.)

Between August 18 and 22, 1961, five libels were filed in the United States District Court for the Eastern District of Virginia against the Naviera Vacuba, S. A., the Republic of Cuba, the ship and the cargo. The Department of State, in an unclassified telegram dated August 19, 1961, to the American Embassy at Bern, Switzerland, requested the Swiss Embassy at Havana, Cuba, to notify the Government of the Republic of Cuba as follows:

USG message August 18 reported arrival Cuban motor vessel *Bahia de Nipe* at Norfolk and stated USG prepared release vessel provided GOC stated vessel its property, requested its return and undertook send sufficient personnel replace those electing remain U. S. Subsequent USG message August 18 informed names and positions crew members electing remain U. S. and suggested GOC send qualified replacements Norfolk immediately. First Mate *Bahia de Nipe* who elected remain with vessel telephonically requested authorization August 18 sail vessel with remaining crew to Habana but did not receive authorization until afternoon August 19. Meanwhile, claimants against *Bahia de Nipe*, its cargo, agents, and owners have attempted bring judicial proceedings against vessel in U. S. District Court, Eastern District, Virginia. Vessel's departure postponed pursuant direction of court pending further proceedings.

U. S. has received through Swiss Embassy GOC message August 19 stating vessel is GOC property and requesting Embassy's good offices

for purpose obtaining vessel's return. In view situation which now has developed advise whether GOC asserts ship and cargo are entitled to sovereign immunity and if so basis therefor.

The American Embassy at Bern, Switzerland, in an unclassified telegram dated August 21, 1961, reported the text of the following note from the Cuban Foreign Minister:

This Ministry reiterates to your Embassy that both the vessel BAHIA DE NIPE and the cargo it is carrying are the property of the Cuban state.

Therefore, in consonance with the principles of international law, and in accordance with the reciprocal treatment which it is willing to grant in similar circumstances, the Revolutionary Government of Cuba requests, through your Embassy, that the Government of the United States recognize its right of sovereign immunity with respect to the vessel BAHIA DE NIPE and the cargo which it is carrying.

In connection with the proceedings pending in the United States District Court for the Eastern District of Virginia, the Secretary of State wrote the following three letters to the Attorney General for transmittal to the court:

(1) Letter dated August 19, 1961, expressing the opinion that release of the vessel *Bahia de Nipe* would avoid further disturbance of United States foreign relations:

In response to your inquiry to the Department of State concerning the Cuban motor vessel *Bahia de Nipe*, now at anchor at Norfolk, this is to inform you that it has been determined that the release of this vessel would avoid further disturbance to our international relations in the premises.

(2) Letter dated August 20, 1961, concerning the status of the vessel *Bahia de Nipe* and cargo and United States international obligations involved:

I understand that the Cuban vessel *Bahia de Nipe* now at Norfolk is owned by the Government of Cuba and is employed in the carriage for the Government of Cuba of a cargo of sugar which is the property of the Government of Cuba.

Heretofore, assurances were given by the United States that the vessel would be released in the event that the Government of Cuba declared the vessel to be its property, requested its return, and provided sufficient properly identified personnel to replace those electing to remain in the United States. These conditions have now been fulfilled.

In the circumstances, it is my opinion that the prompt release of the vessel is necessary to secure the observance of the rights and obligations of the United States.

(3) Letter dated August 21, 1961, recognizing and allowing claim of sovereign immunity by the Cuban Government:

Reference is made to the Cuban motor vessel *Bahia de Nipe* currently subject of proceedings in the United States District Court for the Eastern District of Virginia.

The Government of the United States has received a communication from the Government of Cuba dated August 20, 1961 and forwarded through the Government of Switzerland, stating that said motor vessel *Bahia de Nipe* and its cargo are property of the Government of Cuba, and requesting that said vessel and cargo be granted immunity from the jurisdiction of the United States courts.

This is to inform you that the Department of State recognizes and allows the claim of the Government of Cuba for immunity of said vessel and its cargo from the jurisdiction of the United States courts.

Accordingly, you are requested to instruct the appropriate United States attorney to file with the United States District Court for the Eastern District of Virginia a suggestion of immunity in this case.

Foreign states—no advance opinion by Department of State on immunity of property of foreign state from execution

On January 6, 1962, a patrol vessel, the *Las Villas*, belonging to the Cuban Government, was brought into Key West, Florida, at gunpoint by the captain and two members of the crew who sought political asylum. Attorneys for judgment creditors holding judgments against the Cuban Government sought to attach the vessel in execution of the judgments. The following telegram dated January 9, 1962, was sent to the Secretary of State:

Pursuant to authorization received from Washington DC it is confirmed by the US Coastguard Key West Florida that a certain Cuban vessel to wit *Las Villas* 110 foot patrol boat is released to the Sheriff of Key West Florida. In re American judgment creditors of the Republic of Cuba urgent your Department advise by return wire collect if the State Dept will seek to intervene by suggestion in behalf of Cuba against American judgment creditors in state courts of Florida in re said vessel.

In response thereto the Department of State sent the following telegram dated January 10, 1962:

It is contrary to the Department's practice to express view concerning immunity from execution of foreign Government property until request is made by foreign Government concerned for it to recognize such immunity. However, you are informed that it is Department's view that under international law property of a foreign sovereign is immune from execution. (Exchange of telegrams on file in Office of the Legal Adviser, Department of State.)

Foreign states—immunity of property of foreign governments from execution

A judgment creditor, holding an outstanding judgment obtained in a court in Florida against the Cuban Air Force, sought execution upon two planes belonging to an instrumentality of the Government of Cuba which had "defected" and had been brought into Florida. In response to a claim of sovereign immunity from execution presented by the Cuban Government through the Czechoslovak Ambassador, the Department of State requested that the Attorney General instruct the appropriate United States Attorney that the United States Government recognized the immunity claimed by the Republic of Cuba. That letter stated, in part, as follows:

It does not appear to be contested that the plane in question was the property of the Cuban Government when it arrived in Florida. As has been previously indicated, it is the Department's view that under international law property of a foreign sovereign is immune from execution, and attention has been called to the following precedents for not permitting execution against the property of a foreign government: *Dexter & Carpenter, Inc. v. Kunglig Järnvägsstyrelsen*, 43 F.2d 705 (2d Cir., 1930) cert. den. 282 U.S. 896 (1931); followed in *Bradford v. Chase National Bank*, 24 F. Supp. 28, 38 (D.C.S.D. N.Y. 1938), affd., sub nom. *Berger v. Chase National Bank*, 105 F. 2d 1001 (2d Cir., 1939), 309 U.S. 632 (1940); *Mexico v. Rask*, 118 Cal. App. 21, 4 P.2d 981 (4th Dist. 1931). See also *Weilamann v. Chase Manhattan Bank*, 192 N.Y. S.2d 469 (1959); *Petition of Recht*, 60 F. Supp. 193 (1945).

Therefore, in view of the note from the Embassy of the Czechoslovak Socialist Republic on behalf of the Government of the Republic of Cuba, and for the reasons stated, it would be appreciated if the appropriate United States Attorney were instructed to appear before the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, to present to the Court the views of this Department and to inform the Court that the Government of the United States recognizes and allows the claim of the Republic of Cuba in this case that the attached plane or any proceeds thereof are immune from execution. (Letter on file in Office of the Legal Adviser, dated Dec. 28, 1961.)

*Foreign governmental agencies and instrumentalities—British Admiralty
Naval Auxiliary immune from administrative fine **

The ship *S.S. Fort Rosalie*, owned and operated by the British Admiralty as a naval ship of the Royal Fleet Auxiliary engaged in military functions, arrived at the port of New York on September 17, 1960. Four members of the crew deserted without landing permits. The District Director of the Immigration Service at New York held the agents of the vessel liable to administrative penalties. It was contended that the fines were in fact levied on the British Admiralty, which was ultimately responsible for payment. The defense of sovereign immunity of the British Government was interposed. Upon appeal to the Board of Immigration Appeals it was held that the fines should not be imposed. On the defense of foreign sovereign immunity the judgment, dated July 18, 1961, stated, *inter alia*:

The basic issue here is whether the doctrine of sovereign immunity relieves these agents of liability to the fines. We hold that it does, for the reasons hereinafter stated.

The crucial question to be answered in resolving this issue is whether the vessel involved is employed in private commercial enterprise in competition with vessels of other carriers similarly engaged, or whether it is government-owned and being operated as a public vessel. (*Matter of Plane "N-6104-C,"* 6 I&N Dec. 819.) But a letter from Her Majesty's Minister (Commercial), British Embassy, Washington, D.C. dated June 9, 1961, stating that at all material times this vessel was operating in the service of the Admiralty as a naval ship engaged in

* This is an administrative decision by the Board of Immigration Appeals and does not necessarily represent the view of the United States Government that under international law, in the circumstances involved, there is immunity from liability.

the performance of military functions of a classified nature clearly establishes that it is the latter type of situation confronting us here. The District Director's opinion clearly concedes this to be the fact. Therefore, the appeal will be sustained.

The foregoing definitely distinguishes this case from that of the SS "*Atlantida*" (2 I&N Dec. 571) which involved a vessel owned by the Government of the United States (War Shipping Administration) and being operated on bare-boat or time charter. Also, in that case we specifically found that the United States Government was not obligated to indemnify the agents for all immigration fines and penalties, whereas here the letter of Her Majesty's Minister, *supra*, unequivocally sets forth that the Government of the United Kingdom is responsible for reimbursement of fines paid by these agents in connection with the vessel here involved.

This record does not show that the crewmen here involved were civil servants of Her Majesty's Government (it only indicates their ratings aboard the ship) as in the case of the U.S. Naval Ship "*General Mason M. Patrick*" (5 I&N Dec. 572). But careful consideration of the opinion in that case reveals that the basis for our decision not to fine was the public (non-commercial) purpose of the vessel's operation rather than the status of its personnel.

The present case more closely parallels that of the SS "*Wave Sovereign*" (5 I&N Dec. 336), which was a Royal Fleet auxiliary vessel operating under orders of the British Admiralty and handled in this country by the very agents here involved. We did therein rule that said agents were not liable to fine because they had not been put on notice to detain and deport the crewmen concerned, as was required under the then controlling legislation (Section 20 of the Immigration Act of May 26, 1924; former 8 USC § 167). But we thereafter proceeded, at the request of counsel, to answer in the affirmative the second question of whether the Master of a Royal Fleet auxiliary vessel operating under the orders of the British Admiralty was exempt from liability to fine by operation of the doctrine of sovereign immunity. The reasons for that response (see pp. 338, 339, 340) are closely dispositive of the present matter. The only further comment required on the point is that there is no reason to distinguish the cases on the ground that the former involved the vessel's Master whereas we are here concerned with its agents. The statute under consideration makes no distinction between the two.

ORDER: It is ordered that the appeal be sustained and that the fines be not imposed. (Copy of judgment dated July 18, 1961, on file in Office of the Legal Adviser, Department of State.)

Foreign governmental agencies and instrumentalities—no opinions in vacuo by Department of State on foreign sovereign immunity

In a case pending in a local court involving the United Arab Republic as a defendant, an order was entered vacating a default judgment against that state, and the matter was continued for consideration of the question of sovereign immunity from suit and whether that state's Consul General was a proper person for service of process. An attorney, as *amicus curiae*, requested an opinion from the Secretary of State on the question of sovereign immunity. The Department of State in reply stated in its letter, dated May 12, 1961:

It is contrary to the general policy of the Department to make a decision regarding foreign sovereign immunity in a case the facts of

which do not call for such decision. In this connection, it is noted that there is pending before the Court an application for a holding that the purported service of process by the Marshal on April 27, 1959 is ineffective to bring the United Arab Republic within the jurisdiction of the Court, and that decision on that question has been withheld pending further hearing by the Court of May 17, 1961.

Thus, it appears that any decision of the Department of State that it does not recognize immunity of the United Arab Republic as a foreign sovereign in this case would apparently not prevent dismissal of the suit, if the Court decided that under the rules of the forum there is no jurisdiction over the United Arab Republic because of ineffective service of process. See *Oster v. Dominion of Canada*, 144 Fed. Supp. 746.

In the above circumstances the Department feels that it should not make a decision on the question of sovereign immunity at this time. If, however, the Court were to rule that it has jurisdiction under the rules of the forum, the Department would make a decision on the immunity matter either at the request of the Court or of the United Arab Republic. (Dept. of State, MS file 601.8661/4-2761, May 12, 1961.)

Foreign states—immunity of real property from execution

In response to a claim of sovereign immunity from execution for two parcels of real property situated in Florida made by the Cuban Government, represented by the Czechoslovak Ambassador, the Department of State wrote a letter, dated December 13, 1961, to the Attorney General, stating in part as follows:

Since the ownership of the two pieces of property in question by the Cuban Government does not appear to be disputed, the Department recognizes and allows the sovereign immunity of the property from execution, and you are requested to issue appropriate instructions to the United States Attorney in the jurisdiction indicated to file a suggestion of immunity with the court. (Letter dated December 13, 1961, on file in the Office of the Legal Adviser, Department of State.)

Heads of foreign states—offenses against—reciprocity

The Embassy of Italy, in a note to the Department of State, dated October 25, 1961, informed the Department that an Italian national had been indicted in Bologna for certain remarks derogatory to the President of the United States in violation of Article 297 of the Italian Penal Code, which relates to "offenses to the honor of Heads of Foreign States." The Embassy noted that applicability of Article 297 of the Code is based on reciprocity, and inquired whether an equivalent provision exists in United States laws.

In a note to the Italian Embassy, dated November 15, 1961, the Department of State replied in part as follows:

The Department has now been informed by the Department of Justice that Federal laws relating to foreign relations and the protection to be afforded foreign officials have been examined and that no provisions have been found comparable to Article 297 of the Italian Penal Code. While the determination as to the application of Articles 297 . . . of the Italian Code must of course be made by the appro-

priate Italian officials on the basis of all of the circumstances of the case, it is the view of the Department of Justice that no provision comparable to Article 297 exists in the laws of the United States. (Dept. of State, MS file 711.34/10-2561, Nov. 17, 1961.)

Foreign governmental agencies and instrumentalities—suits against the United States Government and its agencies in foreign courts

The Department of State circulated the following instruction, dated June 16, 1961, to certain American diplomatic posts on the subject of suits against the United States Government and its agencies in foreign courts:

From time to time suits are filed in foreign courts against the United States Government and its agencies such as Army, Navy, and Air bases, missions and units, Post and Naval exchanges, Officers' and NCO clubs and messes, MAAAG's, USOM's, USIS, USIA, ICA, FBO, Embassies, Consulates, etc. Such United States agencies are not legal persons under United States law and such suits are in reality against the United States Government.

Suits are also filed from time to time against individual United States officers, officials or employees. If such suits are based upon the individual defendant's private acts, the suit is not within the purview of this instruction. But past experience has been that usually such suits are based upon the individual defendant's official acts.

Occasionally notice of the commencement of suit ("service of process" in U. S. law) has been mailed directly to the Department of Justice and has not been timely received by the attorneys handling such cases. Sometimes notice of suit has taken the circuitous route of being sent by the foreign court to its Foreign Office for forwarding through its Embassy in Washington to the Department of State. However, in most cases notice of commencement of legal action has been delivered directly to the United States Embassy or Consulate or local office of the United States agency concerned or to local United States officials or employees.

In several such cases the sovereign immunity of the United States has been claimed through diplomatic channels without authorization from the Department and/or the notice of suit has been returned without informing Washington, with the result that default judgments have been entered against the United States Government or its agency concerned.

The Departments of State and Justice have for some time been considering the problem of developing uniform procedures for the purpose of: (1) Insuring adequate and timely notice of suits against the United States, its agencies, and employees growing out of their official acts; and (2) to bring into focus for foreign courts the lack of judicial personality of United States Government agencies.

Action requested: Addressee missions are requested to informally sound out along the following lines appropriate officials of the government to which accredited:

"The United States Government has for some time been considering the problem of developing a uniform procedure that will assure it of adequate and timely notice of suits in the courts of foreign countries against the United States, or its agencies, and officials growing out of official acts. In order to achieve the foregoing objective, the United States Government would like to propose that the appropriate local authorities be instructed not to serve notices of legal action upon United

States Government agencies, officers, officials or employees, but rather that all such notices be served upon the United States Embassy through the Foreign Office.

"If the foregoing procedure is acceptable, it must be upon the express understanding that the United States Government does not thereby waive any defense to the legal action other than the defense of lack of notice. In other words, the United States Government would refrain from challenging the jurisdiction of the court on the ground of lack of proper service of notice, but the United States Government would remain free, for example, to claim sovereign immunity through diplomatic channels or before the court, as it may deem appropriate." (Unclassified instruction, dated June 16, 1961.)

Foreign governmental agencies and instrumentalities—privileges and immunities—legal status of United States diplomatic mission employees' associations abroad

In response to a request from an American embassy abroad, requesting the Department of State to re-examine its policy with respect to the extension of sovereign immunity to United States employees' associations' activities at United States diplomatic missions overseas, on the ground that such associations are instrumentalities of the United States Government, the Department of State, in an instruction dated September 15, 1961, stated, *inter alia*:

. . . it is immaterial whether the Association is an instrumentality of the United States Government if it is engaged in commercial or private type activities as distinguished from activities of a governmental character. The Department follows the restrictive theory of sovereign immunity, and it is its practice to deny claims of sovereign immunity made by foreign governments in behalf of themselves or their agencies engaged in activities of a private or commercial character. Furthermore, it is the practice not to assert claims of sovereign immunity in similar cases in foreign courts in which the United States or its agencies may be parties defendant. In this connection, it should be pointed out for the Embassy's information that it is not the practice of the Department to claim sovereign immunity in behalf of non-appropriated fund activities of the military services, such as post exchanges, commissaries, clubs, etc. The Department is aware that attorneys representing defendants in such cases have sometimes asserted sovereign immunity in their behalf. This has not been done with the Department's approval, and this practice is under review.

As indicated in prior instructions . . . the Department should be promptly notified of the institution of all suits against the United States Government and its agencies. The Embassy should then await appropriate instructions before asserting any claims of sovereign immunity. (Unclassified instruction, dated September 15, 1961.)

DIPLOMATIC PRIVILEGES AND IMMUNITIES

Exemption from judicial process—USOM personnel overseas with assimilated diplomatic status

In response to an inquiry from the American Embassy in La Paz, Bolivia, concerning the privileges and immunities of American employees of United States Operation's Mission (USOM) who have "assimilated diplomatic

status" under the relevant agreement, the Department of State sent the following instruction, dated October 28, 1960:

The Embassy in the referenced despatch correctly notes that under the existing technical cooperation Agreements between the United States and Bolivia full diplomatic privileges and immunities are not afforded to USOM's American employees. The actual privileges are most concisely stated in paragraph 6 of the Agreement effected by an exchange of notes signed at La Paz on August 27, 1953, and January 15, 1954 (TIAS 2944), which is an embodiment of common provisions of agreements entered into pursuant to the Point Four General Agreement for Technical Cooperation between the United States of America and Bolivia signed at La Paz on March 14, 1951 (TIAS 2221).

In the event of legal action being taken against such USOM employees based on their official acts, there would be no basis for immunity from the jurisdiction of local judicial agencies unless such employees have been accredited diplomatically or are entitled to such immunity by international agreement. However, the fact of "official act" may be pleaded as a defense against liability. All such cases should be reported to the Department for determination as to what steps the Department can take in aid of such a defense. There is, of course, no legal basis for excusing USOM employees from whatever personal liability attaches as a result of acts outside official duty. (Unclassified Department of State instruction, October 28, 1960.)

INTERNATIONAL ORGANIZATIONS

Applicability of zoning regulations

A letter from the General Counsel of the National Capital Planning Commission, Washington, D. C., dated December 12, 1961, requested the views of the Department of State concerning the applicability of zoning regulations and related statutes to international organizations. In a letter dated December 20, 1961, the Department replied, in part, as follows:

This problem has come up before in the context of applying zoning regulations to buildings constructed by foreign governments. In response to a query from the Board of Commissioners of the District of Columbia, the Department of State took the position, in 1957, that there was no principle of international law or practice which would require the District of Columbia to permit foreign governments to construct new buildings without complying with applicable building and zoning laws and regulations. This same principle would apply to international organizations. (Exchange of letters on file in Office of the Legal Adviser.)

United Nations—travel of certain delegations

A letter from a private citizen to the Department of State, dated November 13, 1961, raised questions concerning travel within the United States by members of certain delegations to the United Nations. In a letter dated December 20, 1961, the Department of State replied, in part, as follows:

In your letter you asked which delegations to the United Nations have been restricted in regard to travel within the United States. The restrictions to which you referred apply to all personnel assigned to

the Permanent Missions of Albania, Hungary, Rumania and the Union of Soviet Socialist Republics. A similar restriction applies to the non-diplomatic personnel of the Permanent Mission of Bulgaria. These restrictions require that the delegates concerned notify the Department of State and obtain permission to travel prior to commencing travel outside a limited area in New York City. For the purpose of the restriction this area has been defined as lying within a 25 mile radius of Columbus Circle, New York, New York.

The restrictions on these mission representatives are reciprocal in nature and were imposed as a result of restrictions placed on United States diplomatic personnel in the countries the missions represent. The legal basis for the imposition of such restrictions is the right of sovereign states to control completely the access of foreign diplomatic personnel to their territory. The Headquarters Agreement between the United States and the United Nations does not limit this right except with regard to access to the Headquarters District and immediate vicinity thereof. In all cases the restrictions imposed are compatible with this requirement.

The restrictions are not made a part of the visas issued to representatives of permanent missions and delegations to the United Nations, but rather the respective missions are informed by formal note of the imposed restriction and of the requirements and procedures for official notification to the Department of State. Such notifications are subject to approval by the Department. (Exchange of letters on file in the Office of the Legal Adviser.)

TREATIES

Inter-American Consular Agents Convention of 1928—withdrawal of reservations by Dominican Republic

Because of reservations contained in the instrument of ratification deposited by the Dominican Republic in 1932 with respect to the Inter-American Consular Agents Convention, signed at Havana on February 20, 1928 (Treaty Series, No. 843; 47 Stat. 1976; 22 A.J.I.L. Supp. 147 (1928)), the Government of the United States notified the Director General of the Pan American Union, depositary, that the convention as ratified by the Dominican Republic was not regarded as being in effect between the United States and the Dominican Republic.

The United States Government was notified that on October 5, 1961, the Dominican Representative on the Council of the Organization of American States informed the General Secretariat that the Government of the Dominican Republic withdrew and declared to be of no effect its reservations to Articles 12, 15, 16, 18, 20, and 21 of the convention. On November 16, 1961, in accordance with instructions given by the Department of State, the United States Representative on the Council notified the General Secretariat:

It appears that the Dominican Republic has withdrawn all of its reservations to which the United States Government took exception. . . .

In view of the withdrawal of the above-mentioned reservations by the Dominican Republic, and as of October 5, 1961, the date on which the General Secretariat was informed of such withdrawal, the Government of the United States of America regards the above-mentioned

Convention on Consular Agents to be in effect between the United States of America and the Dominican Republic. (Dept. of State, MS file 396.41/11-761, November 7, 1961.)

Conditional notice of withdrawal by a party

The Government of Norway has given notice of withdrawal from the International Convention for the Regulation of Whaling signed at Washington December 2, 1946 (62 Stat. 1716; Treaties and Other International Acts Series, No. 1849), in accordance with the provisions of Article XI of the convention. The notice is, however, a conditional one and may be canceled prior to the time when it would take effect pursuant to the convention. The conditions of the notice are set forth in a note, dated January 8, 1962, from the Secretary of State to the Chiefs of Missions of the governments concerned with the convention, which note reads in part as follows:

In performance of the duties of the Government of the United States of America as depositary for the Convention, the Secretary has the honor to transmit herewith a copy of note No. 329 dated December 29, 1961 from the Ambassador of Norway to the Secretary of State, giving notice of the withdrawal of the Government of Norway from the International Convention for the Regulation of Whaling, in accordance with the provisions of Article XI thereof.

It will be noted that it is stated in the aforementioned note that "The Norwegian Government wishes to emphasize that its primary objective remains the conclusion of a quota agreement between the five nations engaged in Pelagic Whaling in the Antarctic" and that "In the event that such an agreement is signed by Norway, The Netherlands, Japan, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland prior to July 1st 1962, the Norwegian Government will cancel this notice of withdrawal."

The notice of withdrawal was received by the Government of the United States of America on December 29, 1961. In accordance with the provisions of Article XI thereof, the Convention shall cease to be in force with respect to Norway on June 30, 1962, unless the aforesaid notice should be cancelled prior to that time. (Dept. of State, MS file 398.246/1-862, January 8, 1962.)

INTERNATIONAL AGREEMENTS

Articles of Agreement of the International Bank for Reconstruction and Development—membership—readmission of Dominican Republic

Article XI of the Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature at Washington on December 27, 1945 (60 Stat. 1440; Treaties and Other International Acts Series, No. 1502), sets forth the requirements which must be fulfilled by a government to become a party to the Agreement and a member of the Bank. Included among the requirements are those of signature of the Agreement and deposit with the Government of the United States of America of an instrument stating that the government concerned has accepted the Agreement in accordance with its law and has taken all steps necessary to enable it to carry out its obligations under the Agreement.

The Agreement provides, in Article VI, for withdrawal of a member from the Bank; however, the Agreement contains no provisions specifically referring to readmission of such a member.

The procedure whereby the Dominican Republic was readmitted to membership in the Bank is set forth in a note, dated October 27, 1961, from the Secretary of State to the Chiefs of Missions of the governments concerned with the Agreement. The note reads in part as follows:

It will be recalled that the Articles of Agreement of the International Bank for Reconstruction and Development were signed, and an instrument of acceptance thereof deposited, in behalf of the Government of the Dominican Republic on December 28, 1945, the Dominican Republic thus becoming one of the original members of the Bank.

On December 1, 1960 the Government of the Dominican Republic withdrew from membership in the Bank by notifying the Bank to that effect, pursuant to the provisions of Article VI, Section 1, of the Articles of Agreement.

The Board of Governors of the International Bank for Reconstruction and Development adopted a resolution on September 7, 1961 setting forth certain terms and conditions subject to which the Dominican Republic should be readmitted to membership in the Bank, among which was the following:

"The Dominican Republic shall deposit with the Government of the United States of America an instrument stating that, in accordance with its law, the Dominican Republic:

- (i) reconfirms its signature to the Articles of Agreement of the Bank;
- (ii) has accepted all the provisions of this Resolution;
- (iii) reconfirms the Instrument of Acceptance filed by it with the Government of the United States on December 28, 1945; and
- (iv) has taken all steps necessary to enable it to carry out its obligations under said Articles and this Resolution."

The Secretary of State now has the honor to inform the Chiefs of Mission that on September 18, 1961 an instrument of acceptance conforming to the aforementioned requirements was deposited with the Government of the United States of America by the Government of the Dominican Republic. Having complied with the conditions stipulated by the Bank, the Dominican Republic again became a party to the Articles of Agreement and a member of the International Bank for Reconstruction and Development on September 18, 1961. (Dept. of State, MS file 398.13/10-2761, October 27, 1961.)

PASSPORTS

Issuance—denial to members of Communist organizations and certain other persons—administrative procedures for hearing and appeal

The following regulations were published January 12, 1962:

§51.135 Denial of passports to members of Communist organizations.

A passport shall not be issued to, or renewed for, any individual who the issuing officer knows or has reason to believe is a member of a Communist organization registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950 as amended. (50 U.S.C., sec. 786.)

§51.136 Limitations on issuance of passports to certain other persons.

In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

§51.137 Tentative denial of passports and available administrative procedures.

Any person whose application for a passport or renewal of a passport has been tentatively denied under §51.135 or §51.136 shall be entitled to a notification in writing of the tentative denial. The notification shall set forth clearly and concisely the specific reasons for the denial and the procedures for review available to the applicant.

§51.138 Procedure for review of tentative denial.

(a) A person whose application for a passport or renewal of a passport has been tentatively denied in accordance with §51.135 or §51.136 shall be entitled, upon request, and before the denial becomes final, to present to the Passport Office any information he deems relevant to support his application. He shall be entitled to appear in person before a Hearing Officer in the Passport Office; to be represented by counsel; to present evidence; to be informed of the evidence upon which the Passport Office relied as a basis for the tentative denial; to be informed of the source of such evidence; and to confront and cross-examine adverse witnesses.

(b) The applicant shall, upon request by the Hearing Officer, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Office shall review the record and advise the applicant of its decision. In making its decision, the Passport Office shall not take into consideration confidential security information that is not made available to the applicant in accordance with paragraph (a) of this section. If the decision is adverse to the applicant, he shall be notified in writing, and the notification shall state the reasons for the decision. Such notification shall also inform the applicant of his right to appeal to the Board of Passport Appeals under §51.139.

§51.139 Appeal by passport applicant.

In the event of a decision adverse to the applicant, he shall be entitled within thirty days after receipt of notice of such decision to appeal his case to the Board of Passport Appeals provided for in §51.150.

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§51.155 Duty of Board to advise Secretary of State on action for disposition of appealed cases.

It shall be the duty of the Board, on the basis of the evidence on the record, to advise the Secretary of the action it finds necessary and proper

to the disposition of the cases appealed to it, and to this end the Board may first call for clarification of the record; make further investigation; or take other action consistent with its duties.

§51.156 Basis for findings of fact by the Board.

In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§51.135 to 51.154, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case. In determining whether there is a preponderance of evidence supporting the denial of a passport, the Board shall consider the entire record before it. The Board shall not take into consideration any confidential security information which is not part of the record.

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§51.162 Hearings.

The record of proceedings held under §51.138 shall be made available to the applicant in connection with his appeal to the Board. The applicant may appear and testify in his own behalf, be represented by counsel, present witnesses and offer other evidence in his own behalf. The Passport Office may also present witnesses and offer other evidence. The applicant and witnesses may be examined by any member of the Board or by counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such deposition may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths and affirmations for purposes of the depositions. The applicant shall be entitled to be informed of all the evidence before the Board and of the source of such evidence, and shall be entitled to confront and cross-examine any adverse witness.

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§51.167 Notice of decision.

The Board shall communicate to the Secretary of State the action that it recommends under §51.155. In taking action upon such recommendation of the Board, the Secretary shall not take into consideration any confidential security information which is not part of the record. The decision of the Secretary shall be promptly communicated in writing to the applicant. (27 Fed. Reg. 344-45 (1962).)

JUDICIAL DECISIONS

BY COVEY OLIVER

Of the Board of Editors

Protocol on the Privileges and Immunities of the European Coal and Steel Community—Articles 11(b) and 16—basis and scope of Court's jurisdiction—admissibility of appeal by Community official challenging validity of Belgian tax—right of official to file appeal in his own name—exhaustion of Community and national remedies—exemption from national taxation defined—indirect tax on Community salary violation of Protocol

HUMBLET v. BELGIUM.¹ Case No. 6-60, 6 Recueil de la Jurisprudence de la Cour 1125, 6 Sammlung der Rechtsprechung des Gerichtshofes 1163 (1960).

Court of Justice of the European Communities. Judgment of Dec. 16, 1960.

The plaintiff, a Belgian citizen and official of the European Coal and Steel Community, lodged this appeal against Belgium in the Court of Justice of the European Communities, alleging that Belgium had violated the Protocol on the Privileges and Immunities of the E.C.S.C. by considering his Community salary in determining the Belgian supplementary tax rate. Under Belgian revenue laws the supplementary tax (*impôt complémentaire*) is imposed in addition to various taxes on specific income. It is a progressively graduated tax assessed against the joint income of the spouses, irrespective of their individual earnings. The Belgian tax authorities took the position that, while plaintiff's salary was tax exempt, it had to be considered in determining the tax rate upon "other taxable income" subject to the supplementary tax. In the plaintiff's case, the "other taxable income" referred to income received by his wife, who was not an official of the Community.

When the plaintiff, in express reliance on the Protocol on Privileges and Immunities, refused to declare his Community earnings, the Belgian tax authorities determined the supplementary tax rate on the basis of their own estimate of the plaintiff's Community salary. Having exhausted all Belgian administrative, but not judicial, remedies, the plaintiff appealed to the Community Court. He requested the Court to declare that Belgium

¹ Translated from the German, digest of facts prepared, and opinion of the Court excerpted by Thomas Buergenthal, LL.B.; LL.M., Instructor in Legal Method, Law School, University of Pennsylvania.

had violated Article 11(b) of the Protocol.² In addition, he sought an annulment of the tax assessment and an order compelling Belgium to pay him all sums with interest and cost on the amounts paid or to be paid by him to the Belgian tax authorities.

1. *Basis and Scope of Court's Jurisdiction*

Under Article 16 of the Protocol on the Privileges and Immunities of the European Coal and Steel Community³ in conjunction with Article 43 of E.C.S.C. Treaty,⁴ the Court has jurisdiction over all disputes concerning the interpretation or application of the Protocol. The defendant asserts, however, that the Court lacks jurisdiction in this case, since the dispute does not involve the interpretation of the Protocol but rather the proper application of Belgian law to the income of plaintiff's wife who herself is not an official of the Community.

The Court cannot accept this argument. In reality, the question to be resolved in the instant case involves the determination of whether Article 11(b) of the Protocol permits member States to consider the salary an official receives from the Community in determining the tax rate to be imposed upon the wife's income. Besides, the defendant in its answer has itself recognized this to be the issue. The question to be decided consequently involves the interpretation or application of the Protocol, specifically its Article 11(b).

Next the Court proceeded to an examination of its power to annul legislative or administrative enactments of a member state, concluding that it lacked such power:

The E.C.S.C. Treaty is governed by the principle of strict separation of powers between the institutions of the Community and of the member States. Community law does not grant to the institutions of the Community the power to annul legislative or administrative acts of member States. Thus, if the High Authority believes, for example, that a member State has violated the Treaty by passing or retaining legislation in conflict with the Treaty, it lacks the power to annul or void these provisions. Instead, the High Authority can only proceed in accordance with Article 88 of the Treaty by noting its violation and in conjunction therewith instituting the proceedings therein provided for, in order that the State involved repeal the acts in question.

The same is true of the Court which, as the guardian of Community law under Article 31 of the Treaty, has jurisdiction based upon Article 16 of the Protocol to decide any dispute involving its interpretation or application. It cannot, however, by its own authority void or annul laws or administrative acts of member States. . . .

Rejecting the argument advanced by the plaintiff that the protection derived from the privileges and immunities would be meaningless and the judgment of the Court reduced to a mere advisory opinion, if the Court

² Art. 11(b) provides: "On the territory of each of the member States, and regardless of their nationality, the members of the High Authority and officials of the Community: (b) shall be exempt from any tax on salaries or emoluments paid by the Community."

³ Art. 16 provides: "Any dispute concerning the interpretation or application of the present Protocol shall be submitted to the Court."

⁴ Art. 43(1) states that "the Court shall exercise jurisdiction in any other case provided for in an additional provision of this Treaty."

could not annul illegal acts of national administrations and compel a delinquent state to pay damages for injuries sustained thereby, the Court pointed out:

If the Court declares in its judgment that an administrative or legislative act of a member State violates Community law, then this State is required under Article 86 of the E.C.S.C. Treaty⁵ to repeal this act and possibly to remedy the illegal consequences caused by it. This obligation follows from the Treaty and the Protocol, which have the force of law within the territories of the member States as a result of their ratification and precedence over national law. If the Court should in this case declare the tax assessment to be illegal, the Belgian government would be required to take the necessary steps to bring about its annulment and to compensate the plaintiff for such sums as may have been improperly collected.

2. *Admissibility of the Appeal*

The Court examined this question by asking, first, whether a private party was authorized under Article 16 of the Protocol to file such an appeal in his own name, and, secondly, whether he could do so without having exhausted the legal remedies available both under Community and national law:

An analysis of the relevant provisions [of the Protocol] leads to the following conclusion:

Since the authors of the Protocol provided for a right of appeal under Article 16, they apparently intended thereby to assure observance of the privileges and immunities provided for in the Protocol not only in the interest of the Community and its institutions, but also in the interest of those persons who were made the subjects of these privileges and immunities. On the other hand, it was apparently also intended to benefit the member States and their administrative authorities, who must be protected against a too sweeping interpretation of the privileges and immunities. It appears consequently entirely permissible that an official of the Community institute an appeal in the Community Court against his own government.

* * * * *

While the privileges and immunities were granted "solely in the interest of the Community," it should not be overlooked that they were expressly granted "to officials of the institutions of the Community."⁶ The fact that the privileges, immunities and conveniences are designed to serve the public interest of the Community, clearly justifies the powers vested in the High Authority to determine the classes of officials to which the Protocol shall apply (Article 12), or, if necessary, to waive the immunity of an official (Article 13(b)). But this does not mean that these privileges were granted to the Community rather than to the officials. This construction is, furthermore, justified by the wording of the above-mentioned provisions.

⁵ Art. 86(1) provides: "The member States bind themselves to take any appropriate general and particular measures to ensure the execution of their obligations under the decisions and recommendations of the institutions of the Community, and to facilitate the accomplishment of the Community's objectives."

⁶ Protocol on Privileges and Immunities, Art. 13(1).

It follows that the Protocol grants to the persons therein mentioned a personal right [*subjektives Recht*] protected by the right of appeal provided for in Article 16 of the Protocol.

Having established the right of an official to file the appeal in his own name, the court turned to the question of exhaustion of remedies:

Article 16 of the Protocol, according to which "any dispute concerning the interpretation or application of the . . . Protocol shall be submitted to the Court," contains no reference to any procedure, which might have to be instituted prior to the filing of an appeal with the Community Court. Anyone who believes himself aggrieved by an improper interpretation or application of this Protocol may, according to the wording of this Article, submit the dispute to the Court. It follows that officials of the Community are authorized under Article 16 to appeal to the Court against their national government without having previously proceeded in accordance with any other procedure provided for under provisions of Community or domestic law.

While acknowledging that it was a fundamental principle of the E.C.S.C. Treaty that private parties could not appeal directly to the Court against a treaty violation by a member state, and that it was up to the High Authority to proceed in such a case in accordance with Article 88 of the treaty, the Court pointed out that

[I]t could surely not have escaped the authors of the Treaty that the "disputes," which would arise from the "interpretation or application" of the Protocol would consist mainly of differences of opinion between the persons to whom the Protocol grants certain privileges and immunities on the one hand, and the authorities who have an interest in a narrow interpretation of these privileges and immunities on the other. Viewed in this light, the parties to the instant litigation would certainly seem to represent the typical parties to the "dispute" within the meaning of Article 16.

* * * * *

In addition, it must be determined whether the appeal is inadmissible, because the plaintiff may not have exhausted the administrative and judicial remedies available to him under the law of his home country.

In this connection, the Court found that the plaintiff had exhausted his administrative remedies under Belgian law but not the available judicial remedies:

The Treaties establishing the European Communities have not placed the Community Court above national judicial tribunals in the sense that the decisions of these courts can be appealed to the Community Court. The Community Court, on the other hand, has exclusive jurisdiction as far as the interpretation of the Protocol is concerned. As already indicated, the Treaties are based on the principle of strict separation of jurisdiction between the Community Court on the one hand, and national judicial tribunals on the other. It follows therefrom that any overlapping of these separate jurisdictions is precluded. Once the Court has jurisdiction, there can be no talk of prior "exhaustion" of local remedies, since this would amount to the submission for resolution of one and the same legal dispute first to national courts and subsequently to the Community Court.

Since the Court has jurisdiction to decide the instant case within the limits indicated above, the plaintiff's failure to exhaust his country's judicial remedies cannot be a bar to the admissibility of this appeal.

Accordingly, the plaintiff's right to appeal has been clearly established. The appeal is, therefore, admissible insofar as the Court has jurisdiction to grant the relief requested.

3. *On the Merits*

Here the Court found that the use of plaintiff's Community salary to determine the supplementary tax rate was an indirect tax violating the Protocol. After pointing out that "under Article 86 of the E.C.S.C. Treaty the competent Belgian authorities are accordingly bound to remedy the effect of the act which brought about the tax assessment and its authorization," the Court held that:

a. The Protocol on the Privileges and Immunities of the E.C.S.C. prohibits member States from imposing any tax on an official of the Community, if this tax is based in whole or in part on his compensation received from the Community.

b. The Protocol also prohibits consideration of this compensation in determining the tax rate on income from other sources.

c. The same is true as far as taxes are concerned which are owed by a spouse of such official, if the tax is assessed jointly against the spouses.

U. S.-Polish Claims Settlement Agreement—claims for property of American nationals in the Polish Eastern Territories now a part of the U.S.S.R.—Poland not responsible for takings in that territory after September 17, 1939

CLAIM OF SILBERG AND MOGILANSKI.* Mimeographed Decisions Nos. PO 62 and 63.

Foreign Claims Settlement Commission of the United States, Dec. 20, 1961.

FINAL DECISION OF THE COMMISSION

These claims are based upon the asserted ownership and loss by the claimants, LENA SILBERG and MUSIA MOGILANSKI, of property situated in Nieswiez, Krzywoszyn, and Ostrow in which each claims a one-half interest. The loss was alleged to have occurred after World War II, when territory including these three communities was ceded to the U.S.S.R.

Under Section 4(a) of the International Claims Settlement Act of 1949,¹ as amended, the Commission is given jurisdiction over claims of nationals of the United States included within the terms of the Polish Claims Agreement of 1960,² Article 2 of which provides:

* Reported in full through the good offices of the Honorable Edward D. Re, Chairman of the Commission. The United States has not yet found it possible to publish an official collection of the decisions of the Foreign Claims Settlement Commission. In view of this serious deficiency in the preservation and distribution of prime source material, we shall from time to time report key or "pilot" decisions of the Commission here.—Ed.

¹ 45 A.J.I.L. Supp. 58 (1951).

² 55 A.J.I.L. 540 (1961).

Claims to which reference is made in Article 1 and which are settled and discharged by this Agreement are claims of nationals of the United States for

- (a) the nationalization or other taking *by Poland* of property and of rights and interests in and with respect to property;
- (b) the appropriation or the loss of use or enjoyment of property under *Polish* laws, decrees or other measures limiting or restricting rights and interests in and with respect to property . . . ; and
- (c) debts owed by enterprises which have been nationalized or taken *by Poland* and debts which were a charge upon property which has been nationalized, appropriated or otherwise taken *by Poland*. (Underlining added.)

If an award is to be made on a claim filed under the Agreement, the Commission must find that the claim comes within the purview of the above-quoted Article. Hence, a claim may be compensable only if based upon a loss arising from a nationalization, appropriation, or other taking of property *by the Government of Poland*.

In Proposed Decisions issued on April 19, 1961, the Commission found that Nieswiez, Krzywoszyn, and Ostrow are situated in the so-called Polish Eastern Territories which are now a part of the U.S.S.R., and that the Government of Poland had no control over these territories after September 17, 1939, and no sovereignty over the territories after August 16, 1945. It was concluded that there could not have been a nationalization, appropriation, or other taking of property there by the Government of Poland after September 17, 1939, and the claims accordingly were denied.

The claimants have objected, stating that the Eastern Territories remained under Polish sovereignty until August 16, 1945; that in July 1944 a Polish army, formed in the U.S.S.R., liberated the Eastern Territories with the help of the Soviet Army; that when Lublin (in present-day Poland) was freed, a Committee of National Liberation proclaimed itself the Provisional Government of Poland; that between July 1944 and August 1945 this government confiscated all Jewish property, acting under Polish law in territory under Polish sovereignty, and administered the property confiscated in the Eastern Territories until cession of the area to the Soviet Union.

The Commission has stated that the Eastern Territories have been under the sovereignty of the U.S.S.R. since August 16, 1945, and this is not disputed. The Commission has not held, and does not now hold, that sovereignty passed to the Soviet Union on any earlier date, it being sufficient for the purpose of this decision to find, as was done in the Proposed Decision, that the territory was beyond the control of the Polish Government after September 17, 1939. Claimants' allegations regarding events between July 1944 and August 1945 are found to be contrary to fact.

Except for a short-lived "Congress Poland" (1815-1832), there was no independent state of Poland from the time of the Third Partition in 1795 until the close of World War I. Although the Allied Governments agreed upon a reconstitution of Poland, the Paris Conference of 1919 was unable

to settle the matter of its eastern boundary, and hostilities continued between Poland and Russia in 1919 and 1920. The Curzon Line, which approximates the present boundary, had its origin when the northern half of the present line was proposed on December 8, 1919 by the Supreme Council of the Allied and Associated Powers for purposes of an armistice. It was rejected by both belligerents. Polish forces drove deep into Russia in the spring of 1920, but by July 10, 1920 had retreated to the gates of Warsaw, and announced that they would accept an armistice along the proposed line. In a note to the Russians, Lord Curzon, the British Foreign Secretary, extended the line southward to its present length. Russia declined the proffered armistice, and the conflict continued with the Poles prevailing until the Treaty of Riga was signed on October 12, 1920, establishing a border well to the east of the Curzon Line, and embracing between the two lines the Eastern Territories of interest herein. Both governments approved the treaty on March 18, 1921. It was recognized by the Council of the League of Nations on February 3, 1923, by the Conference of Ambassadors on March 15, 1923, and by the United States on April 5, 1923, and remained unchallenged until 1939. During this period, privately owned property in the Eastern Territories was located within Poland and might have been subjected to Polish nationalization measures had the Government of Poland embarked upon any such programs.

Shortly before the onslaught of World War II, the Ribbentrop-Molotov agreement was signed on August 23, 1939, binding Germany and the U.S.S.R. to mutual non-aggression. By a secret protocol to the agreement, spheres of interest were laid down for application "in the event of a territorial and political rearrangement." Such an event occurred when Germany invaded Poland on September 1, 1939, and Russia followed suit on September 17, at which time the Polish Government fled the country to operate in exile from Rumania, France, and finally London. Poland was occupied completely by German and Russian forces, meeting at the Ribbentrop-Molotov line, which corresponded partially with the Curzon Line and otherwise was more favorable to the Soviet Union. This line was formalized by German-Russian treaty on September 29, 1939. The Polish Government in Exile rallied Polish armed forces to Allied support, but was at no time able to enforce its will in Poland.

On June 22, 1941, Germany attacked Russia. The British then moved to reconcile its old and new allies, Poland and Russia. After a month of negotiations, during which the Russians insisted that their western frontier was not open to discussion, an agreement was signed in London on July 30, 1941 by representatives of Poland and the U.S.S.R., which stated, among other things, that earlier German-Russian agreements had lost their validity, but was silent as to where the Russo-Polish frontier should be fixed. The Poles had wanted more than mere dissolution of the Ribbentrop-Molotov line, and had striven for specific treaty recognition of the 1921 boundaries; but they signed the agreement in the knowledge that they could get nothing better.

In the meantime, however, the Eastern Territories had been incorporated formally into the Soviet Union, supposedly according to the will of the inhabitants as freely expressed in a "plebiscite" held shortly after the 1939 Russian invasion. Immediately upon occupation of Eastern Poland in 1939, Soviet authorities had removed all members of State and local government administrations from office, arresting most of them, and appointing so-called "temporary administrations" in their place, composed principally of Red Army officers and Soviet officials. On October 6, 1939 an election was scheduled for October 22, 1939 of National Assemblies for the Western Ukraine and Western White-Ruthenia, which between them would govern the Eastern Territories. On the latter date, elections were conducted by the Red Army, NKVD, and Communist organizers. The two National Assemblies convened in Lwow and Bialystok, and on October 27 and 29, enacted resolutions for incorporation of their territories into the U.S.S.R. Formal incorporation of Western Ukraine was accomplished by Decree of the Supreme Council of the U.S.S.R. on November 1, 1939, and of Western White-Ruthenia on November 2, 1939.

The Poles now hopefully interpreted the London Agreement of July 30, 1941 as Soviet recognition of the pre-1939 boundary, but the Soviet Government would not commit itself, and made no move to disincorporate the territories. At every opportunity, the London Poles expressed their claim to all territory within their pre-war boundaries, but were met with official silence. In any event, all of Poland and the Eastern Territories was now under German control, with the battle line well into Russian territory. As they had advanced, the Germans had incorporated Western Poland into the Reich in two Gaus—Danzig and Warthegau. The rest of Poland up to the Ribbentrop-Molotov line was given the name General Government. Lands east of the line were administered separately, as part of German-occupied Russia.

Friction arose between the London Poles and the Soviet Government over many things, not least over the citizenship status of Poles who had fled or been deported to Russia. On November 29, 1939, a Soviet Decree stated that all citizens of Western districts of the Ukrainian and White-Ruthenian Soviet Socialist Republics who were present in those districts on November 1 and 2, 1939, acquired Soviet citizenship. As evidence of "good will," the Soviet Government exempted persons of "Polish origin" from this automatic Soviet citizenship; but on January 16, 1943 they eliminated this exception.

On February 19, 1943 an article appeared in *Radianska Ukraina*, setting forth in print for the first time since the agreement of July 30, 1941, the Russian claim to retention of the Eastern Territories, and characterizing Polish pretensions as wholly unjustified. A stiff Polish note of February 25 elicited a Soviet reply of March 1, 1943 invoking the Atlantic Charter of August 14, 1941 as justification for the Curzon Line. Then, in April 1943, the Germans announced the discovery at Katyn of a mass grave of thousands of Polish officers who had been missing since taken as prisoners-

of-war by the Russians. The Poles appealed to the International Red Cross for an investigation, whereupon the Soviet Union broke off diplomatic relations with the Polish Government in Exile, stating that the motive for the Katyn accusations was to wrest concessions from them regarding the Eastern Territories.

The British now began urging the London Poles to accept the inevitability of the Curzon Line. With the tide of battle running in its favor, the Soviet Government issued a statement on January 11, 1944 that the injustices of the 1921 Riga Treaty had been rectified by the 1939 incorporation of the Eastern Territories into the Soviet Union, and that Poland must be reformed by the acquisition of German lands in the west. The eastern boundary was to be the Curzon Line, but willingness to negotiate adjustments therein as warranted by population majorities was expressed. It was already apparent, however, that the Kremlin would not be satisfied to see the Polish Government in Exile restored to power. In Moscow, a Union of Polish Patriots had been formed among pro-Soviet Poles in 1943, and was groomed for eventually taking over the government of a liberated Poland. Pro-Soviet resistance elements from Poland were added, and the group became the Polish Committee of National Liberation, pledged to recognize the Curzon Line as their eastern frontier.

In July 1944 the Red Army crossed the Curzon Line at the Bug River, and so, in the official Soviet view, entered Poland. As Soviet troops moved westward, the Polish Committee of National Liberation moved with them, establishing themselves in Lublin, and receiving from the Red Army the responsibility for civil administration behind the front. On December 31, 1944, they proclaimed themselves the Provisional Government of Poland and were recognized as such by the Soviet Government on January 5, 1945.

At the Yalta Conference in February 1945, Roosevelt, Churchill, and Stalin agreed formally on the Curzon Line, with slight modifications in Poland's favor, and decided that the Lublin Government must be reorganized to include democratic leaders from the West, and must then hold free elections. A commission established to work out details was unable to agree, and a months-long deadlock ensued. The deadlock was broken by Mr. Harry Hopkins, representing President Roosevelt [*sic*: President Truman] in a June visit to Moscow, after which the commission quickly agreed upon a list of leaders. On June 28, 1945 the new Polish Provisional Government of National Unity was installed, with a twenty-man Cabinet including sixteen Lublin members. British and United States recognition came on July 5, 1945. The new government and the Soviet Union formalized their mutual frontier by the treaty of August 16, 1945, since which time the Eastern Territories have been indisputably under Soviet sovereignty.

From the above historical narrative,¹ it will be seen that at no time since

¹ Sources include: Mikolajczyk, *The Pattern of Soviet Domination*; Churchill, *The Second World War*; Kirkien, *Russia, Poland and the Curzon Line*; Shotwell & Laserson, *Poland and Russia, 1919-1945*; Grabski, *The Polish-Soviet Frontier*; Jordan, *Poland's Frontiers*.

September 17, 1939 could there have been a nationalization or other taking of property in the Eastern Territories by a Polish Government. During a six-month period from January 5, 1945 to July 5, 1945, there were two rival Governments of Poland—the Lublin group which was recognized by the Soviet Union, and the London group recognized by Britain, the United States, and other nations. The London Poles, who had held out for reestablishment of the 1921 eastern frontier, never regained power within the country from which they had been exiled. The Lublin group, the only one to which the claimants' allegations could refer, was the pro-Soviet group which had pledged its acceptance of the Curzon Line as the eastern boundary of Poland before any Polish territory was liberated. As the liberation progressed, it was this group which received civil authority over lands west of the Curzon Line, and evolved into the postwar Government of Poland. The claimants' allegations of circumstances under which Polish taking of property in the Eastern Territories might have been accomplished between July 1944 and August 1945 are without foundation and contrary to fact.

In the instant claims, there is no evidence that the property of the claimants was nationalized or otherwise taken by the Government of Poland or any other government at any time. True, there was a transfer of sovereignty, from Poland to the U.S.S.R., of the territory in which the property was located; but, whether this occurred on August 16, 1945 or earlier, the transfer of sovereignty did not constitute a taking of the private property of individuals within the territory, and in itself did not disturb the title of private individuals to property. A taking by the Government of Poland of property owned by United States nationals in the Eastern Territories, when that government had the sovereign right and the power to effectuate such a taking, might give rise to a compensable claim under the Agreement. The loss of sovereignty over the territory was not a taking of private property within the territory by the Government of Poland; and a later taking of such property by the new sovereign is not within the purview of the Polish Claims Agreement.

Notwithstanding the claimants' allegations to the contrary, the Commission affirms its findings that the Eastern Territories were beyond the control of a Polish Government after September 17, 1939, and outside the sovereignty of the Government of Poland after August 16, 1945. Inasmuch as the claimants' property was located within the Eastern Territories, it is manifest that there could not have been a nationalization or other taking thereof by the Polish Government during or after World War II. Accordingly, the claims are denied.

Dated at Washington, D. C.

Dec. 20, 1961

EDWARD D. RE
THEODORE JAFFE
LAVERN R. DILWEG
Commissioners

Immunity of foreign state—merchant vessel seized by Cuban state in Cuban waters and later hi-jacked and brought into U. S. territory—unconstitutionality of President's direction to Coast Guard if intended to exclude U. S. Marshal from arrest of vessel under libels filed in Admiralty—claim of immunity in court by foreign state in relationship to suggestion of immunity by Department of State—effect of repudiation of partial waiver of immunity by foreign state in Louisiana court proceeding—findings as to ownership and possession by Department of State not required in relationship to Department's decision whether to "suggest and allow" immunity

RICH v. NAVIERA VACUBA, S.A. AND REPUBLIC OF CUBA; MAYAN LINES, S.A. v. REPUBLIC OF CUBA AND THE M/V BAHIA DE NIPE; UNITED FRUIT SUGAR CO. v. 5,000 TONS OF SUGAR; NAVARRO AND OTHERS v. THE M/V BAHIA DE NIPE. 295 F.2d 24.

United States Court of Appeals, Fourth Circuit,¹ September 7, 1961.

The vessel *Bahia de Nipe* sailed on August 8, 1961, from Cuba with a cargo of 5,000 bags of sugar destined for a Russian port. When on August 17 the ship was about 300 miles east of Bermuda the master and ten of his crewmen put the rest of the crew under restraint, turned the vessel towards Hampton Roads, Virginia, and notified the Coast Guard of their intention to seek asylum in the United States. As they crossed the three-mile limit and neared the entrance to the Chesapeake Bay the vessel was met by the Coast Guard and taken to anchorage off Lynnhaven, Virginia.

These proceedings were begun on August 18 by the filing of a libel against the vessel on behalf of two longshoremen who had earlier recovered judgments against the Republic of Cuba and Naviera Vacuba, S.A. The latter owned the vessel before she was taken over by the revolutionary government of Cuba. Shortly thereafter another libel was filed against the ship and cargo by Mayan Lines, S.A. which had previously recovered judgment by consent in a state court of Louisiana in the sum of \$500,000 against the Republic of Cuba. A third libel was filed against the cargo only by the United Fruit Sugar Company which claimed that the sugar belonged to it, having been unlawfully confiscated in Cuba by the revolutionary government. Libels for wages were also filed by the defecting master and the ten crew members.

Upon the institution of these suits in the United States District Court for the Eastern District of Virginia at Norfolk, the Clerk, pursuant to law and the practice of the court, issued the customary in rem process and delivered the same to the United States Deputy Marshal to be served upon the ship. Service, however, was prevented by the Coast Guard, which

¹ Per Curiam opinion in full. The opinion of Hoffman, D.J., below, 197 F.Supp. 710 (U. S. Dist. Ct., E. Dist., Virginia, Aug. 29, 1961) was affirmed, and should be consulted for detailed examination of the major problems, especially with respect to the issue of executive-judicial relationships involved in (1) the attempt of the Coast Guard to keep the U. S. Marshal from arresting the vessel and (2) the authority of the Department of State as to "suggestion and allowance" of immunity.

purported to act "pursuant to orders" and in reliance upon the authority of 50 U.S.C.A. §191. On being advised of this interference with the Marshal in the performance of his duties, the District Judge issued an order directed to the Captain of the Port and the Commander of the Coast Guard, requiring them to appear and to show cause why an order should not be entered permitting the Marshal to board the vessel to execute the writs.

A number of communications from and on behalf of the Secretary of State addressed to the Attorney General were presented to the court by the United States Attorney.² While infelicitously expressed, we think these sufficiently set forth the requisites of a valid suggestion for the allowance of sovereign immunity.

Arguments extending over several days were heard by the District Court which then held that the Coast Guard and those who had directed it acted in excess of their authority in preventing the service of the court's process. We likewise do not condone the Coast Guard's refusal to permit the Marshal to serve the process and find no authority therefor in section 191.

We turn to a consideration of the other questions raised. The chief defense, indeed the only one argued by the Government, is that the Republic of Cuba is a sovereign power immune from the jurisdiction of the courts of the United States, and that when the Department of State accepted Cuba's claim of ownership, possession and public operation of the ship, and ownership of the cargo, and so certified to the court and suggested that sovereign immunity be accorded, the court was bound to respect the determination and suggestion of the State Department.

The libellants argue that before sovereign immunity may be granted they should be heard by the court on whether the foreign government is in fact the owner and possessor of the property in question and, as to the ship, whether she was operated by that government not commercially but in a public capacity.

Mayan Lines, S.A. showed in addition that in the state court action wherein its \$500,000 judgment was obtained against the Republic of Cuba, the defendant specifically waived its sovereign immunity in respect both to the adjudication of liability and the enforcement of the judgment by execution. It argued that it is both illegal and unconscionable for Cuba to attempt in the present proceedings to repudiate its unlimited waiver, solemnly made in the course of the Louisiana litigation.

For the libellant, United Fruit Sugar Company, evidence was adduced to prove that the very bags of sugar constituting the cargo were its property, expropriated from the company's plants in Cuba. Accordingly, this libellant asserted that release of the cargo under the doctrine of sovereign immunity, upon the mere certificate of the State Department without opportunity for further inquiry, would deprive it of its property without due process of law in violation of the Fifth Amendment. Similar contentions under the Fifth Amendment were advanced by the other libellants.

Despite these contentions, we conclude that the certificate and grant of

² 197 F. Supp. 710, at 714-715. Quoted above, pp. 527-528.

immunity issued by the Department of State should be accepted by the court without further inquiry. *Ex parte Republic of Peru*, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014. See also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729; *Compania Espanola De Navegacion Maritima, S.A. v. Navemar*, 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.

The fact that the *Mayan Lines'* judgment was rendered in the Louisiana court after a specific waiver of immunity by the Cuban Government, both with respect to liability and enforcement of the judgment, does not significantly distinguish its position from that of the other libellants, in view of the controlling effect that must be given the State Department's action. We do not mean to suggest that the contention raised by this libellant as to the effect to be given the waiver would not be a suitable subject of inquiry in the absence of State Department action. In that case the question would be a proper one for the court to consider. The certification and suggestion of immunity, however, which has been made by the State Department in this matter affecting our foreign relations, withdraws it from the sphere of litigation. Especially is this so when the presence of the ship within the territorial jurisdiction of the court is made possible only by the barratry of the shipmaster. Refusal of the State Department in these circumstances to enforce Cuba's earlier waiver over its present assertion of immunity is within the Department's authority, and constitutes no violation of the libellant's rights under the Fifth Amendment.

The legal questions at stake are substantial, and we will withhold our mandate for a period of five days in order that the libellants may, if they see fit, apply to the Supreme Court of the United States, or a Justice thereof, for a stay pending review.

The order of the District Court is
Affirmed.

Jurisdiction of Federal courts as to torts committed in violation of the law of nations—parent's use for minor child of passport of state other than that of child's nationality—recognition in U. S. of custody order in state of child's nationality under Moslem personal law

ABDUL-RAHMAN OMAR ADRA *v.* CLIFT. 195 F.Supp. 857.

United States Federal District Court, Maryland, June 30, 1961.

Plaintiff, a national of Lebanon, brought a suit in the United States court against his former wife, who resumed Iraq nationality after a divorce from plaintiff and is now a resident alien married to an American citizen. Jurisdiction is alleged under 28 U.S.C. §1350, 1 Stat. 1350 (1789). The statute provides that the Federal district courts shall have original jurisdiction: ". . . of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The plaintiff's cause of action under this statute for equitable relief is based on his

former wife's alleged failure to transfer to him custody of their minor daughter at age nine, as directed by an order of the Religious Court of Beirut, made a part of a judicial confirmation of divorce in Lebanon under Article 391 of the Lebanese Code of Personal Status, which applies generally accepted Mohammedan Law to the domestic relations of Moslems in Lebanon. Both parties are Sunnite Moslems and at the time of the proceeding in Lebanon had Lebanese nationality. The defendant, however, was not personally served, but cited by publication in Lebanon. Plaintiff alleges that in 1954 defendant caused the child, then under nine and in the defendant's sole custody, to be included in defendant's Iraqi passport, concealing the child's full name and nationality, adding that in 1959 the defendant obtained a new Iraqi passport in Washington which included the child under her first name only. In 1960 the Iraqi Embassy in Washington notified defendant that the child would have to be taken off the passport, because of her Lebanese nationality. Thereafter, however, the defendant had her status and that of the child adjusted for permanent residence in the United States, the child's surname being stated as that of her mother and her nationality as Iraqi.

The court first decided that the action brought was one "for tort only" under common law principles, relying on *Prosser on Torts* (2d ed.) §103, and various law review articles. The court then went on to consider whether the tort was one committed in violation of the law of nations, and on this said:

. . . The statute in question, 28 U.S.C.A. §1350, was first enacted in 1789, 1 Stat. 77. It contains no requirement that any pecuniary claim be made. Despite its age, only six cases and one opinion of Attorney General Bonaparte, 26 Op.Atty.Gen. 250 (1907), are cited in the annotations. *Bolchos v. Darrell*, D.S.C., 3 Fed.Cas. pages 810, 811, No. 1,607, involved neutral property, slaves, in an enemy ship captured and brought into the port of Charleston and a treaty between the United States and France. Relying on the statute in question here, Judge Bee said: "It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the 14th article of the treaty with France alters that law, by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited. Let these negroes, or the money arising from the sale, be delivered to the libellant."

Defendants argue that international law is divided into two mutually exclusive branches, the law of nations and private international law. *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95, relied on by defendants, does not so hold; there is some intertwining of the branches. Hyde's *International Law*, 2d Rev. ed., 1945, vol. 1, sec. 11A, pp. 33-34, under the heading "The Relation of International Law to Private Individuals" says: "The commission of particular acts, regardless of the character of the actors, may be so detrimental to the welfare of the international society that its international law may either clothe a State with the privilege of punishing the offender, or impose upon it the obligation to endeavor to do so. The offender may be a private individual; and when he is subjected to the imposition of a penalty, he comes into close contact with the law of nations. Whenever he commits acts on account of which a country not his own

may not unlawfully proceed to punish him even though they are consummated beyond the limits of its territory and have no connection therewith, or whenever he commits acts which the territorial sovereign of the place where they are committed is under an obligation to endeavor to prevent or penalize, he feels the direct consequence of what that law permits an offended sovereign to do, or enjoins a law-respecting sovereign to do. In both situations, it is not unscientific to declare that he is guilty of conduct which the law of nations itself brands as internationally illegal. For it is by virtue of that law that such sovereign acquires the right to punish and is also burdened with the duty to prevent or prosecute.

"... The injunctions of international law that may be applicable to the private individual do not necessarily disappear when he enters the territory of his own or of any other State. He learns that there are acts of which that law there itself forbids the commission by any one whomsoever. Evidence of this has long been reflected in the statutory law of the United States, which subjects to penalties one who in any manner 'offers violence to the person of a public minister, in violation of the law of nations,' and which confers upon the United States District Courts original jurisdiction of 'all suits brought by any alien for a tort only, in violation of the law of nations or of a treaty of the United States'."

In *United States v. Arjona*, 120 U.S. 479, 488, 7 S.Ct. 628, 632, 30 L.Ed. 728, Chief Justice Waite declared: "It remains only to consider those questions which present the point whether, in enacting a statute to define and punish an offense against the law of nations, it is necessary, in order 'to define' the offense, that it be declared in the statute itself to be 'an offense against the law of nations'. This statute defines the offense, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations. Such being the case, there is no more need of declaring in the statute that it is such an offense than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested by the Constitution in the Government of the United States. Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress."

In the instant case, despite the fact that the child Najwa was a Lebanese national, not entitled to be admitted to the United States under an Iraqi passport, defendant concealed Najwa's name and nationality, caused her to be included in defendant's Iraqi passport, and succeeded in having her admitted to the United States thereby. These were wrongful acts not only against the United States, 8 U.S.C.A. §1182, 18 U.S.C.A. §1546, but against the Lebanese Republic, which is entitled to control the issuance of passports to its nationals. See *Kent v. Dulles*, 357 U.S. 116, 121, 78 S.Ct. 1113, 2 L.Ed.2d 1204, where the Court quoted from *Urtetiqui v. D'Arbel*, 9 Pet. 692, 699, 9 L.Ed. 276, as follows: "[A passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact." See also Hackworth, *Digest of International Law*, vol. III, ch. X, 1942.

. . . The wrongful acts were therefore committed in violation of the law of nations. And since they caused direct and special injury to the plaintiff, he may bring an action in tort therefor.

The court then considered the question whether jurisdiction should be declined under the general practice of Federal courts (usually in diversity of citizenship cases or on habeas corpus) to decline jurisdiction in cases involving domestic relations. It recognized that the authorities raise "a grave doubt" as to whether the court should entertain jurisdiction in custody disputes, but concluded that it should take jurisdiction here, because:

. . . The importance of foreign relations to our country today cautions federal courts to give weight to such considerations (nationality, entry, position of plaintiff as a citizen of a friendly nation with which the United States has long had cultural contacts) and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations.

Finally, the court ruled that, despite the nature of the service on the defendant in the Lebanese proceeding, the decree could be recognized here

. . . to the same extent [a court] would recognize a similar decree of a court of one of the United States, without being foreclosed thereby from deciding whether the equitable relief requested should be granted, and particularly, whether the granting of such relief would be in the best interests of the child.

On the latter point the court decided the child should remain with her mother and dismissed the complaint on the merits.

NOTES

Civil aviation—Warsaw Convention—"willful misconduct"—regulations of country of take-off not conclusive on determination of meaning of treaty term

In a suit for wrongful death in a crash in Irish waters following take-off from Shannon, Ireland, the defendant airline attempted to avoid plaintiff's contention that the "willful misconduct" exception to limitation of liability under the Warsaw Convention was applicable, by showing compliance with Irish regulations regarding the use of life vests. In the course of deciding that the airline was guilty of "willful misconduct" within the meaning of the treaty, the court said that it was ". . . not bound by the limits of the Irish Government's regulations as to when life vest instructions should be given to fulfill the duty of care owed to passengers." *K.L.M. v. Tuller*, 292 F.2d 775 (U.S.Ct.A., D. C. Cir., June 23, 1961).

Legislative jurisdiction—injury on a drilling platform outside Louisiana's off-shore waters—applicable law is Federal maritime law under Outer Continental Shelf Lands Act

An oil well worker ["roughneck"] was injured on a drilling platform affixed to the floor of the Gulf of Mexico 65 miles off the coast of Louisiana. The issue was whether the admiralty doctrine of laches or the Louisiana

statute of limitations was applicable. The court ruled that the location was substantially seaward of Louisiana's "historic maritime boundary" recognized in the Submerged Lands Act, 43 U.S.C. §§1301-1315, and in the area defined by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1343. §1333 (a) (2) of the latter Act adopts the civil and criminal law of the adjacent State as Federal law "... to the extent ... not inconsistent with this sub-chapter or with other Federal laws and regulations. . . ." The court held that Congress intended that "... the pervasive maritime law of the United States . . . , " not Federal law adopted from Louisiana law, should govern this case. *Pure Oil Co. v. Snipes*, 293 F.2d 60 (U.S.Ct.A., 5th Cir., June 30, 1961).

NOTE: Cf. *Guess v. Read*, reported at 56 A.J.I.L. 211 (1962). A claim for inclusion of attorney's fees in the measure of damages for a contract action involving work done by plaintiff on a drilling platform outside Louisiana's historic waters and within the zone of the Outer Continental Shelf Lands Act was held to be governed by Louisiana law under §1333 (a) (2) of the Act in *Corrosion Rectifying Co. v. Freeport Sulphur Co.*, 197 F.Supp. 291 (U.S. Dist. Ct., S. D. Texas, July 31, 1961).

Status of Forces Agreement—membership in a "force"—liability of the United States for tort here of Belgian soldier—when issue of performance of official duty arbitrable—materiality of bipartite agreement that soldier not a member of a "force"

Plaintiff sued the United States under the Tort Claims Act, 28 U.S.C. §2671, *et seq.*, as applicable pursuant to the Act of August 31, 1954, 68 Stat. 1007, 31 U.S.C. 224i-3 (1958), and to Article VIII, paragraph 5, of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, 4 U.S. Treaties (Pt. 2) 1806 (1955), 48 A.J.I.L. Supp. 83 (1954), for injuries caused by the operation of a motor vehicle in the District of Columbia by a Belgian corporal serving as a clerk in the office of the Belgian Military Attaché. In response to the United States' contention that the corporal was not engaged in the performance of his official duty at the time of the accident, plaintiff requested arbitration under Article VIII, paragraph 8, of the Status of Forces Agreement. The motion was denied and this intermediate appeal thereon allowed. The court affirms the ruling, but subject to further proceedings below on the question, also contested but not reached, whether the corporal was a member of a "force." (If he were not, there could be no liability on the part of the United States, whether he was engaged in the performance of official duty or not.) The court expressed the view that an official exchange after the event between the United States and Belgium concluding that the corporal was not a member of a "force" would have disposed of the case. However, there was no such agreement. The court refused to accept as equivalent to an agreement: (1) a letter from the Department of State to the Department of Justice expressing the "understanding" of the Department of State that the corporal was merely a member of the Embassy staff, and (2) a similar but also unilateral expression by the Belgian Govern-

ment. Only an "agreement" within the terms of the Status of Forces Treaty can affect plaintiff's right. *Robertson v. U. S.*, 294 F.2d 920 (U.S.Ct.A., D. C. Cir., July 11, 1961).

Conflicting national laws on production of documents—alien shipping companies engaged in carriage between the United States and foreign countries—preliminary issue of good faith effort to obtain waivers from foreign governments

In a proceeding in which one hundred eighty-three alien shipping corporations seek review on various grounds of a Federal Maritime Board order requiring them to submit contracts and other documents involving their water-borne commerce with the United States, several petitioners asserted that the production by them of the documents required by the order would violate their national law. The court ruled that, prior to any determination of whether in fact this is so, the petitioners must, on remand to the Board, make a showing there of good-faith attempts to obtain waivers of the alleged restrictions from their respective governments. *Montship Lines, Ltd., et al. v. Federal Maritime Board*, 295 F.2d 147 (U.S.Ct.A., D. C. Cir., June 30, 1961).

Suez affair—cease-fire agreement—cessation of "war" for insurance policy purposes

In an action by a beneficiary of a life insurance policy on the life of a correspondent killed by Egyptian forces on November 10, 1956, during the Suez incident, the court examined the "international law" on the subject and decided that the "war" ended when the cease-fire agreement became effective on November 6, 1956. ". . . In truth, the resolution of the United Nations is to be considered here as having the same effect of terminating the war and restoring peace as a traditional treaty of peace." The court went on to observe that in the interpretation of private contracts the courts have treated the actual cessation of hostilities as synonymous with the cessation of war. *Shneiderman v. Metropolitan Casualty Co.*, 220 N. Y. S. 2d 947 (Sup. Ct., App. Div., 1st Dept., Nov. 9, 1961).

UNITED STATES DECISIONS ON NATIONALITY

[For some time we have published here brief digests of virtually all reported decisions by United States courts on matters of Citizenship, Naturalization (including State court rulings), Denaturalization, Deportation, and the like. Review shows that very few of the cases reported have had any relevance to matters of legal concern to other states in relationship to the United States or to international legal transactions. The cases are, as a group, of little analytical interest. Now that several commercial compilations and texts on U. S. Nationality and Immigration Laws have appeared and the JOURNAL attempts additional coverage in the truly international sphere (as, for example, selected international conflict-of-laws cases) we have decided to drop this subsection of JUDICIAL DECISIONS. Cases in the sector of national law formerly reported here, which do have

significant international legal associations, will be reported as leading cases or as Notes.—ED.]

BRITISH AND COMMONWEALTH DECISIONS *

Sovereign immunity—state-owned vessel engaged in commerce—restrictive theory of sovereign immunity—effect of contract clause conferring jurisdiction on courts of foreign sovereign

A Lease-Purchase Agreement entered into between an American company and the Government of the Republic of Cuba was allegedly broken by the Cuban Government. The plaintiff thereupon attempted to arrest seven vessels in the Port of Halifax, Nova Scotia, Canada. A warrant having been issued, the Cuban Government entered an appearance, under protest, claiming that the Exchequer Court of Canada had no jurisdiction to entertain the action on the grounds, *inter alia*:

(d) that the said steamships and motor vessel defendants herein were and are public national property of, and in the possession of, and service of the Government of the Republic of Cuba at all times relevant to these proceedings and cannot be impleaded in this action.

It was further contended that the Lease-Purchase Agreement contained an agreement that the plaintiff expressly submitted to the jurisdiction of the courts of Cuba, "renouncing their right to resort to any other jurisdiction by reason of nationality or of domicile or for any other cause." Considering that the theory of sovereign immunity derives its force from the standard of international usage, from what is termed the comity of nations, Pottier, D.J., found that he would have to examine the law under four headings: British law, United States law, Canadian law and the law of nations. Reviewing the approach of the English court in the *Parlement Belge*, (1880) 5 P.D. 197, and dicta of the judges of the House of Lords in *Compañía Naviera Vascongado v. S.S. Cristina*, [1938] A.C. 458, 60 Ll. L. Rep. 147, 32 A.J.I.L. 824 (1938), he came to the conclusion that English law is not clear whether an absolute or restrictive theory of sovereign immunity would be applied. It is most likely that English courts will not grant sovereign immunity to a trading vessel operated by a foreign government, unless the trading is carried on *publicis usibus destinata*, such as, for example, during war, or for the carrying of material or men for the purpose of defense or attack. Considering the approach in the United States, the learned judge reviewed not only judgments of the United States Supreme Court, but also the writings of Mr. Wm. W. Bishop, Jr., in his *Case Book* and in an article in 47 A.J.I.L. 93 (1953): "New United States Policy Limiting Sovereign Immunity," and came to the conclusion that the United States adopts a restrictive approach to the theory of sovereign immunity; that it recognizes such immunity in relation to sovereign or public acts (*jure imperii*), but rejects the immunity where the acts amount to private acts (*jure gestionis*). Thus, in the opinion of his Lordship,

* Reported by Egon Guttman, LL.B., LL.M. (London), Faculty of Law, Edmonton, Alberta, Canada.

"it is clearly the law in the United States at the present time that vessels engaged in commerce cannot claim sovereign immunity." Two decisions of the Canadian courts were considered by Pottier, J. *The Scotia*, [1903] A.C. 501 (J.C.P.C.), merely followed the *Parlement Belge*, *supra*, while the second, *White v. The Frank Dale*, (1946) Ex. C.R. 555, was based on a misunderstanding of the *dicta* in *The Cristina*, *supra*, and was therefore not binding in the present case. Considering that the restrictive theory of sovereign immunity now exists in the United States, Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Rumania, Peru, The Netherlands (at least in the lower courts) and possibly Denmark, while some of the countries following the absolute theory of sovereign immunity, such as Brazil, Chile, Estonia, Germany, Hungary, Norway and Sweden, are parties to the Brussels Convention of 1926 in favor of the view that in times of peace there should be no immunity as regards state-owned ships engaged in commerce, the learned judge came to the conclusion that Canada too would follow the restrictive theory of sovereign immunity. An investigation of the vessels in Port Halifax had shown that, although they had been at anchor for a number of years, there was nothing to show that they were involved in matters *jure imperii*. They are ordinary vessels fitted for cargo and passengers. Considering the provisions of the Lease-Purchase Agreement conferring jurisdiction on Cuban courts, the learned judge found that the law had been correctly stated in *Wm. H. Muller & Co. Inc. v. Swedish American Line*, 224 F.2d 806 (2d Cir.), that it depends on the reasonableness of such agreement whether effect will be given to it. Applying this decision, Pottier, D.J., held that it would be unreasonable and unjust to relegate the plaintiff to a Cuban forum. *Flota Maritima Browning de Cuba, S.A., v. The "Canadian Conqueror" and other Vessels*, [1961] 2 Ll. L.R. 46 (Ex. Ct. Can., Nova Scotia Admiralty District, Pottier, D.J. in Adm., April 25, 1961).

Foreign judgment—enforcement in England—jurisdiction of foreign court—finality of judgment

The defendant was a partner in a firm in Austria. She at no time received any profits, nor did she participate in the activities of the firm, but was at all times resident in England. The plaintiff had obtained a judgment against the partnership in an Austrian court. Under Austrian law a partnership is not a legal entity, but judgments against the partnership are not enforceable against the individual partners until a further proceeding is completed at which the individual partner may raise certain personal defenses. The defendant contended that she was not amenable to the jurisdiction of the Austrian court and, further, that the judgment, not being a final one, was not enforceable in an English court. Diplock, J., upheld the second contention, but held that a person who becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court impliedly agrees with all persons having notice of his being a partner, *e.g.*, through registration of the membership of the partnership in a public register, that he submits to the jurisdiction of such foreign

court in respect to the transactions of the partnership business there carried on. *Blohn v. Desser and Others*, [1961] 3 W.L.R. 719, 3 All E.R. 1 (Queen's Bench Div., Diplock, J., May 3, 1961).

Foreign marriage—proof of marriage—Ireland Act, 1949 (12, 13 & 14 Geo. 6 c. 41)

During divorce proceedings the petitioner was called upon to prove the marriage which had been entered into in Ireland. Admitting the evidence of an expert witness that the marriage certificate would be accepted in the courts of the Republic of Ireland as *prima facie* evidence that the marriage was valid, Wrangham, J., held that, for this purpose, the statutory provision in Section 2 of the Ireland Act, 1949, that the Republic of Ireland was not to be regarded as a foreign country, was inapplicable. *Todd v. Todd*, [1961] 1 W.L.R. 951, 2 All E.R. 881 (P.D.A. Div., Wrangham, J., June 9, 1961).

Construction of Constitution of Ireland by English court—nullity—marriage in Eire dissolved in England where husband domiciled—remarriage in Eire—validity of second marriage

In 1952 the husband married a Miss Dineen in Dublin, Ireland. Subsequently the parties acquired a domicile in England. This marriage was dissolved by the English court in 1952 on the grounds of the husband's adultery and desertion. The husband returned to Ireland and there married the present petitioner. The parties returned to England, where they resided until they separated in 1958. Throughout this time the former wife was still alive. The petitioner now claims that this second marriage was a nullity, contending that Article 41(3) of the Constitution of Ireland does not recognize a decree of divorce. The husband, therefore, had no capacity to enter into the second marriage. Karminski, J., reviewed the Irish decisions and found that Article 41(3) of the Constitution of Ireland had never been authoritatively construed. In *Mayo-Perrott v. Mayo Perrott*, [1958] I.R. 336, the Supreme Court of Ireland, while dealing with the enforceability of an order for costs granted in an English divorce action, did not have to decide this question. However, two of the judges, *obiter*, expressed contrary views as to the recognition of foreign divorces in Ireland. There never had been any divorce jurisdiction in the Irish court, and petitions to the Imperial Parliament in London for Private Acts of Divorce had come to end with the creation of the Irish Free State. Such petitions would receive little sympathy from the present Irish Parliament and no procedural rules for the introduction of such petitions exist (*McK. v. McK.*, [1936] I.R. 177, per Hanna, J., at pp. 188, 189). Looking at the Constitution of Ireland unaided by any "expression of Irish judicial opinion," Karminski, J., held that the principle of recognition of a decree pronounced by the courts of the domicile has been long established, forms an essential part of the comity of nations and had been part of the law of Ireland prior to the creation of the Irish Free State. Thus, Article 41(3) of the Constitution of Ireland does not affect such decrees, but is confined

to attempts to dissolve a marriage by a court not having jurisdiction based on domicile. The dissolution of the prior marriage would therefore be recognized in Ireland. He accordingly dismissed the petition. *Breen (otherwise Smith) v. Breen*, [1961] 3 W.L.R. 900, 3 All E.R. 225 (P.D.A. Div., Karminski, J., June 26, 1961).

*Criminal law—jurisdiction—offense during flight over high seas—
Civil Aviation Act, 1949 (12, 13 & 14 Geo. 6 c. 67)*

Prior to a hearing on an indictment for theft committed during a flight over the high seas, a motion to quash the indictment was made. Lord Parker, C.J., held that Section 62(1) of the Civil Aviation Act, 1949, though unfortunately worded, must be construed as conferring jurisdiction on an English court, if the act or omission done on a British aircraft would constitute an offense if committed in England, unless the offense is clearly one of domestic application only. *R. v. Naylor*, [1961] 3 W.L.R. 896, 2 All E.R. 932 (Central Criminal Court, Lord Parker, C.J., July 18, 1961).

*Non-enforcement of foreign revenue laws—consent judgment based on
revenue debt—effect of stipulations on revenue debt—submission of
U. S. A.*

The defendant moved to set aside a writ based upon a consent judgment entered in California after stipulations by her attorney as to the defendant's debt to the United States Internal Revenue Service. Holding that at common law a court has no jurisdiction to enforce either directly or indirectly the penal, revenue or other public laws of a foreign state, MacLean, J., held that this rule is applicable even where a judgment on such revenue debt has been entered into with the consent of the defendant. The substance of the claim is still foreign taxation, and the fact that it appears in the form of a judgment does not entitle it to consideration different from that applicable to foreign tax assessments. Nor does it matter that there have been stipulations, for these do not change the tax liability into a contract debt. The United States, having submitted to the jurisdiction of the court, was ordered to pay the cost of the defendant. *United States of America v. Harden*, 35 W.W.R. 654 (1961) (Sup. Ct. B.C., MacLean, J., May 31, 1961).

Divorce—jurisdiction—recognition of foreign decree

In 1944 Walter, who throughout retained his domicile in Alberta, Canada, while in the Canadian Army in England, married one Elizabeth Rose. He deserted her and she, after acquiring a residence in Scotland, in 1953 obtained a divorce from the Scots court based upon the Matrimonial Clauses Act, 1950 (14 Geo. 6 c. 25) on the ground of desertion. In 1957 Walter, who had returned to Alberta, married one LaPierre. This marriage was declared null and void in 1960, *LaPierre v. Walter*, 31 W.W.R. 26 (Sup. Ct. Alta., Riley, J., Feb. 26, 1960), on the basis of non-recognition of a divorce granted otherwise than by a court of domicile, and the inapplicability of the facts of the case to the approach indicated in *Travers v.*

Holley, [1953] P. 246. Walter later married one Pledge who now seeks to have this marriage declared void. Primrose, J., granting a decree of nullity, held that, although Alberta courts will recognize a foreign decree based upon provisions similar to those applied in Alberta, in this case, "the courts of Alberta where the parties are domiciled would not recognize the Scottish divorce on the ground of desertion, and consequently, the first marriage" was still subsisting. *Pledge v. Walter*, 36 W.W.R. 96 (1961) (Sup. Ct. Alta., Primrose, J., June 14, 1961).

GERMAN DECISIONS *

Export control—violation of undertaking against trans-shipment to embargoed areas—false statements to U. S. authorities by German parties—contract void as being contra bonos mores.

Judgment of Federal Supreme Court, December 21, 1960 (VIII ZR 1/60). 14 *Neue Juristische Wochenschrift*, No. 16, p. III; No. 18, p. 822 *et. seq.*

Plaintiff, a German exporter, sued a German chemical firm for breach of contract on the following facts: The defendant sold to plaintiff a considerable quantity of borax. Borax is made from rasurite, a raw material mainly mined in the United States, which, because of its importance for national defense, is under an American embargo prohibiting exportation to countries of the Eastern bloc. The American export license is predicated upon a declaration in writing designed to make sure that there will be no resale through which the merchandise might reach any such country. The plaintiff had resold the merchandise to a Danish firm, which in turn was only an intermediary for a British enterprise, which intended to ship it to the Soviet bloc via Rostock. The two German parties had agreed on a statement to the American authorities in which the plaintiff declared that the merchandise was destined for Denmark and, to the best of its knowledge, would remain in Denmark. When, however, the American authorities requested a more specific declaration, which the plaintiff declined to make, defendant refused to deliver the merchandise to plaintiff in order not to be cut off from the source of the American raw material.

The Federal Supreme Court, reversing the lower courts of Hamburg, dismissed the action for damages for the following reason:

According to a consistent line of precedents, a contract is null and void as being *contra bonos mores* under section 138 of the Civil Code, not only where the conduct of one party toward the other violates ethics, but also in cases where the parties to a contract conspire to deceive an outside party in order to attain the purpose of their contract. Thus the courts have found a violation of ethics, and hence nullity of the contract, where the parties conspired to evade a rationing law, where such law was designed to protect vital interests of the nation against selfish actions of individuals. To be sure, there are no German laws which have adopted and made directly

* Reported by M. Magdalena Schoch, United States Department of Justice, Washington, D. C.

binding within the federal territory the American embargo provisions. The same basic principle, however, applies here. The American provisions are designed to prevent the growth of the war potential of the East by furnishing it goods from the West. Consequently, they serve to preserve peace and freedom for the entire Western world, including the Federal Republic of Germany. Anyone who seeks to defeat the protection of these interests vital to the Western community by deceiving the authorities concerned with safeguarding these interests, acts *contra bonos mores*. While it is already doubtful whether it is ethical for a merchant to ship merchandise to a country of the West, knowing that it is destined for the East, it is clearly

indecent, unclean and incompatible with the customs of honorable merchants to seek to evade the embargo by deliberate deception of the authorities charged with the enforcement of the embargo provisions. It cannot be tolerated that individuals, in the interest of financial gain, disregard the demands of the community serving the fight for liberty and peace.

Consequently, the contract of the parties is null and void under section 138 of the Civil Code.

Collision of German ships in foreign port—German law applicable under Rechtsanwendungs Decree of 1942

Decision of Federal Supreme Court of February 2, 1961 (II ZR 163/59, Hamburg). 14 *Neue Juristische Wochenschrift* 731.¹

This was an action for damages arising out of the collision of two German vessels, *M.* and *E.*, in Antwerp harbor. The defendant, owner of the *E.*, admitted its liability for the damage incurred by the consignor, the shipowner, the crew and the cargo owners of the *M.*, but left the question of liability open. It sent its vessel on a new voyage, with knowledge of the claims of plaintiff, the charterer of the *M.* Plaintiff calculated the hull damage to the *M.* at DM.380,000, and the total damage of the owners of *M.* and of the cargo at DM.744,000. The defendant calculated the total amount in accordance with Belgian law on the basis of 1,400 Belgian francs per ton, and deposited the resulting amount of DM.588,000 in Belgium, where a proceeding for distribution among the interested parties was pending in the Commercial Court of Antwerp.

Plaintiff sued in the District Court of Hamburg for the balance of the actual hull damage which was not covered by the amount deposited in Belgium, plus interest, and sought execution against the *E.* The defendant did not deny that, on distribution of the amount deposited under Belgian law, there remained a balance of DM.10,000 for hull damage, but argued that its liability was governed by Belgian law as the *lex loci*. The District

¹ This decision, together with the one following, is discussed at length by Wengler in 1961 *Juristen-Zeitung* 424, and by Beitzke in a highly critical article on "Deliktort und anwendbares Recht beim Schiffszusammenstoß," 14 *Neue Juristische Wochenschrift* 1993.

Court of Hamburg decided for plaintiff, the Court of Appeals reversed the lower court, and the Federal Supreme Court upheld the lower court.

The Federal Supreme Court reasoned as follows:

I. In its decision of January 29, 1959, II ZR 233/57 (29 BGHZ 239; 12 NJW 769),² this Court held that the legal consequences of a collision of a German ship with a foreign ship in foreign waters are governed by the law of the place where the collision occurred. The question whether an exception from the rule of *lex loci* should be made in favor of the application of German law in a case where only German vessels are involved, was left open. It should be answered in the affirmative. The claim for compensation for damages to the ship which plaintiff as charterer has under section 510 of the Commercial Code is governed by the "Decree concerning the law applicable to damages suffered by German citizens outside the territory of the Reich" (briefly called *Rechtsanwendungsverordnung*) of December 7, 1942 (RGBl. I 706). Section 1, paragraph 1, of that decree provides that German law shall apply to non-contractual claims arising from an act or omission which a German national has committed outside the territory of the Reich, if and to the extent that a German national was injured thereby. According to section 1, paragraph 2, this rule is applicable also to legal entities having their commercial domicile in the Reich territory. The decree of 1942 is effective today, contrary to the view of the appellate court.

1. The appellate court held correctly that the decree of 1942 is not based upon national socialist thinking. The rule that torts committed abroad are governed by the common national law of the injuring and the injured party is found in several legal systems, and has been applied in the past by German courts, in particular in cases of ship collisions (*e.g.*, *Hamburg*, 14 OLGE 391).

2. It is true that the decree of 1942 was issued by reason of the war and with retroactive effect from the beginning of the war, and with a view to conditions caused by the war, in particular the driving of German automobiles outside the territory of the Reich. Its effectiveness, however, was not restricted to the duration of the war and to war conditions. In particular, the decree was not applicable to acts and omissions committed in the occupied territories only. The Reich Minister of Justice was authorized to repeal the decree because at the time there was no certainty whether the rule enacted therein was to be retained. But the principle that torts should be governed by the common German national law of the injured and the injuring party could be considered and enforced as a proper conflict-of-laws rule, independent of any exercise of sovereign power over foreign territory. Hence the decree cannot be held, as the appellate court did, to have become obsolete and, therefore, ineffective even without formal repeal.

3. When the legislature after the war examined the rules of civil law with a view to eliminating those rules which could no longer be considered

² Reported in 54 A.J.I.L. 426 (1960).

effective because of the changed conditions, and enacted the "Law to restore unity of legislation in the field of civil law" of March 5, 1953 (BGBl. I 33), it did not see fit to repeal the decree in question.

4. Court decisions have held the decree to have remained in force and so have the majority of authors [citations].

II. Whether in given cases a restrictive interpretation of the decree of 1942 is indicated, need not be discussed here. In the case of collisions of German vessels in foreign waters, in any event, there is no reason to deviate from the rule of the decree, which rule, moreover, had previously already been applied by German courts and approved by some German authors. There are no compelling reasons for not applying this rule to ship collisions. No doubt the nautical conduct of the persons responsible for the navigation should be judged according to the navigation rules of the place of the collision as handled by the courts and authorities of that place. But the legal consequences of liability can be submitted to the common law of the flag without an improper splitting up of the judicial treatment of the conduct causing the damage. Nor does Article 1 of the 1942 decree violate Article 3 of the Basic Law,³ as was argued in the final appeal. To subject the injuring party to his national law instead of a foreign law in a case where a German was injured by him does not constitute an arbitrary determination of the applicable law. Shipowners who engage in navigation from a German base have no reason to complain if the rights and duties flowing from a collision abroad of their vessels with one another are adjudicated by a German court according to German law.

Collision of German vessels in foreign waters—German law applied to rights of foreign cargo owner

Decision of Federal Supreme Court of February 2, 1961 (II ZR 164/59, Hamburg). 14 *Neue Juristische Wochenschrift* 1063.

This was an action for damages to the cargo of the German ship which was damaged in the collision that gave rise to the decision reported above, p. 563. The action was brought by the insurance company which had compensated the consignee, a firm in Beirut. The Court held German law applicable to the claim, despite the finding that the damage to the cargo was not suffered by a German national and that, therefore, the *Rechtsanwendungs* decree of 1942 (see preceding case) did not apply. The Court reasoned as follows:

The application of German law to the rights of the cargo owner is necessitated by the fact that the Court, in its decision of the same day, has held German law applicable to the claims of the injured shipowner. The rights of the cargo owners must likewise be adjudicated according to German

³ Art. 3 of the Basic Law provides:

"(1) All men shall be equal before the law.

"(2) Men and women shall have equal rights.

"(3) No one may be prejudiced or privileged because of his sex, descent, race, language, homeland and origin, faith or his religious and political opinions."

law; otherwise an unjustifiable differential treatment of the ship and cargo would result. Since, under a natural way of viewing things, the cargo belongs to the ship, and in particular is entrusted to the protection and care of the ship, there exists no reason for submitting the claims of the cargo owners, which arise from a collision, to a law different from that which governs the rights of the shipowner. The liability of the injuring party arising from the same facts must be governed by the same legal principles with regard to the shipowner as well as with regard to the cargo owners or other parties having an interest in the cargo. Since this Court has held that the law of the flag is applicable to the hull damage, it follows that the cargo of the ship must be governed by the same law and that the *lex loci* is inapplicable.

BOOK REVIEWS AND NOTES

American Enterprise in the European Common Market: A Legal Profile.

2 vols. Edited by Eric Stein and Thomas L. Nicholson. (Michigan Legal Studies Series.) Ann Arbor: University of Michigan Law School, 1960. Vol. I: pp. xxiv, 510; Vol. II: pp. xxix, 732. \$25.00.

These two volumes are an encyclopedic and useful contribution to the legal understanding of the most fateful political experiment of the twentieth century—the creation of the European Common Market. The overall economic purpose of the Common Market is clear: the establishment of an integrated producing and consuming bloc of 170 million Western Europeans. This Market would be rid of the trade barriers and unjustifiable economic discriminations that have in the past bedeviled trade among the six countries constituting the Market. The human and natural resources of the area could then be exploited on the basis of competitive efficiency rather than economic autarchy. However, the legal and institutional implementation of this economic ideal is incredibly complex. The Rome Treaty establishing the Common Market contains, among other things, a detailed blueprint for the establishment and operation of a Customs Union; antitrust provisions covering the same business practices as are the subject of our own Sherman and Robinson-Patman Acts and Section 3 of the Clayton Act; international commitments to facilitate the free movement of capital, labor, professional services and goods within the Common Market; an impressive series of new supra-national institutions, performing administrative, executive, legislative and judicial functions; and several “all-purpose” clauses which have already generated programs for the elimination of governmental restrictions on trade and for harmonization and unification of national patent and trademark laws. It is to the difficult task of evaluating the impact of these revolutionary provisions on pre-existing national legislation and on the U. S. foreign businessman that these two volumes are devoted.

Professor Eric Stein, one of the editors of these volumes, supplies two introductory chapters of great importance to those who want to see the legal forest before they start studying the legal trees. The first sketches the historical background and the general objectives of the Common Market, and its implications for the U. S. exporter, investor, foreign-based enterprise and lawyer. The second describes the functioning of the new institutions of the Common Market—the Council of Ministers, the Commission, the European Parliamentary Assembly, the Court of Justice and the various Advisory Committees and their relations with each other and interest groups and enterprises within the Community.

The latter essay will be of particular interest to the political scientist and the administrative lawyer. They will also be interested in the concluding chapter of the first volume, containing a survey by Professor Stein

and Mr. Hay of the respects in which, and the bases on which, the Court of Justice and national tribunals will provide remedies for business enterprises suffering legal injury at the hands of Common Market institutions or by virtue of a violation of the Rome Treaty. Practicing commercial lawyers, who frequently find international law discussions long on the enunciation of substantive rights and short on administrative and judicial procedures for implementing those rights, will also be aided by this particular essay.

At the substantive core of the new dispensation are the provisions establishing the Customs Union, which involve the gradual abolition of internal tariffs and import quotas within the Common Market and the establishment of a common external tariff with third countries. These subjects are well developed by Dr. Ouin, of Paris, who, quite properly in this reviewer's opinion, regards the external tariff as a short-run detriment and probable long-term boon to the U. S. exporter. Dr. Ouin's study also contains useful information concerning the European Free Trade Association, a group of seven other European trading Powers which had entered into an international agreement to abolish tariffs and quantitative restrictions among themselves, but did not aspire to erect a common external tariff.

Probably the most erudite contribution is that of Professor Riesenfeld, dealing with the protection of competition. The Rome Treaty establishing the Community creates, in the substantive provisions of Articles 85 and 86, a new supra-national law of restrictive business practices. A Common Market that will be free of governmental (tariff and quota) barriers to trade within the Market must also address itself to the control and elimination of private (cartel) barriers to such trade. Professor Riesenfeld's detailed historical treatment of the prior national antitrust laws encompasses such matters as Article 419 of the Penal Code of 1810 in France and the German Cartel Ordinance of 1923. It has value as a record of earlier governmental experience with the antitrust problem, even if, as is quite possible, the Rome Treaty antitrust provisions ultimately relegate national antitrust legislation to a secondary rôle.

The Common Market contains general forces for legal and institutional reform that transcend the literal provisions of the Rome Treaty. Thus, the only specific reference to patents and trademarks in the Rome Treaty carries with it the clear inference that they will continue to be the responsibility of the individual countries. Yet Dr. Ladas' clear-cut delineation of the current status of the law of industrial property within the Common Market sets forth why the adoption of a common European patent and common European trademark is a currently imminent probability. The constitutional basis for this development is the nebulous powers created by the Rome Treaty to eliminate barriers to international trade and to equalize the conditions of competition within the Market.

In the area of business organization, a well-organized functional essay is supplied by Professor Conard, who has most wisely associated himself with a large panel of informed European practitioners and law professors, because European business practice bears out to a surprising extent the

truism that the law in action is only partially reflected (and is occasionally misrepresented) by the law on the books. This essay, which, like the competition and tax chapters, is of monograph length, is complemented by a less exhaustive one by Mr. Nicholson of the Chicago Bar, on the effect of United States treaties of commerce with member countries of the Common Market, and of the Rome Treaty, on the conditions of doing business within the Common Market, which highlights the institution-creating potentialities inherent in the Rome Treaty.

In the corporate area, Professor Conard envisages that considerable time will elapse before the general language of the Rome Treaty will operate to produce a framework for the Common European company. The harmonization and unification of national policies in the industrial property field currently has a higher priority than any comparable program in the company law field. However, proposals for a European corporation had been pending in Europe long before the Rome Treaty was enacted. Also, countries anxious to attract capital and industry have a practical incentive to rid their company and tax legislation of unique features having a deterrent effect on local investment. Who therefore can foresee what the rate of progress towards greater legal uniformity in this area will be?

Heavy reading for the non-specialist, but useful and well-organized, is the comprehensive chapter on taxation by Mr. van Hoorn, Jr., of the Amsterdam Bureau of Fiscal Documentation, and Professor Wright of the University of Michigan. Here, as in the case of business organization, there is no imminent alternative to scrutinizing the individual laws of the member countries of the Common Market. There are no comprehensive Rome Treaty provisions establishing new and superseding supra-national norms in the corporate and tax areas; the clear implication is that these matters still remain within the domestic jurisdiction of the member countries. Nevertheless, the Common Market may exert an intangible influence even in these areas, and one that will become stronger as time goes on. Thus, the establishment of freedom of movement within the Market for goods, capital, labor and services tends to reduce somewhat the importance of the geographical availability of raw materials, manpower, managerial talent and credit as determinants of where business ventures are to be located. Parallel to this lowered emphasis there will be a corresponding increased emphasis on choosing jurisdictions and forms of business organization (which could include countries outside the Common Market, such as Switzerland), which are more flexible, lend themselves to a minimum of governmental intervention and carry with them more beneficial tax consequences.

Another area where the main motivating forces for legal and institutional change are rather general treaty obligations to assure the mobility of labor and to "correct distortions" of competition within the Market is the field of labor law and social security. In contrast to most of his collaborators, Professor Otto Kahn-Freund brings his unusual genius and expository ability to bear on the risky enterprise of predicting those areas in which the Rome Treaty will have an impact on labor and social security,

before addressing himself to the difficult but more mundane problem of describing the existing state of the law and social organization in those areas. To the extent that these volumes are intended, as the subtitle suggests, to convey a "legal profile," this reviewer must confess to something of a preference for the methodology adopted by Professor Kahn-Freund and Dr. Ladas in their essays.

There is only one essay in the first two volumes that is not of pressing consequence today, the discussion by Dr. Jeantet of exchange control regulations in France. Since the adoption of the Rome Treaty, and due in large measure to the economic improvement and confidence which the treaty was instrumental in generating, currency convertibility has largely eliminated the need for exchange controls. However, the Rome Treaty contains provisions dealing with this general problem, and there is no guarantee that balance-of-payments difficulties on the part of individual countries may not in the future revive the necessity for such controls. It is therefore important to be reminded of their past extent and rationale and that the Rome Treaty contemplates the progressive disappearance of such restrictions on monetary transfers, so as not to create obstacles to free trade and investment.

Because of the utility of these two volumes, it is to be hoped that the work of the University of Michigan in this absorbing field is not ended. Outside of topics thus far not covered, such as transportation and the analysis of the Common Market as an exercise in constitutional federalism, this reviewer has only two general approaches to suggest. One is dictated by current events. The United Kingdom and other members of the Outer Seven European Free Trade Association are now negotiating for admission to the magic circle of the Inner Six of the Common Market. What are the economic, political, social and legal problems created by the adherence of these countries; what substantive and administrative changes will this necessitate within the Common Market Treaty and structure; and what are the implications for the British Commonwealth, Latin America and the United States? Mr. Hay's essay on the way in which the French and Belgian overseas countries and territories are to be associated with the Common Market is already due for monograph size expansion.

The other recommendation is that, despite the manifest difficulties involved, an effort be made to outline patterns for sound future development, to a greater extent than is done in the current two volumes. This may involve leaving the safe bedrock of solid legal research, for the emergent profile of the Common Market will not be a purely legal one, but will be primarily the product of economic, social and political forces, of which treaties and legal regulations are merely the recorded traces. Thus, the final reconciliation between the all-inclusive condemnation of restrictive business practices contained in Article 85(1) of the Rome Treaty and the indeterminate scope of the exemption from that prohibition set forth in Article 85(3) will be a function of such diverse factors as the attitudes of business, labor, agriculture, and differing national political parties; the relations of anti-cartel policy to anti-inflationary and full-

employment policy; the degree to which the member countries are willing to subordinate national economic policies to a co-ordinated supra-national policy; the efficiency of the administrative and judicial enforcement mechanisms developed within the Common Market; levels of prosperity and trade; and many other factors. Similarly, the effective scope of the somewhat more limited provisions of Article 86, dealing with restrictive business practices engaged in by enterprises with a dominant influence on the Market, has been, and will continue to be, affected by the feeling of government administrators and the business community that most existing European enterprises are too small to be efficient; the ability of economists to develop meaningful norms as to what are adverse effects on the Market and what business concentrations are capable of exercising such effects; the strength of popular resentment of business monopolies; and the like.

In the course of explaining dynamic and developing institutions and legal usages to businessmen and lawyers who are facing concrete and immediate problems, the history and legal records of even the recent past must be viewed, not as ends in themselves, but as tools for the understanding of the future. This invitation to Professor Stein and Mr. Nicholson and their colleagues at the University of Michigan to build upon their current useful efforts is obviously not a criticism but a commendation.

SIGMUND TIMBERG

International Immunities. By C. Wilfred Jenks. New York: Oceana Publications; London: Stevens & Sons, 1961. pp. xl, 178. Index. \$6.00; 35 s.

The whole sweep of contemporary immunities of international organizations and their staffs is systematically reviewed and analyzed here, along with their underlying principles. The greater scope by far is given to the United Nations and its specialized agencies, but regional and mutual defense organizations, the status of the U.N.E.F. in Egypt, the U.N. presence in the Congo, and even the U.N. Cemetery in Korea are drawn upon to show the flexibility of solutions to meet particular needs and circumstances, though always on the basis and in the light of the basic principles promulgated by the United Nations. It is both natural and historically correct to single out for mention the contribution which the International Labor Organization, and through it Mr. Jenks personally, made to the modern law and practice of international immunities. Few jurists know as much about this subject as he does, both in terms of actual regulations and practices as well as in terms of the minutiae where there is still insufficient international regulation, such as in the matter of the personal status of international officials, comprising questions of their domicile, validity of marriages, matrimonial causes, testamentary successions, et cetera. Here Mr. Jenks renders useful service by indicating trends in national jurisprudence and possible solutions.

The strength of the book lies in the elaboration of the principles on the vigorous adherence to which the vitality of international immunities de-

pend. There are three main principles: first, international institutions should be protected against unilateral governmental interference; secondly, no state should derive any financial advantage by imposing fiscal charges on institutional funds; and, finally, international institutions should be granted the necessary facilities for the conduct of their official functions. Functional independence is decisive in every respect, and it is the common starting point, as well as the object, of all immunities of the institutions as well as their servants. The consequence of this is the inevitable limitation upon the sovereignty of states in their conduct toward such institutions and their staffs, and the equally inevitable principle that all immunities are granted solely for the benefit of the institutions and not for that of their servants. Jurisdictional provisions in modern regulations are based on a partial recognition of these principles: Disputes between the institution and member governments, particularly the host countries, are to be resolved through arbitration. To a large extent disputes between institutions and staff members have been placed under the jurisdiction of true international tribunals, the Administrative Tribunals of the United Nations and the International Labor Organization. But the staff members are still in principle subject to the jurisdiction of municipal courts, and this includes the determination whether the individual acted in his official capacity. Ideally, this preliminary question, whenever it becomes litigious in the courts, should be decided by an international tribunal.

Generally, Mr. Jenks is a maximalist; for practical and prestige reasons international institutions should be satisfied with no less "in matters of dignity and status" (page 168) than is granted by governments to each other. On the other hand, he is well aware of both governmental and popular sentiments which often, particularly in times of stress, tend to regard both institutions and staff with suspicion. He prudently accepts as a fact of international life that governments are reluctant to grant immunity from national service obligations, and he recognizes the legitimacy of security considerations. He formulates seven principles regarding the conduct of staff members, the chief of which is that officials owe exclusive responsibility to the organization and that organizations should not provide a shield for activities unconnected with function. The other aspect of security, which affects both the organization and governments, relates to freedom of communications. The complete freedom provided for in the Geneva Convention on the Privileges and Immunities of the United Nations may prove to be "a fair-weather arrangement." The Convention on Privileges and Immunities of Specialized Agencies, by contrast, provides that appropriate security precautions may be determined by agreement between the parties to it and the organization, reflects the wartime experience of the International Labor Organization, and may be more realistic.

The book is thoroughly documented and, apart from its intrinsic scholarly merits, will be immensely useful as a guide to the vast body of international and national precepts in this important area of international law. Once again we must gratefully acknowledge our indebtedness to Mr. Jenks.

LEO GROSS

Le Défaut des Parties à un Différend devant les Juridictions Internationales. Étude de droit international public positif. By Geneviève Guyomar. (Bibliothèque de Droit International, Vol. XI.) Paris: Librairie Générale de Droit et de Jurisprudence, 1960. pp. 242.

This work, whose author is a woman teacher of law at present *chargé de cours* at the University of Grenoble Law School, is a detailed and scholarly study of default judgments in procedures before international tribunals, both arbitral and judicial. The author demonstrates, by an examination of 75 decided cases and 112 treaties, that the matter is of first importance, although few instances of default judgments have occurred in the history of the Permanent Court of International Justice and/or the International Court of Justice. In fact, Manley O. Hudson, in his work on the Permanent Court of International Justice, devoted less than a page to the subject, although Article 53 of the Court's Statute specifically provides for the possibility of judgments by default. But, as we learn from this study, the matter has proved to be of greater importance in the course of the work of the International Court of Justice than in the case of its predecessor.

The author has searched for precedents in the history, statutes and jurisprudence of arbitral and judicial tribunals, past and present, those in actual operation as well as those, like the International Prize Court, which never were more than projects. Special courts, such as the International Court of the Saar and the Nuremberg War Crimes Tribunals, and the Courts of the European Coal and Steel Community and of the European Economic Community are also studied. The result is a monograph which fills a gap in the literature on international adjudication and should be of great value to all students of the subject.

While the primary sources utilized by the author appear to be unexceptional, it seems regrettable that the secondary sources are confined almost entirely to those of French authors. All of the items entitled "*Ouvrages Généraux*" are in French except Lauterpacht's *Oppenheim*. Most of the "*Ouvrages Spéciaux*" are likewise in French, even Hudson's *Permanent Court of International Justice*, cited in the French edition of 1936, with no reference to the revised English edition of 1943. And while the study purports to preface the body of the book with a comparative study of default judgments in national jurisprudence, the only local system referred to is the French law.

Among the author's conclusions the following are of exceptional interest: The default judgment plays a much greater rôle in procedures of international adjudication than it does in local systems of law. In both systems the tribunal, before passing judgment by default, must assure itself of its competence and also determine that the claim under consideration is well founded in fact and in law. Whether, when the *compromis* is silent in the matter, the tribunal may nevertheless pronounce judgment by default in a proper case, is still uncertain, although all the precedents point in that direction. At the least, such a rule is on the way to formulation as a binding custom. The study closes with a word of caution against draconian

rules governing default, for fear of further discouraging the states from accepting the obligatory adjudication of their disputes.

JOHN B. WHITTON

The Relation between International Law and Municipal Law in the Netherlands and in the United States. By L. Erades and Wesley L. Gould. New York: Oceana Publications; Leiden: A. W. Sijthoff, 1961. pp. 510. Table of Cases. Index. \$11.00.

A Dutch judge and an American professor have collaborated in a comparative study of the laws of their respective countries with respect to the relationship between international law and local law. In dealing with each phase of the subject, the Dutch author states the law of The Netherlands on the point, and the American author states the law of the United States; then follows a comparative summary by the American author, commenting on the significant similarities and differences shown by the two legal systems in dealing with the same subject. The first half of the book provides a general description of the state organs, legal methods, and court procedures of the two nations. Succeeding chapters deal with the judicial application of international law, both customary and conventional. Erades concludes (though the late Professor B. M. Telders is cited as dissenting) that

Netherlands case law in its present stage of development does treat international agreements as binding internally as rules of international law and not as rules of municipal law. (pp. 320-321.)

The final portion of the book (Part V) on conflicts between municipal law and international law is the most interesting. Four chapters treat municipal law *vs.* pre-existing or subsequent international customary law; international agreements *vs.* antecedent statutes; international agreements *vs.* subsequent statutes; and national constitution *vs.* international law, respectively. It is of interest to note that in The Netherlands a treaty prevails over later (as well as earlier) national legislation. When this rule was expressly adopted in the 1953 revision of the Dutch Constitution it was not a revolutionary innovation (page 413). In the United States, although Jefferson and Jay espoused it, the courts have rejected it and held that the latest expression of the legislative will must prevail. Likewise a treaty prevails over the Dutch Constitution (pages 466-468), while in the United States this is not the case (although in practice a treaty has never yet been declared unconstitutional).

The book displays a high quality of scholarship, although (perhaps because printed in a foreign country) there are numerous minor misprints and several meaningless sentences, such as the following (page 352): "Thus, a principle of international law which had been enunciated judicially as early as 1781 a court having extraordinary jurisdiction as ground for setting aside a statute." (For other specimens, see pages 391, 456, 463. These passages occur in the contributions of the American author, it should be noted, and thus are not attributable to translation.) A curious com-

pound of error appears in the American author's discussion of Senatorial courtesy: "For example, when in 1930 President Hoover nominated Judge Parker of New York for the Supreme Court, the Senate turned down the nominee because of objection from the senior Senator from New York. Dean Owen J. Roberts of the University of Pennsylvania Law School then was nominated and confirmed" (page 113). Chief Justice Earl Warren is also described as a former "District Attorney of the State of California" (page 114). In spite of these minor defects the book is very interesting and useful. The authors plan to follow it with another volume comparing Netherlands and American case law on substantive topics of international law.

EDWARD DUMBAULD

Asian-African Legal Consultative Committee. Third Session, Colombo, 1960. Issued by the Secretariat of the Asian-African Legal Consultative Committee. New Delhi: The Laxmi Press, 1960. pp. iii, 247.

The work of the Asian-African Legal Consultative Committee merits attention as reflecting the considered and, in most cases, concerted assessments by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan, the Sudan and the United Arab Republic of legislative proposals of the International Law Commission and other organs of the United Nations. Given the political background of the discussions, it is not entirely surprising that the Committee's draft conventions on diplomatic immunities and privileges, the status of aliens, extradition, immunities of states in commercial transactions and the detailed discussion of the International Law Commission's draft of 1958 on Arbitral Procedure should reveal an assertive espousal of national, rather than international, jurisdiction.

Thus, while the draft on Diplomatic Immunities and Privileges follows textually that of the International Law Commission, the injection of reciprocity suggests impairment of even those immunities normally recognized by international law. Similarly, the regime of national treatment for resident aliens has been broadly extended, as have the immunity of the state trading corporation (the U.A.R. dissenting) and extradition for political crimes. All drafts and discussions, particularly those on the International Law Commission's proposals for Arbitral Procedure, reveal an intent to exclude the International Court of Justice, the Japanese Government being alone in favoring retention of a rôle for it in the appointment of an arbitrator in the absence of agreement between the parties.

The draft on Diplomatic Immunities and Privileges contains a useful innovation (adopted in the Vienna Convention) designed to restrict an abuse widespread in the Afro-Asian area, namely, the persistent operation of radio transmitters on mission premises for direct communication with the home state.

The volume suffers from a profusion of typographical and other textual errors.

JOHN H. SPENCER

Zasady Międzynarodowego Prawa Konsularnego [*Principles of International Consular Law*]. By Kazimierz Libera. Warsaw: Państwowe Wydawnictwo Naukowe, 1960. pp. 546.

As the author, professor at the University of Warsaw School of Law, states, for a long time internationalists were surprisingly reluctant to undertake serious studies of the status of consuls and rules of the law of nations pertaining to their function. International law treatises were usually contented to point out that consuls are not diplomats, and briefly described the features of some consular conventions. And even when the activities of the consul merited more attention in the legal world, with the end of the last century most studies in this field were limited to the internal law provisions about the duties of the consul and organization of his service. Yet, there is a body of international consular law irrespective of international conventions or municipal statutes (which, however, cannot establish any rules of the law of nations) (page 42). Before the last war, for instance, Poland maintained consular relations with 57 countries, but entered into consular agreements with only 11 of them (page 9).

Thorough studies in the field of international consular law are the more important since, with the increase of international intercourse, the duties of the consuls become ever more complicated, numerous, and essential to the maintenance of peaceful relations among nations. From interesting data collected by Professor Libera, it appears that in 1931 Great Britain had 1,075 consulates, Italy—1,008, Spain—974 (page 16). Even small countries deemed it necessary to maintain many consular outposts: Finland—351, Greece—316, Panama—292 (page 16). In 1951 the United States maintained consular relations with 101 countries. The tremendous importance of the consul's functions was thus ably characterized by the author:

. . . (T)he work of the consuls, though deprived of spectacular and impressive features which are connected with the diplomatic service, renders to the states services really immeasurably important to their national economy in everyday, peaceful intercourse, in the practical carrying out of the idea and contents of co-existence. Therefore, if the role of the consuls should not be overemphasized, neither should it be underestimated. (p. 16.)

Professor Libera gives in his thorough study an encyclopedic, up-to-date, treatment of the subject. He juxtaposes internal and international consular law, analyzes the sources of the latter, and concludes:

In the field of consular relations . . . customary law has the same great importance as in the field of diplomatic relations, and its norms . . . have no mere subsidiary character . . . but play a role as essential as, or even more controlling than, conventional law. (p. 68.)

The importance of international consular law and the feeling that it had ripened into a well-settled body of principles prompted the International Law Commission of the United Nations to decide to codify it (page 73).

After giving a thorough analysis of the legal character of the institution of the consul, the author examines the right to maintain consular relations, the categories of consuls and their staff.

The second part of the book deals in detail with the beginning and the

end of the consular mission, the consular privileges and immunities, the functions of the consul, and the legal situation of the consul in time of war. The author recognizes the official character of the consul as a representative of a foreign country, and finds that the receiving state has the obligation of ensuring him special protection and personal freedom, as "any infringement of it would have to be treated as infringement of the rights and dignity of the sending state" (page 285). The jurisdictional immunity of the consul in his work results "from the protection that international law ensures to the official consular functions as a form of the activity of a sovereign state" (page 291).

The book is supplemented by a four-page index of sources, eight-page list of international conventions, and a ten-page bibliography. The whole is an extremely valuable contribution to international law literature. Unfortunately, being in the original Polish text, it will not be accessible to the American reader. It would be highly desirable to have the book published in an English translation.

W. J. WAGNER

The Position of the Individual in International Law according to Grotius and Vattel. By Peter Pavel Remec. The Hague: Martinus Nijhoff, 1960. pp. xii, 260. Index. Gld.18.

This scholarly study of the status of the individual in international law according to Grotius and Vattel purports to determine (1) whether and to what extent widely recognized principles governing the status of the individual under international law may be traced to the views expressed in the teachings of publicists belonging to the school of natural law; and (2) whether certain basic principles set forth by the classical writers may "provide fundamentals for the construction of a new modern theory of international law" (page 2), that is, a theory which goes beyond the traditional positivist doctrine of international law on the legal position of the individual.

The author, after stating his reasons for selecting Grotius and Vattel as the representatives of major schools of natural law (page 44), renders a lucid exposition of the views of these writers on the relationship of volitional or positive law to natural law. He recognizes that there is more than one body of rules which may be styled "natural law" or "school of natural law" (page 41), and designates Grotius as a representative of the earlier or classic group, in contrast to Vattel, who is considered a member of the modern or egalitarian, rationalistic school of natural law (pages 45 and 54).

The author contends that "Grotius recognizes but Vattel denies the possibility of international protection of human rights against one's own state" (page 243). In support of this thesis he recalls above all that Grotius considered an outside intervention on behalf of unjustly persecuted subjects as a proper and lawful method to protect the rights of the subjects (page 221)—a point which is stressed also in the preface by Professor Quincy Wright. Generally Grotius is declared to be the most important

representative in the field of international law of that school of natural law which conceived the individual human being as the ultimate basis of international law (page 57). However this may be, it is clear from the author's analysis that the approach of Grotius both to the theory of the state (including such concepts as sovereignty as well as public, private¹ and mixed wars) and to the sources of law (which include the law of nature and volitional law, which may either be in conformity with or contrary to the law of nature) does not necessarily yield a workable theory on the legal status of the individual, and, in particular, of his substantive or procedural rights under international law.

Actually, the author points out that the Grotian construction of a law of nations contrary to the law of nature was probably an important step which influenced later trends toward strict legal positivism and which, in his view, was also responsible for the gradual displacement of the individual by the omnipotent sovereign state as the subject of the law of nations (page 240).

The part of the book (pages 127-200) which is devoted primarily to Vattel brings out clearly Vattel's views on the sovereign equality of states, on the sovereign state as *the* subject of the law of nations, and on the legal and moral personality of the state (see especially pages 161, 166-171, 180). The view is advanced that in Vattel's system only states are immediate addressees of international law rules (page 194; note 1: ". . . tout Etat souverain et indépendant . . . figure immédiatement dans la grande Société du Genre-humain"), and that in this system "states effectively mediatized individual men in relation to the great society of the human race" (*ibid.*). Nevertheless, the individual has not been completely submerged or forgotten in Vattel's approach; in this context the references to Vattel's "individual state-analogy" (pages 186-189) and to the right of the individual to resist public authority in specified circumstances (pages 227-229) are of special interest.

On the whole, the book constitutes a valuable contribution to an important and still somewhat controversial subject; it reflects in its summaries and critical evaluations a quite unusual empathy of the author for the doctrines of Grotius and Vattel. It is noteworthy that the study is not concerned with historical analysis *per se*; also, the recent literature and the practice of states and of the United Nations in the field of human rights are taken into consideration. Notwithstanding the undeniable merits of the work and the high level of sophistication which it attains, this reviewer feels compelled to take exception to the statement that, in effect, all legal positivists asserted "that states are the sole subjects of international law, while individuals . . . are considered merely as its objects" (page 6). Both the theory and practice of international law, especially since 1918, furnish ample evidence to the contrary.²

¹ On the background of the views of Grotius on private wars, see Nussbaum, *A Concise History of the Law of Nations* 104 (New York, 1947).

² See, on this point, Aufrecht, "Personality in International Law," 37 *American Political Science Review* 217-243 (1943). See also *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] *I.C.J. Rep.* 179.

Moreover, the author tends to over-emphasize the rudimentary development of the procedural standing of individuals before international tribunals and to de-emphasize the law and practice of states as regards substantive human rights. Finally, a basic antinomy inherent in traditional natural-law doctrine, including that of Grotius, seems to be overlooked. While it is alleged that natural law is based on the rational and sociable nature of man, natural law is frequently invoked as an appropriate means to restrain governments (the prince, chief executive, legislator), which are prone to adopt, or actually have adopted, rules that are contrary to natural law. Such a view, it is submitted, suggests the inference that all human beings are rational and sociable except those who are charged with being the leaders and guardians of man in organized society. If right reason (*ratio recta*), according to classical natural-law doctrine, is the eternal bond between law and man, natural law itself should by definition be the embodiment of generally understandable and observable standards of reasonableness.

HANS AUFRICHT *

Foreign Relations of the United States. Diplomatic Papers. 1940, Vol. V: The American Republics. (Dept. of State Pub. 7188.) pp. vii, 1202. \$4.00; 1942, Vol. III: *Europe.* (Dept. of State Pub. 7165.) pp. vi, 869. Index. \$3.25. Washington, D. C.: U. S. Government Printing Office, 1961.

The publication at one time of two volumes of *Foreign Relations* two years apart and some 20 years after the record was made emphasizes the point that the President himself saw fit to make to those concerned in a letter of September 6, 1961, in which he called the delay "undesirable" and questioned past clearance practice. The Bureau of American Affairs held up the 1940 volume nearly three years after the rest of the year's record was published.

Volume V of 1940 contains the published record of United States dealings with the American Republics in the year which saw Germany seize France and much of the rest of Europe. By April, 1940, half of the states of the Hemisphere were seeking arms from the United States and, by September, laws and regulations had been adjusted so that requests were reviewed in the Department of State and forwarded to the defense departments for filling "on financial terms these Republics can meet." Defense of the Hemisphere occupied attention after the collapse of France in June, and consultations with all 20 of the republics developed arrangements that were much the same except for Argentina, Bolivia, Mexico, Panama and Paraguay. The defense posture permeates the record of the year.

In 1939 the Foreign Ministers had issued the Declaration of Panama defining their neutrality position. Their second meeting at Havana July 21-30, 1940, set a pattern of collaboration which made for hemispheric

* Legal Department, International Monetary Fund, Washington, D. C. The views expressed are those of the reviewer and not necessarily those of the International Monetary Fund.

solidarity in the Second World War and planted seeds that seem to be sprouting in the Alliance for Progress of 1961. The Act of Havana and the Convention of July 30 concerning the Provisional Administration of European Colonies and Possessions in the Americas was an unchallenged precaution, but remains in effect. The Havana meeting continued the Inter-American Neutrality and the Financial and Economic Advisory Committees; it approved an unperfected convention for establishment of an Inter-American Bank, set up an Inter-American Development Commission, outlined a program for inter-American economic co-operation and forwarded the Inter-American Coffee Agreement subsequently signed on November 28, 1940.

In 1940 territorial questions were few. Mediation of the boundary dispute between Honduras and Nicaragua came to no conclusion; United States interest in the dispute between Guatemala and the United Kingdom over British Honduras continued; and the United States expatiated at full length to Honduras on its assertion of ownership of Swan Island.

Financial, economic and commodity questions dominated negotiations with individual states. Other negotiations related to Bolivia's nationalization of Standard Oil Company property, arrangements to smelt Bolivian tin in the United States, and the settlement of claims against Mexico and payment for its expropriation of oil properties, both settled by agreements dated November 19, 1941.

Publication of *Foreign Relations* is current for the year 1942, except, of course, lack of domestic clearance of the *American Republics* volumes for 1941.

These war volumes of *Foreign Relations* exhibit the difficulty the compilers find in sifting the increasing mass of documents and the proliferation of foreign relations into other agencies of the Government. Notes to material already printed elsewhere have increased. Omissions have multiplied of documents whose basic facts or points can be deduced or are sufficiently set forth in another form. Memoranda of conversations or summarizing a situation in many cases carry the narrative in lieu of extensive documents. Cross references multiply. By such devices a compact and clear record is presented and its technical incompleteness is not obscured.

DENYS P. MYERS

Foreign Relations of the United States. Diplomatic Papers. The Conferences at Cairo and Tehran, 1943. (87th Cong., 1st Sess., H. Doc. 144.) Washington, D. C.: U. S. Government Printing Office, 1961. pp. lxxxvii, 932. \$4.00.

This volume publishes the intimate details of the Tehran Conference with Marshal Stalin from November 27 to December 2, 1943, which President Franklin D. Roosevelt had been trying to arrange since December, 1941. On the way to and from Tehran there were conferences at Cairo from November 22 to 26 with Generalissimo Chiang Kai-Shek and with President Ismet İnönü of Turkey from December 2 to 7. Prime Minister Churchill

took part in all three. The Combined Chiefs of Staff (British-American) were present at all three, and at Tehran one meeting of the tripartite military group was held, the rest of the discussion of OVERLORD (the invasion of Europe in June, 1944) taking place in the political meetings at Tehran.

For the three conferences the President traveled 17,442 miles by train, battleship convoy and air, being absent from his desk from November 11 to December 17, 1943, during wartime. The formal results were: Anglo-American-Chinese statement on the disposition of Japan after its defeat (page 448); Tehran communiqué consisting of a signed Declaration of the Three Powers (page 640); signed Declaration of the Three Powers regarding Iran (page 646); initialed Military Conclusions of the Tehran Conference (page 652); Cairo communiqué on relations with Turkey (page 831). The President and Prime Minister approved a report of the Combined Chiefs of Staff which specified the conclusions reached at Tehran and Cairo (page 810). The primary object of these conferences was to co-ordinate and strengthen the war effort of the United Nations, and the heads of government involved regarded the conferences as successful in that respect. The results were published simply as press releases in the United States and the United Kingdom, but the Soviet Union incorporated the two declarations of Tehran in its treaty series—a contrast in treating documents as statements of policy or binding instruments.

It will be recalled that this volume is one of the series covering conferences in which the President took part that the Department of State was enjoined by the Senate to publish out of the chronological order of *Foreign Relations* volumes. In consequence, this volume is an egregious deviation from the customary order of publication of *Foreign Relations*. But the Historical Office is to be congratulated upon fulfilling the artificial injunction imposed upon it. The volume was edited by William M. Franklin, Deputy Director.

To begin with, none of these conferences produced agreed minutes of the meetings, or even formal delegation minutes, except for those of the Joint Chiefs of Staff and the Combined Chiefs of Staff. There were no agenda. The clue to what happened is the President's Log, the detailed diary of all his activities, conversations, meals, courtesy calls, et cetera. The proceedings of each conference are identified primarily from that data and the record of every contact assembled under its date and hour. Aside from records made by the Chiefs of Staff, the minutes kept by interpreters, one or two "agreed minutes" (pages 323, 711) and some memoranda of conversations, many of the contacts are covered by citations of memoirs of participants or by interviews with them. Under the circumstances, the record is as complete as possible, and largely undigested.

The direction to issue volumes on the Heads-of-Government conferences out of chronological order necessarily required collecting much preliminary material that would normally be in earlier volumes of *Foreign Relations*. The directive, moreover, had a flavor of criticism of what had occurred. This volume clearly shows the effect of the consequential abandonment of

the expert selectivity which is standard for compiling *Foreign Relations*. For this volume, even more than for *Conferences at Malta and Yalta*, every scrap of preliminary or post-conference information from the files or writings of participants has been collected and presented. The extent to which the files have been exhausted is illustrated by the 107 pages of papers on arranging for the conferences. From the prefatory calendar of papers and the index, an inquirer can work out the discussion on any subject covered, and it is up to him to find if a decision was taken on it. Perhaps the subjects of most interest in the volume are the understandings reached with the Soviet Union with regard to Operation OVERLORD, Soviet plans for war against Japan, and the Chinese communiqué.

DENYS P. MYERS

BRIEFER NOTICES

Post-War Thinking About the Rule of Law. (Ann Arbor: University of Michigan Law School, 1961. pp. 485-613.) This slim volume, which is a reprint from the *Michigan Law Review* for February, 1961, of papers delivered by the members of the Michigan Law School faculty during the 1960 summer session for lawyers, presents provocative thoughts on the rule of law. Seven lectures were delivered, ranging from "The Rule of Law in Historical Perspective," on the one hand, to what may be termed *Closing the Ring*, namely, "The Challenge of the Rule of Law," on the other. Five of the essays deal with the judicial process, the executive department, the Supreme Court, the international facets and the legislative processes of this concept. No uniform definition of this so frequently debated notion is advanced by the participants, even though they are agreed on the value, significance and desirability of this phenomenon and on some of its basic assumptions. In the historical essay, for example, three basic meanings are presented, only to be criticized in favor of a more positivist tradition, although not in the traditional sense of positivism, but in the "Ideal of Just Law" which is to be tested by stated techniques. The article on "The Legislative Process and the Rule of Law" advises us that individual intellectual freedom is or should be part of the rule of law, while the paper on "The Rule of Law and the Judicial Process" points out that the notion of a government of laws and not of men is a fiction, and the one on "The Executive Department of Government and the Rule of Law," in a sweeping indictment of the administrative agencies, states that the policy of these organs is in derogation of the rule of law and laments the fact that the position of these independent agencies will lead toward a government by men and not by law.

The International Rule of Law includes three principles, according to Professor Bishop: (1) reliance on law and not on naked power; (2) legal settlements in lieu of forcible ones; (3) realization that legal principles can further social goals without sacrificing the freedom and dignity of the individual. This reviewer particularly enjoyed that essay and regards it as pertinent to note the comment that the newly independent nations of Asia and Africa do not necessarily accept all the underlying values of the international legal system as developed by the older members of the community. Indeed, this was illustrated forcefully when India's Ambassador to the United Nations, in denying that aggression had been committed against Goa, stated:

This is the situation that we have to face and if any narrow-minded legalistic considerations, considerations arising from international law, were written by European international law writers, these writers are, after all, part of the atmosphere of colonialism.¹

GUENTER WEISSBERG

Comunicazioni e Studi. Vol. X, 1958-1959. (Milan: Dott. A. Giuffrè, 1960. pp. viii, 886. Index.) In the summer of 1940 the Institute of International Law was founded at the University of Milan. This constituted in those dark times, as the preface to the volume under review puts it, an act of bold hope. The Institute has published *Comunicazioni e Studi* in 1942, 1946, 1950, 1952 and, since 1953, annually. The preface admits that there is again today a profound and dangerous crisis of international law, but holds that it is only a "crisis of growth." Whether this diagnosis is not over-optimistic remains to be seen. But however this may be, we want to present our congratulations to the Institute and its publication on this anniversary.

Volume X, as always, beautifully printed and bound, again has a rich and valuable content. The studies, nearly all devoted to international law, show a great variety. Gandolfi's essay deals with the first treaty between Rome and Carthage (pages 327-353); Guggenheim pays homage to Max Huber, "the most characteristic international lawyer Switzerland has had since the times of Eméric de Vattel" (pages 13-33).

Many articles treat problems of international organizations. Gros analyzes (in French, pages 1-12) the new Treaty of Brussels (1960) concluded between the states of "little Europe," creating an international organization for the security of aerial navigation in the upper atmosphere ("Euro-control"); Capotorti (pages 113-131) writes on the new Road Traffic Conventions; Arangio-Ruiz on the fundamental principles of the international conventions for the recovery of nuclear damages (pages 77-111). Sperduti's theme is the human person and international law (pages 159-180); the title of Rolin's essay is "Towards a Really International Public Order" (pages 53-75).

Migliazza (pages 351-391) investigates the interpretative function of the Court of Justice of the European Communities; Jenks (pages 35-51) discusses the outlook for international judicial procedures. Giuliano (pages 133-158) studies the significance and range of "innocent passage" through territorial waters in his usual comprehensive and richly documented way. The principal theoretical study is by Ziccardi on the theory of international customary law (pages 187-257). The study is interesting, but remains rather vague and amorphous, by reason of its attempt to make use of Ago's untenable theory of "spontaneous" law; this is so, even though the author rejects this theory in the most vital part of his investigation.

Finally, the volume contains a broad study of the decisions of the Italian courts in 1957 involving problems of conflict of laws (Bianchini, pages 691-744) and of international law (Luzzatto, pages 623-689). The article by Fabozzi (pages 601-622) on the jurisdiction of the International Court of Justice in 1958 reveals the sad situation of this Court: only one judgment is to be discussed, and even this one is hardly a case of international law. Of particular interest are the voluminous studies on the Italian science of conflict of laws in the preceding year (Ruini, pages 469-599) and of international law (Kojanec, pages 393-468). Many pages of reviews of new works and of all the great international law reviews conclude this excellent Yearbook.

JOSEF L. KUNZ

¹ The New York Times, Dec. 19, 1961, p. 14.

Pakistan and the United Nations. By K. Sarwar Hasan. (New York: Manhattan Publishing Co., 1960. pp. ix, 328. Index. \$3.00.) In 1952 the Carnegie Endowment for International Peace initiated a series of National Studies on International Organization to assess the strengths and weaknesses of the United Nations in terms of national attitudes. This volume in the series was prepared in the Pakistan Institute of International Affairs with the assistance of a distinguished study group and of officials of the Institute and the government.

The assessor of public attitudes must locate himself in relation to his subject. He may view the national attitude as a non-participant, and attempt objective evaluations and specialized analyses, or he may state and defend the national attitude as one who shares it. Mr. Hasan leans heavily toward the latter approach. The first chapter describes the emergence of Pakistan within the framework of international organization. Succeeding chapters deal with the major international interests of Pakistan. Of initial importance are relations with India and the consequent regional arrangements to strengthen the position of Pakistan. Two chapters, comprising almost one third of the book, defend Pakistan's claim to Kashmir. Other topics for discussion are the partition of Palestine, the Suez crisis, trusteeship and colonial matters, human rights, economic assistance programs and some of the "cold war" issues.

There is more discussion of relations *vis-à-vis* India than seems necessary in a study of national attitudes toward international organization. The problems suggested by the Carnegie Endowment and covered in detail in other studies of the series receive less space. On balance, however, this study does answer the basic question of Pakistan's attitudes toward the United Nations, and it demonstrates only too well that one of the weaknesses of that organization is the nationalism of each member state.

Turkey and the United Nations. Prepared under the auspices of the Institute of International Relations of the Faculty of Political Science, University of Ankara. (New York: Manhattan Publishing Co., 1961. pp. xii, 228. Index. \$4.00.) This book is among the last in the series of studies sponsored by the Carnegie Endowment for International Peace. The prospect of Charter review, an immediate stimulus for the project, diminished before the studies had been carried far, but their usefulness continues. A basic theme of this study is Turkey's reliance on international organization to provide peace and security. Turkey emerged distrusting the League of Nations as an instrument for carrying out the provisions of an unfavorable peace treaty, and for a time found support in the Soviet Union by signing a pact of friendship with its "traditional enemy" in 1921. After Turkey entered the League in 1932, it drew away from the Soviet Union, and Turkish attitudes toward international organization have since been influenced by the threats of its big neighbor. Accounts of the use of the veto in the Security Council, the membership impasse, and collective security and regional arrangements are critical of Soviet positions. Lengthy quotations from statements of government officials and press commentators are major bases for conclusions. Results of a public opinion poll parallel these statements, but are included in an appendix rather than in the body of the report. (The poll was limited, and the authors warn against extensive reliance on it. Of 351 respondents, 178 were students and teachers.)

Turkish dismay at the weakness of the United Nations is frankly admitted and is the cause for emphasis on regional alliances; however, proposals for amendment are restrained, and are offered as "positive contributions toward the preservation of the organization."

JOHN M. HOWELL

The Anglo-Iranian Oil Dispute. By Sunil Kanti Ghosh. (Calcutta: Firma K. L. Mukhopadhyay, 1960. pp. xiv, 340. Index. Bibliography. Rs. 16.) In this study, which appears to have been largely written in 1953-1954, while the author was a candidate for the degree of Doctor of Science of Law at the College of Law, University of Illinois, and to have been accepted for that purpose in 1956 in typewritten form and not in the form of the present printed volume, Mr. S. K. Ghosh, a native of India and now practicing there, seeks to determine why nationalism should be such a potent force, when most nations believe so strongly that security and well-being depend upon co-operation and interdependence. To this end, he explores the background and development of the dispute over the expulsion of the Anglo-Iranian Oil Company. He describes in some detail the decisions of the International Court of Justice, and he summarizes the debates in the Security Council. There is some obscurity in his treatment of the negotiations following the expropriation.

The need for private investment in developing countries is recognized, and it is noted that "the effects of foreign expropriation are a matter of concern to all those who wish to be of assistance in the development of this important segment of international relations." While it is said that there are "many uncertainties and conflicts of opinion in the interpretation and application of the principles of international law," and that "acceptance of the general principle of compensation has not sufficed to put an end to this controversy," Mr. Ghosh admits that failure to settle the Iranian dispute was not due to any "lack" of law or available procedures, but rather to a lack of faith in, and unwillingness to submit to, those procedures.

It is unfortunate that this book, published in 1960 and poorly printed, does not describe the events following the fall of Mossadegh. The uninformed reader may be left with the impression that Mossadegh "got away with it." He did not. He was dismissed in 1953, and in the following year the important agreements with Anglo-Iranian and the oil consortium were concluded under which Anglo-Iranian obtained a 40% participation, cancellation of substantial claims, and provision for £225,000,000 in cash.

G. W. HAIGHT

Die Internationale Kontrolle der Höheren Luftschichten und des Welt-raums. By Robert K. Woetzel. (Bad Godesberg: Asgard-Verlag, 1960. pp. 97. DM. 16.) This is a competent survey of the legal problems of outer space along conventional lines. The author deals with the technological bases of human activity in space, the upward extent of sovereignty in airspace, the legal status of outer space, proposals for international control of activities in space, the legal status of space vehicles, responsibility for damages caused by such vehicles, regulation of telecommunications in outer space, and the problem of acquisition or control of heavenly bodies. He inclines to the view that national sovereignty extends upward approximately 60 miles (the altitude beyond which the air is too rarified to support the flight of aircraft) and that space above this altitude is *res communis* which is open to peaceful uses by all nations. In this connection, he stresses the 1958 resolution of the U. N. General Assembly on peaceful uses of outer space and attributes a "quasi-legal" effect to it as expressing the consensus of the international community. "Peaceful" is apparently regarded as synonymous with "non-military." The discussion is thoroughly documented and there is a good bibliography.

O. J. LISSITZYN

Private International Law. 6th ed. By G. C. Cheshire. (New York: Oxford University Press; Oxford: Clarendon Press, 1961. pp. lvi, 733. Index. \$11.20; 70 s.) This English classic on conflict of laws has reached its sixth edition.¹ Because of important new decisions and several statutory enactments affecting the area, a new edition became desirable within the relatively short period of four years. It is as impressive and distinguished as its predecessors. Never tiring in the search for lucidity, Professor Cheshire has used the occasion to restate or re-phrase his views on a number of important questions.

To the public international lawyer, changes in the discussion of "Sovereign Immunity" (pages 88-102) are of special interest. The results of the decision of the House of Lords in *Rahimtoola v. Nizam of Hyderabad*² are incorporated. With a reference to a dictum by Lord Denning in that case, the principle of absolute immunity, adhered to in England, which rules out a possible distinction between *acta imperii* and *acta gestionis* is criticized by the author in even stronger language than before. And lack of sympathy is expressed with the decision of the majority of the Court of Appeal in *Baccus S.R.L. v. Servicio Nacional del Trigo*,³ holding the principle of immunity to extend to a separate legal entity set up by a sovereign state.

Because of acceptance by English law through the Legitimacy Act of 1959 of the doctrine of the putative marriage, the parts on legitimacy and legitimation had to be re-written and the coverage of adoption was extended. Substantial effort has also gone into the treatment of "jurisdiction" with its many aspects and meanings (pages 107-111, 120-122). The doctrine of the principle of "effectiveness" has been dropped—and it will not be missed. Kept is the statement, originating with Mr. Justice Holmes, that "the foundation of jurisdiction is physical power"—a truth which cannot explain the growing assumption, in England and everywhere else, of jurisdiction *in personam* for reasons other than physical power over the defendant. "Arrestment *ad fundendam jurisdictionem*" in Scotland and in certain Continental countries (not identified) is criticized as a basis for *in personam* jurisdiction, but no mention is made of the well-established concept of *quasi in rem* jurisdiction, of daily application in the United States, under which jurisdiction *in personam* may be acquired through attachment, but with limitation to the attached *res*. Undisturbed by a dictum possibly to the contrary, Professor Cheshire maintains the view (page 652) that a general extension of the "reciprocity" doctrine of *Travers v. Holley*⁴ to areas outside the field of matrimonial status matters would be beneficial. Indeed, in evaluating the equity, for purposes of recognition, of bases for jurisdiction used abroad, regard should be had to the instances in which jurisdiction is being assumed at home. The effects of the argument made would be even stronger if "assumption of jurisdiction" and "recognition of foreign-assumed bases for jurisdiction" were not discussed at different places in the book.

¹ For a review of the second edition (1938), which broke away from the vested rights theory, see Arthur K. Kuhn, in 32 A.J.I.L. 635 (1938).

² [1958] A.C. 379, digested in 52 A.J.I.L. 340 (1958).

³ [1957] 1 Q.B. 438, digested in 51 A.J.I.L. 427 (1957).

⁴ [1958] P. 246.

On many other points as well, the new edition gives the reader Professor Cheshire's latest views. Thus, like the earlier editions, the sixth will be indispensable to all workers in the field. They rejoice in having this learned treatise available in up-to-date form.

KURT H. NADELMANN

XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema. Edited by Kurt H. Nadelmann, Arthur T. von Mehren and John N. Hazard. (Leiden: A. W. Sijthoff, 1961. pp. xv, 547. Fl. 46.90; \$12.50.) This volume encompasses a collection of essays in the fields of comparative law and conflict of laws, contributed by 38 eminent specialists from fifteen different legal systems in tribute to the distinguished Editor-in-Chief of the *American Journal of Comparative Law* on the occasion of his seventieth birthday. As the title indicates, most of the content of this book does not focus directly on matters of public international law and therefore might appear to be only of peripheral interest to a large segment of the readers of our JOURNAL. Nevertheless, since international law in some subtle fashion must be the quintessence of, and an absorbent for, the underlying presuppositions and basic policies of the existing legal systems in the world, scholars of international law will gain fruitful insights and stimulations from a number of essays found in this volume, especially in view of the increasing importance of supra-national and transnational arrangements and transactions. Thus René David's inquiry, "*Existe-t-il un droit occidental?*", Konrad Zweigert's study, "*Zur Lehre von den Rechtskreisen*," and Rudolf Schlesinger's paper on "The Common Core of Legal Systems," go right to the mainsprings of unifying and divisive forces and factors in the existing families of legal orders, and thus contain much valuable information on the nature and direction of the stresses and strains in the foundations of our present international legal structure.

Obviously a detailed discussion or even listing of the contents of the 38 essays which are so varied in subject matter, scope, and depth, would be tedious and of little positive value to our readers. All that needs and can be said here is that much in this *Festschrift* deserves attention from students of international law; in fact, at least one of the articles contained therein should be indispensable fare: Professor Doelle's "*Vorstudie zur Erörterung der Problematik mehrsprachiger Gesetzes- und Vertragstexte*." Vera Bolgár's moving contribution, entitled "The Magic of Freedom," deserves special mention because it touches on society's ultimate and eternal aspirations.

STEFAN A. RIESENFELD

Tratado sobre a Nacionalidade. Vol. IV: *Conflitos de Leis em Materia de Nacionalidade.* By Ilmar Penna Marinho. (Rio de Janeiro: Departamento de Imprensa Nacional, 1961. pp. 564. Bibliography.) Supplementing three earlier volumes on the subject of Nationality,¹ now comes a fourth volume by Dr. Marinho specifically devoted to conflicts of law in the matter of nationality. An opening chapter surveys the different bases of nationality, and this is followed by an analysis of the principal causes of conflicts and the various proposals offered for their solution. As in the case of the earlier volumes, the text is clarified by numerous citations from authorities on the subject, the comments of the author himself upon such items as the United Nations World Refugee Year being a significant indication of his good judgment and humane approach to the problem. A special chapter is devoted to leading cases on the conflict of laws in

¹ Reviewed in this JOURNAL, Vol. 53, p. 989 (1959).

the matter of nationality, the *Canevaro*, *Nottebohm* and other cases; and a closing chapter gives the texts of important documents, among which are the proposed United Nations agreements for the suppression of statelessness.

Congratulations to the Foreign Office of Brazil which promotes these studies.

C. G. FENWICK

Ambassadors Ordinary and Extraordinary. By E. Wilder Spaulding. (Washington, D. C.: Public Affairs Press, 1961. pp. ix, 302. Index. \$5.00.) Before, during and since Harvard (Ph.D.), as student, teacher, writer and bureaucrat, Wilder Spaulding has been concerned with history, and for some twenty-five years in government service he handled source materials. In this book he presents a congeries of sketches, in terms of "an informal study of ministers and ambassadors . . . interesting examples . . . who have represented the United States abroad." The approach is indeed "informal," and the "study" has been directed, not to the producing of a treatise on diplomacy, but to becoming acquainted with persons, qualifications, positions, circumstances and performances. Of this there has come, by processes of comparing and of arranging in groups based on backgrounds, a set-up which has enabled the author and will enable readers to view in perspective by the case method the practices and the experience of the United States in the choosing and use heretofore of its ambassadors.

The sketches are interesting in substance and in style; much of what their author tells about several ambassadors recently or still in service is "new"; his chapter entitled "The Female of the Species" is especially informative; and his conclusions and suggestions are well worth attention in a world and an era wherein, for the regulation of relations between and among nations, the human factor is becoming everyday more and more important. Most of the statements of fact in the narrative passages can be accepted; but, as in the works of many other authors who range over vast fields, there crop up in several contexts statements, some of fact and some of appraisal, the essence and the effects of which are repetitive of elsewhere-created fictions and myths.

In the United States we have developed within the present century a "career" Foreign Service; to it the President may look for personnel presumably qualified by experience to serve effectively as ambassadors; but, in the choosing process, the most heavily weighing considerations still are, and probably always will be, political. It is interesting to note that since, and soon after, the coming off the press of this book, there has come, authored in the area in the Department of State wherein Dr. Spaulding long served, a more formal *opus* entitled "The Foreign Service of the United States."

STANLEY K. HORNBECK

Politics and Trade Policy. By Joe R. Wilkinson. (Washington, D. C.: Public Affairs Press, 1960. pp. vi, 151. Index. \$3.75.) This is a valuable review of the legislative history of the reciprocal trade agreements program from its inception, early in the New Deal, as a temporary, emergency measure, to the current Trade Agreements Extension Act of 1958. During this quarter of a century, the trade agreements legislation has been approved by Congress on 12 occasions, beginning with the 3-year authority contained in the original Trade Agreements Act of 1934, which has been extended 11 times.

In Chapter I ("Trade Policy and the Depression"), the author describes the persistent efforts of Roosevelt's Secretary of State, Cordell Hull, to persuade, not only members of the two Houses of Congress, but also the President himself, of the need for and efficacy of a new technique of tariff reduction in the United States, *viz.*, delegation by Congress of limited authority to the President to modify U. S. tariff duties in return for corresponding reductions in trade barriers maintained by foreign countries against American exports. The legislative battles over the Extension Acts of 1940, 1943 and 1945 are covered in Chapter II ("Internationalism and Trade Policy"). The author rightly points out that the passage of the 1945 Act, with its greatly increased tariff-reducing authority, "marked the high-point in the history of the Trade Agreements program." "Reversing the Trend" is the subject of Chapter III, and covers the Extension Act of 1948, which first provided for "peril-point" findings by the Tariff Commission, as well as the Acts of 1949 and 1951. The latter enacted into law the "escape clause" provisions, theretofore provided for by direction of the Executive.

Chapter IV takes up "Trade Policy in the Eisenhower Years," and Chapter V, "the Trade Agreements Program in Retrospect." The latter contains a good summary analysis of all the legislation from 1934 to 1958. The author's discussion in Chapter VI of "the Trade Agreements Program in the Future" is especially timely, since the current trade agreements authority is due to expire in June, 1962, unless renewed. From advance rumblings, the 13th appearance of the trade agreements legislation on the Congressional stage may well be the stormiest yet.

All in all, Dr. Wilkinson has done an excellent job. He has told a fascinating story of the political problems and pressures, the "uneasy compromises," that have been involved in the efforts to accommodate both economic principles and the process of democratic government in the attempt to realize a trade policy for the United States in the national interest.

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AS ORGAN OF CONSULTATION IN APPLICATION OF THE INTER-AMERICAN
TREATY OF RECIPROCAL ASSISTANCE

Punta del Este, Uruguay, January 22-31, 1962

FINAL ACT¹

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, was held in the city of Punta del Este, Uruguay, from January 22 to 31, 1962.

The Meeting was convoked by a resolution of the Council of the Organization of American States adopted on December 4, 1961, the text of which is as follows:

The Council of the Organization of American States,

CONSIDERING:

The note presented by the Delegation of Colombia, dated November 9, 1961, in which it requests the convocation of a Meeting of Consultation of Ministers of Foreign Affairs, in accordance with Article 6 of the Inter-American Treaty of Reciprocal Assistance, to consider the threats to the peace and to the political independence of the American states that might arise from the intervention of extracontinental powers directed toward breaking American solidarity,

RESOLVES:

1. To convoke a Meeting of Consultation of Ministers of Foreign Affairs to serve as Organ of Consultation, in accordance with Articles 6 and 11 of the Inter-American Treaty of Reciprocal Assistance, in order to consider the threats to the peace and to the political independence of the American states referred to in the preamble of this resolution, and particularly to point out the various types of threats to the peace or certain acts that, in the event they occur, justify the application of measures for the maintenance of the peace and security, pursuant to Chapter V of the Charter of the Organization of American States and the provisions of the Inter-American Treaty of Reciprocal Assistance, and to determine the measures that it is advisable to take for the maintenance of the peace and security of the Continent.

¹ Doc. 68 (English) Rev., January 31, 1962. OAS Official Records OEA/Ser.F/11.8 (English).

2. To set January 10, 1962, as the date for the inauguration of the Meeting.

3. To authorize the Chairman of the Council to present to the Council, at the appropriate time, after consultation with the representatives of the member states, a recommendation on the site of the Meeting of Consultation.

On December 22, 1961, the same Council modified the provisions as to site and date of the meeting by a resolution that reads as follows:

The Council of the Organization of American States

RESOLVES:

1. To thank the National Council of the Government of Uruguay and accept its generous offer to be host, in Punta del Este, Uruguay, to the Eighth Meeting of Consultation of Ministers of Foreign Affairs to Serve as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, which was convoked by a resolution of December 4, 1961, of the Council of the Organization.

2. To set the date of January 22, 1962, for the opening of the Meeting.

The Members of the Meeting, in the order of precedence determined by lot, are listed below:

PANAMA:	His Excellency Galileo Solís, Minister of Foreign Affairs;
PARAGUAY:	His Excellency Raúl Sapena Pastor, Minister of Foreign Affairs;
CUBA:	His Excellency Osvaldo Dorticós Torrado, Minister of Foreign Affairs;
NICARAGUA:	His Excellency René Schick, Minister of Foreign Affairs;
HONDURAS:	His Excellency Andrés Alvarado Puerto, Minister of Foreign Affairs;
EL SALVADOR:	His Excellency Rafael Eguizábal Tobías, Minister of Foreign Affairs;
ARGENTINA:	His Excellency Miguel Angel Cárcano, Minister of Foreign Affairs;
PERU:	His Excellency Luis Alvarado G., Minister of Foreign Affairs;
CHILE:	His Excellency Carlos Martínez Sotomayor, Minister of Foreign Affairs;
COLOMBIA:	His Excellency José Joaquín Caicedo Castilla, Minister of Foreign Affairs;
BOLIVIA:	His Excellency José Fellman Velarde, Minister of Foreign Affairs;
COSTA RICA:	His Excellency Alfredo Vargas Fernández, Minister of Foreign Affairs;
MEXICO:	His Excellency Manuel Tello, Secretary of Foreign Affairs;

VENEZUELA:	His Excellency Marcos Falcón Briceño, Minister of Foreign Affairs;
HAITI:	His Excellency René Chalmers, Secretary of State for Foreign Affairs;
GUATEMALA:	His Excellency Jesús Unda Murillo, Minister of Foreign Affairs;
DOMINICAN REPUBLIC:	His Excellency José Antonio Bonilla Atilés, Minister of Foreign Affairs;
ECUADOR:	His Excellency Francisco Acosta Yépez, Minister of Foreign Affairs;
UNITED STATES OF AMERICA:	His Excellency Dean Rusk, Secretary of State;
BRAZIL:	His Excellency Francisco Clementino de San Tiago Dantas, Minister of Foreign Affairs;
URUGUAY:	His Excellency Homero Martínez Montero, Minister of Foreign Affairs;

The Meeting was also attended by His Excellency José A. Mora, Secretary General of the Organization of American States.

His Excellency Eduardo Víctor Haedo, President of the National Council of Government of Uruguay, opened the Meeting on the afternoon of January 22, 1962. At the inaugural session the speakers were: His Excellency Homero Martínez Montero, Minister of Foreign Affairs of Uruguay; His Excellency Alfredo Vargas Fernández, Minister of Foreign Affairs of Costa Rica; and His Excellency José A. Mora, Secretary General of the Organization of American States. The Government of the Republic of Uruguay designated his Excellency Homero Martínez Montero, Minister of Foreign Affairs of that country, as Provisional President of the Meeting. Mr. Martínez was elected Permanent President at the first plenary session, held on January 23. At the same session His Excellency Galileo Solís, Minister of Foreign Affairs of Panamá, was elected Vice President of the Meeting.

Pursuant to the Regulations of the Meeting, the Government of the Republic of Uruguay appointed Mr. Gustavo Magariños, as Secretary General of the Meeting.

The Meeting was governed by the Regulations of the Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, approved by the Council of the Organization of American States at its meeting of July 29, 1960.

In accordance with the Regulations, the Meeting designated a Credentials Committee composed of El Salvador, Mexico, and Uruguay. A Style Committee composed of Colombia, Haiti, United States of America, and Brazil was also appointed.

In conformity with the provisions of Article 20 of the Regulations, a General Committee, composed of all the Members, was established to consider the topics of the Meeting and to submit its conclusions to a plenary

session of the Meeting for approval. The General Committee appointed His Excellency Marcos Falcón Briceño, Minister of Foreign Affairs of Venezuela, and His Excellency Alfredo Vargas Fernández, Minister of Foreign Affairs of Costa Rica, as Chairman and Rapporteur, respectively. When the Minister of Foreign Affairs of Costa Rica found it necessary to return to his country, His Excellency Rafael J. Oreamuno, Special Delegate from the same country, was elected to serve as Rapporteur.

At the closing session of the Meeting, which took place on January 31, this Final Act was signed. At that session addresses were given by His Excellency Homero Martínez Montero, Minister of Foreign Affairs of Uruguay, and His Excellency Luis Alvarado G., Minister of Foreign Affairs of Peru.

As a result of their deliberations, the Eighth Meeting of Consultation of Ministers of Foreign Affairs approved the following resolutions:

I

COMMUNIST OFFENSIVE IN AMERICA

1. The Ministers of Foreign Affairs of the American republics, convened in their Eighth Meeting of Consultation, declare that the continental unity and the democratic institutions of the hemisphere are now in danger.

The Ministers have been able to verify that the subversive offensive of communist governments, their agents and the organizations which they control, has increased in intensity. The purpose of this offensive is the destruction of democratic institutions and the establishment of totalitarian dictatorships at the service of extracontinental powers. The outstanding facts in this intensified offensive are the declarations set forth in official documents of the directing bodies of the international communist movement, that one of its principal objectives is the establishment of communist regimes in the underdeveloped countries and in Latin America; and the existence of a Marxist-Leninist government in Cuba which is publicly aligned with the doctrine and foreign policy of the communist powers.

2. In order to achieve their subversive purposes and hide their true intentions, the communist governments and their agents exploit the legitimate needs of the less-favored sectors of the population and the just national aspirations of the various peoples. With the pretext of defending popular interests, freedom is suppressed, democratic institutions are destroyed, human rights are violated and the individual is subjected to materialistic ways of life imposed by the dictatorship of a single party. Under the slogan of "anti-imperialism" they try to establish an oppressive, aggressive, imperialism, which subordinates the subjugated nations to the militaristic and aggressive interests of extracontinental powers. By maliciously utilizing the very principles of the inter-American system, they attempt to undermine democratic institutions and to strengthen and protect political penetration and aggression. The subversive methods of communist governments and their agents constitute one of the most subtle

and dangerous forms of intervention in the internal affairs of other countries.

3. The Ministers of Foreign Affairs alert the peoples of the hemisphere to the intensification of the subversive offensive of communist governments, their agents, and the organizations that they control and to the tactics and methods that they employ and also warn them of the dangers this situation represents to representative democracy, to respect for human rights, and to the self-determination of peoples.

The principles of communism are incompatible with the principles of the inter-American system.

4. Convinced that the integrity of the democratic revolution of the American states can and must be preserved in the face of the subversive offensive of communism, the Ministers of Foreign Affairs proclaim the following basic political principles:

a. The faith of the American peoples in human rights, liberty, and national independence as a fundamental reason for their existence, as conceived by the founding fathers who destroyed colonialism and brought the American republics into being;

b. The principle of non-intervention and the right of peoples to organize their way of life freely in the political, economic, and cultural spheres, expressing their will through free elections, without foreign interference. The fallacies of communist propaganda cannot and should not obscure or hide the difference in philosophy which these principles represent when they are expressed by a democratic American country, and when communist governments and their agents attempt to utilize them for their own benefit;

c. The repudiation of repressive measures which, under the pretext of isolating or combatting communism, may facilitate the appearance or strengthening of reactionary doctrines and methods which attempt to repress ideas of social progress and to confuse truly progressive and democratic labor organizations and cultural and political movements with communist subversion;

d. The affirmation that communism is not the way to achieve economic development and the elimination of social injustice in America. On the contrary, a democratic regime can encompass all the efforts for economic advancement and all of the measures for improvement and social progress without sacrificing the fundamental values of the human being. The mission of the peoples and governments of the hemisphere during the present generation is to achieve an accelerated development of their economies and to put an end to poverty, injustice, illness, and ignorance as was agreed in the Charter of Punta del Este; and

e. The most essential contribution of each American state in the collective effort to protect the inter-American system against communism is a steadily greater respect for human rights, improvement in democratic institutions and practices, and the adoption of measures that truly express the impulse for a revolutionary change in the economic and social structures of the American republics.

II

SPECIAL CONSULTATIVE COMMITTEE ON SECURITY AGAINST THE
SUBVERSIVE ACTION OF INTERNATIONAL COMMUNISM

WHEREAS:

International communism makes use of highly complex techniques of subversion in opposing which certain states may benefit from mutual advice and support;

The American states are firmly united for the common goal of fighting the subversive action of international communism and for the preservation of democracy in the Americas, as expressed in Resolution XXXII of the Ninth International Conference of American States, held in Bogotá, in 1948,² and that for such purpose they can and should assist each other, mainly through the use of the institutional resources of the Organization of American States; and

It is advisable, therefore, to make available to the Council of the Organization of American States a body of an advisory nature, made up of experts, the main purpose of which would be to advise the member governments which, as the case may be, require and request such assistance,

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

RESOLVES:

1. To request the Council of the Organization of American States to maintain all necessary vigilance, for the purpose of warning against any acts of aggression, subversion, or other dangers to peace and security, or the preparation of such acts, resulting from the continued intervention of Sino-Soviet powers in this hemisphere, and to make recommendations to the governments of the member states with regard thereto.

2. To direct the Council of the Organization to establish a Special Consultative Committee of experts on security matters, for the purpose of advising the member states that may desire and request such assistance, the following procedures being observed:

a. The Council of the Organization shall select the membership of the Special Consultative Committee on Security from a list of candidates presented by the governments, and shall define immediately terms of reference for the Committee with a view to achieving the full purposes of this resolution.

b. The Committee shall submit reports to such member states as may request its assistance; however, it shall not publish these reports without obtaining express authorization from the state dealt with in the report.

² Pan American Union, *The International Conferences of American States*, 2nd Supp. 1942-1954, p. 270; Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948, Report of United States Delegation with Related Documents, p. 266 (Appendix Two) (Dept. of State Pub. No. 3263).

c. The Special Consultative Committee on Security shall submit to the Council of the Organization, no later than May 1, 1962, an initial general report, with pertinent recommendations regarding measures which should be taken.

d. The Committee shall function at the Pan American Union, which shall extend to it the technical, administrative, and financial facilities required for the work of the Committee.

e. The Committee shall function for the period deemed advisable by the Council of the Organization.

3. To urge the member states to take those steps that they may consider appropriate for their individual or collective self-defense, and to co-operate, as may be necessary or desirable, to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security resulting from the continued intervention in this hemisphere of Sino-Soviet powers, in accordance with the obligations established in treaties and agreements such as the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance.³

III

REITERATION OF THE PRINCIPLES OF NON-INTERVENTION AND SELF-DETERMINATION

WHEREAS:

This meeting has been convoked by a resolution of the Council of the Organization of American States that invoked Article 6 of the Inter-American Treaty of Reciprocal Assistance;

It is necessary to maintain the principles of non-intervention and self-determination set forth in the Charter of the Organization of American States, because these principles are a basic part of the juridical system that governs relations among the republics of the hemisphere and makes friendly relations among them possible;

In the Charter of the Organization of American States and in the Declaration of Santiago, signed in August 1959,⁴ all the governments of the American states agreed voluntarily that they should result from free elections;

The will of the people, expressed through unrestricted suffrage, assures the formation of governments that represent more faithfully and without yielding to the interests of a privileged few the basic aspirations to freedom and social justice, the constant need for economic progress, and the call of brotherhood that all our peoples feel throughout the hemisphere;

³ Pan American Union, International Conferences of American States, 2nd Supp. 1942-1954, pp. 178, 142; Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948, Report of United States Delegation with Related Documents, p. 166 (Appendix Two) (Dept. of State Pub. No. 3263); 46 A.J.I.L. Supp. 48 (1952); 43 *ibid.* 53 (1949).

⁴ Final Act, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, Aug. 12-18, 1959. Pan American Union, Doc. 89 (English), Rev. 2, Oct. 12, 1959, p. 4; 55 A.J.I.L. 537 (1961).

Formation by free elections of the governments that comprise the Organization of American States is therefore the surest guarantee for the peace of the hemisphere and the security and political independence of each and every one of the nations that comprise it; and

Freedom to contract obligations is an inseparable part of the principle of the self-determination of nations, and consequently a request by one or more countries that such obligations be complied with does not signify intervention,

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

RESOLVES:

1. To reiterate its adherence to the principles of self-determination and non-intervention as guiding standards of coexistence among the American nations.

2. To urge that the governments of the member countries of the Organization of American States, bearing in mind the present situation, and complying with the principles and aims set forth in the Charter of the Organization and the Declaration of Santiago, organize themselves on the basis of free elections that express, without restriction, the will of the people.

IV

HOLDING OF FREE ELECTIONS

WHEREAS:

The preamble to the Charter of the Organization of American States proclaims that the true significance of American solidarity and good neighborliness can only mean the consolidation on this hemisphere, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man;

The same Charter reaffirms, among its principles, the requirement that the political organization of the American states be based on the effective exercise of representative democracy, even as it reasserts the fundamental rights of the individual;

The Charter confirms the right of each state to develop, freely and naturally, its cultural, political, and economic life, while respecting in this free development the rights of the individual and the principles of universal morality;

The Inter-American Treaty of Reciprocal Assistance affirms as a manifest truth, that juridical organization is a necessary prerequisite of security and peace, and that peace is founded on justice and moral order and, consequently, on the international recognition and protection of human rights and freedoms, on the indispensable well-being of the people, and on the effectiveness of democracy for the international realization of justice and security; and

According to the principles and attributes of the democratic system in this hemisphere, as stated in the Declaration of Santiago, Chile, the govern-

ments of the American republics should be the result of free elections, and perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy,

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

RESOLVES:

To recommend that the governments of the American states, whose structure or acts are incompatible with the effective exercise of representative democracy, hold free elections in their respective countries, as the most effective means of consulting the sovereign will of their peoples, to guarantee the restoration of a legal order based on the authority of the law and respect for the rights of the individual.

V

ALLIANCE FOR PROGRESS

WHEREAS:

The American states have the capacity to eradicate the profound evils of economic and social underdevelopment;

Resolution XI of the Fifth Meeting of Consultation of Ministers of Foreign Affairs⁵ and Resolution V of the Seventh Meeting of Consultation of Ministers of Foreign Affairs declare that economic co-operation among the American states is necessary for the stability of democracy and the safeguarding of human rights, and that such co-operation is essential to the strengthening of the solidarity of the hemisphere and the reinforcement of the inter-American system in the face of threats that might affect it; and

In view of the fact that all the nations of the Americas have recognized their urgent need for economic and social development, it is necessary that they intensify immediately their self-help and co-operative efforts under the Alliance for Progress and the Charter of Punta del Este, on the basis of the adoption of vigorous reforms and large-scale internal efforts by the developing countries concerned and a mobilization of all the necessary financial and technical resources by the highly developed nations,

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

DECLARES:

1. That the preservation and strengthening of free and democratic institutions in the American republics require, as an essential condition, the

⁵ Final Act, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959. Pan American Union, Doc. 89 (English) Rev. 2, October 12, 1959, p. 12.

prompt, accelerated execution of an unprecedented effort to promote their economic and social development for which effort the public and private, domestic and foreign financial resources necessary to those objectives are to be made available, economic and social reforms are to be established, and every necessary internal effort is to be made in accordance with the provisions of the Charter of Punta del Este.

2. That it is essential to promote energetically and vigorously the basic industries of the Latin American countries, to liberalize trade in raw materials by the elimination of undue restrictions, to seek to avoid violent fluctuations in their prices, to encourage the modernization and expansion of services in order that industrialization may rest on its own appropriate bases, to mobilize unexploited natural resources in order to increase national wealth and to make such increased wealth available to persons of all economic and social groups, and to satisfy quickly, among other aspirations, the needs for work, housing, land, health, and education.

VI

EXCLUSION OF THE PRESENT GOVERNMENT OF CUBA FROM PARTICIPATION IN THE INTER-AMERICAN SYSTEM

WHEREAS:

The inter-American system is based on consistent adherence by its constituent states to certain objectives and principles of solidarity, set forth in the instruments that govern it;

Among these objectives and principles are those of respect for the freedom of man and preservation of his rights, the full exercise of representative democracy, non-intervention of one state in the internal or external affairs of another, and rejection of alliances and agreements that may lead to intervention in America by extracontinental powers;

The Seventh Meeting of Consultation of Ministers of Foreign Affairs, held in San José, Costa Rica,⁶ condemned the intervention or the threat of intervention of extracontinental communist powers in the hemisphere and reiterated the obligation of the American states to observe faithfully the principles of the regional organization;

The present Government of Cuba has identified itself with the principles of Marxist-Leninist ideology, has established a political, economic, and social system based on that doctrine, and accepts military assistance from extracontinental communist powers, including even the threat of military intervention in America on the part of the Soviet Union;

The Report of the Inter-American Peace Committee to the Eighth Meeting of Consultation of Ministers of Foreign Affairs⁷ establishes that:

⁶ Final Act, Seventh Meeting of Consultation of Ministers of Foreign Affairs, San José, Costa Rica, August 22-29, 1960. Pan American Union, OEA/Ser.C/II.7 (English).

⁷ Eighth Meeting of Consultation of Ministers of Foreign Affairs, Report of the Inter-American Peace Committee. Pan American Union, Doc. 3 (English), January 14, 1962.

The present connections of the Government of Cuba with the Sino-Soviet bloc of countries are evidently incompatible with the principles and standards that govern the regional system, and particularly with the collective security established by the Charter of the OAS and the Inter-American Treaty of Reciprocal Assistance [page 39];

The above-mentioned Report of the Inter-American Peace Committee also states that:

It is evident that the ties of the Cuban Government with the Sino-Soviet bloc will prevent the said government from fulfilling the obligations stipulated in the Charter of the Organization and the Treaty of Reciprocal Assistance [page 40];

Such a situation in an American state violates the obligations inherent in membership in the regional system and is incompatible with that system;

The attitude adopted by the present Government of Cuba and its acceptance of military assistance offered by extracontinental communist powers breaks down the effective defense of the inter-American system; and

No member state of the inter-American system can claim the rights and privileges pertaining thereto if it denies or fails to recognize the corresponding obligations,

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

DECLARES:

1. That, as a consequence of repeated acts, the present Government of Cuba has voluntarily placed itself outside the inter-American system.

2. That this situation demands unceasing vigilance on the part of the member states of the Organization of American States, which shall report to the Council any fact or situation that could endanger the peace and security of the hemisphere.

3. That the American states have a collective interest in strengthening the inter-American system and reuniting it on the basis of respect for human rights and the principles and objectives relative to the exercise of democracy set forth in the Charter of the Organization; and, therefore,

RESOLVES:

1. That adherence by any member of the Organization of American States to Marxism-Leninism is incompatible with the inter-American system and the alignment of such a government with the communist bloc breaks the unity and solidarity of the hemisphere.

2. That the present Government of Cuba, which has officially identified itself as a Marxist-Leninist government, is incompatible with the principles and objectives of the inter-American system.

3. That this incompatibility excludes the present Government of Cuba from participation in the inter-American system.

4. That the Council of the Organization of American States and the other organs and organizations of the inter-American system adopt without delay the measures necessary to carry out this resolution.

VII

INTER-AMERICAN DEFENSE BOARD

WHEREAS:

The Inter-American Defense Board was established pursuant to Resolution 39 of the Third Meeting of Consultation of Foreign Ministers, held in Rio de Janeiro in 1942,^s recommending the immediate meeting of a commission composed of military and naval technicians appointed by each of the governments to study and to suggest to them measures necessary for the defense of the hemisphere;

The Inter-American Defense Board, on April 26, 1961, resolved that the participation of the Cuban regime in defense planning is highly prejudicial to the work of the Board and to the security of the hemisphere; and

The present Government of Cuba is identified with the aims and policies of the Sino-Soviet bloc.

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

RESOLVES:

To exclude immediately the present Government of Cuba from the Inter-American Defense Board until the Council of the Organization of American States shall determine by a vote of two thirds of its members that membership of the Government of Cuba is not prejudicial to the work of the Board or to the security of the hemisphere.

VIII

ECONOMIC RELATIONS

WHEREAS:

The Report of the Inter-American Peace Committee to the Eighth Meeting of Consultation of Ministers of Foreign Affairs states, with regard to the intense subversive activity in which the countries of the Sino-Soviet bloc and the Cuban Government are engaged in America, that such activity constitutes "a serious violation of fundamental principles of the inter-American system"; and,

During the past three years 13 American states have found it necessary to break diplomatic relations with the present Government of Cuba,

The Eighth Meeting of Consultation of Ministers of Foreign Affairs,

^s Final Act, Third Meeting of Ministers of Foreign Affairs of the American Republics, Rio de Janeiro, January 15-28, 1942. Pan American Union, International Conferences of American States, 2nd Supp. 1942-1954, p. 44; 36 A.J.I.L. Supp. 61 at 92 (1942).

Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

RESOLVES:

1. To suspend immediately trade with Cuba in arms and implements of war of every kind.

2. To charge the Council of the Organization of American States, in accordance with the circumstances and with due consideration for the constitutional or legal limitations of each and every one of the member states, with studying the feasibility and desirability of extending the suspension of trade to other items, with special attention to items of strategic importance.

3. To authorize the Council of the Organization of American States to discontinue, by an affirmative vote of two thirds of its members, the measure or measures adopted pursuant to the preceding paragraphs, at such time as the Government of Cuba demonstrates its compatibility with the purposes and principles of the system.

IX

REVISION OF THE STATUTE OF THE INTER-AMERICAN
COMMISSION ON HUMAN RIGHTS

WHEREAS:

The Fifth Meeting of Consultation of Ministers of Foreign Affairs, by Resolution VIII, created the Inter-American Commission on Human Rights, and charged it with furthering respect for human rights in the American states;⁹

Notwithstanding the noble and persevering effort carried on by that Commission in the exercise of its mandate, the inadequacy of the faculties and attributions conferred upon it by its statute have made it difficult for the Commission to fulfill its assigned mission;

There is a pressing need for accelerating development in the hemisphere of the collective defense of human rights, so that this development may result in international legal protection of these rights; and

There is an obvious relation between violations of human rights and the international tensions that work against the harmony, peace, and unity of the hemisphere,

The Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance,

RESOLVES:

To recommend to the Council of the Organization of American States that it revise the Statute of the Inter-American Commission on Human

⁹ Final Act, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959. Pan American Union, Doc. 89 (English) Rev. 2, October 12, 1959, p. 10.

Rights, broadening and strengthening the Commission's attributes and faculties to such an extent as to permit it effectively to further respect for these rights in the countries of the hemisphere.

STATEMENTS

STATEMENT OF HONDURAS

Honduras wishes to have the explanation of the position it adopted in voting for Resolution VI, Exclusion of the Present Government of Cuba from Participation in the Inter-American System, recorded in the Final Act.

With regard to the observations of a juridical nature made by several distinguished foreign ministers, Honduras maintains the existence of sufficient bases in the letter and in the spirit of the treaties and conventions of the regional system.

In the last analysis, however, in view of the threat to the peace and security of the hemisphere, in view of the threat to the dignity and freedom of the inhabitants of the Americas, and in view of the political presence of the Soviet Union in America, the Delegation of Honduras, aware of the juridical doubt that might arise, has not hesitated to give the benefit of the doubt to the defense of democracy in America.

STATEMENT OF ARGENTINA

In view of the statement made by the Representative of Uruguay at the second plenary session, held on January 31, 1962, the Delegation of Argentina wishes to record that it reiterates the juridical views expressed by Dr. Miguel Angel Cárcano, Minister of Foreign Affairs and Worship, at the ninth session of the General Committee, in explanation of his vote on Resolution VI of this Final Act.

STATEMENT OF COLOMBIA

The position of Colombia has been defined in the two statements that will be shown in the minutes of the second plenary session of this Eighth Meeting of Consultation, and that refer to general policy and to Resolution VI.

STATEMENT OF MEXICO

The Delegation of Mexico wishes to make it a matter of record in the Final Act of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, that, in its opinion, the exclusion of a member state is not juridically possible unless the Charter of the Organization of American States is first amended pursuant to the procedure established in Article 111.

STATEMENT OF HAITI

My country is proud to have participated in these discussions, which have taken place in an atmosphere of calm, of courtesy, and of mutual respect.

Haiti came to Punta del Este with the firm intention of defending the principles of non-intervention and self-determination of peoples, with all

that they imply. Haiti remains firmly attached to these intangible principles, which guarantee an order of mutual respect in relations among peoples of different languages and cultures.

Here Haiti has become persuaded that "the fallacies of communist propaganda cannot and should not obscure or hide the difference in philosophy which these principles represent when they are expressed by a democratic American country, and when communist governments and their agents attempt to utilize them for their own benefit."

This is the sole reason for the change in the position and attitude of my country, which is honored to have had a modest part in resolving a problem which jeopardized the peace, the solidarity, and the unity of the hemisphere.

STATEMENT OF ECUADOR

The Delegation of Ecuador wishes to state in the record that the exclusion of a member state from the inter-American system could only be accomplished through the prior amendment of the Charter of the Organization of American States to grant the power to exclude a state.

The Charter is the constitutional juridical statute that prevails over any other inter-American instrument.

STATEMENT OF ECUADOR ON RESOLUTION VIII

Ecuador abstained from voting, inasmuch as sanctions are being applied, by invoking the Treaty of Reciprocal Assistance, sanctions that begin with the suspension of traffic in arms with the possibility of being extended to other items, with special attention to items of strategic importance, a concept that might include basic necessities of which the Cuban people should not be deprived and thus make the present situation more critical.

Of course, Ecuador, as a peace-loving country, reaffirms its faith in peaceful methods to settle controversies between states and condemns illegal traffic in arms.

STATEMENT OF BRAZIL

In view of the statement made by the Representative of Uruguay at the plenary session held on January 31, 1962, the Delegation of Brazil reaffirms the validity of the juridical bases of the position taken by its country with respect to Resolution VI of the Eighth Meeting of Consultation, which position was explained at length by the Minister of Foreign Affairs of Brazil in statements made at the sessions of the General Committee held on January 24 and 30, 1962.

STATEMENT OF URUGUAY

The Delegation of Uruguay wishes to state in the record that, in adopting its position in the Eighth Meeting of Consultation, far from violating or forgetting the juridical standards applicable to the Cuban case, it adhered strictly to them, as befits its old and honorable tradition of being a defender of legality. The bases for this position were explained at the

plenary session held on January 31, as will be shown in the minutes of that session.

IN WITNESS WHEREOF, the Ministers of Foreign Affairs sign the present Final Act.

DONE in the city of Punta del Este, Uruguay, on January thirty-one, nineteen hundred sixty-two. The Secretary General shall deposit the original of the Final Act in the Archives of the Pan American Union, which will transmit the authenticated copies thereof to the governments of the American republics.

AMERICAN JOURNAL OF INTERNATIONAL LAW

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THE GOA INCIDENT

BY QUINCY WRIGHT

Of the Board of Editors

The military take-over of Goa by India on December 18, 1961, was of legal importance, not only because it raised serious issues concerning the application of United Nations law, but also because it indicated a major difference between the East and the West in the interpretation of that law.

The Security Council Debate

A meeting of the Security Council was called on December 19, 1961, on the complaint of Portugal that India was guilty of aggression in occupying the Portuguese territories of Goa, Damao and Diu. Seven members—the United States, United Kingdom, France, Turkey, China, Ecuador, and Chile—supported a draft resolution, introduced by the first four of these, calling for a cease-fire and withdrawal of Indian forces from the territory, and urging the parties to work out a permanent solution by peaceful means in accord with the principles of the Charter. The resolution failed to carry because the Soviet Union vetoed it, with support of three other members of the Council—Ceylon, Liberia and the United Arab Republic. This pattern of voting was reversed in a resolution initiated by the three latter states, rejecting the Portuguese complaint and calling upon that country to terminate hostile action and to co-operate with India in the liquidation of its colonial possessions in India.¹

Since both these resolutions failed to pass, India has proceeded to integrate these three territories, as it had previously done with the enclaves of Nagar-Aveli and Dadra which it occupied in 1954, leading to *The Right of Passage* Case in the International Court of Justice. In that case, the Court had recognized Portuguese title to the enclaves and its right of civilian access, but had refused to hold that India had violated international law when, because of disorders arising from the demand for “self-determination” by the people in the enclaves, it occupied them and prevented Portuguese access. According to the Court, India’s overriding responsibility to preserve order in its territory, through which the servitude of access ran, justified its action, presumably as a temporary measure.²

The debate in the Security Council on the Goa incident indicated that the Western Powers, supported by two Asian allies—Turkey and Nationalist China—regarded the obligation to settle international disputes by peaceful means and to refrain from the threat or use of force in inter-

¹ 9 U.N. Review 14 (Jan., 1962).

² *Right of Passage over Indian Territory*, [1960] I.C.J. Rep. 6; 54 A.J.I.L. 673 (1960).

national relations³ as a primary obligation of states under the Charter. They thought the only qualifications of this obligation must flow from the Charter itself, and it permits the use of force only in individual or collective self-defense,⁴ as a sanction under authority of the United Nations itself,⁵ or to assist another government at the latter's explicit request, and in its territory, for purposes other than the suppression of revolution or insurrection.⁶ The use of force by a government to maintain its jurisdiction in its own territory or over its ships at sea is not a use in "international relations" and is clearly permitted as an implication of a state's sovereignty.⁷ In accord with this concept, the United States, British and Turkish members of the Council insisted that the merits of the dispute over Goa were not involved, but only the use of means forbidden by the Charter.

The United States representative, Adlai Stevenson, said "India's armed attack on Goa mocks the good faith of its frequent declarations of lofty principles." The French representative described the hostilities as an "unadulterated military attack" and called the argument that the matter was within the domestic jurisdiction of India a "negation of law" as stated by the International Court of Justice in the *Right of Passage* Case. The representatives of Nationalist China, Ecuador and Chile, while expressing sympathy with efforts to eliminate colonialism, saw no justification for the use of force and rejected the Indian arguments.

The uncommitted Eastern states, on the other hand, agreed with the Soviet Union's assertion, while trying to keep the issue off the agenda, "that the matter was within the domestic jurisdiction of India, as it concerned colonial territories forming integral parts of India held by Portugal." In the debate the Soviet representative suggested that the Council, far from criticizing India, should apply sanctions against Portugal to force it to carry out the General Assembly's declaration against colonialism. Portugal had, in his opinion, "created a threat to peace and security in various parts of the world including Goa." The Liberian representative insisted that Goa was not Portuguese territory but, as declared by the General Assembly's resolution, a "non-self-governing territory," and the question concerned "Portuguese domination over Indian people for five and a half (*sic*) centuries." The representative of the United Arab Republic agreed, and stressed India's effort to obtain a peaceful transfer of the territory. The Ceylonese representative said that, as the Goans had been conquered by force, they had the right of rebellion and India was entitled to assist in their liberation. "It had not used force for territorial aggrandizement."

The Indian representative, C. S. Jha, sought to defend the seizure of

³ Art. 2, pars. 3, 4.

⁴ Art. 51.

⁵ Arts. 11, 39, 40, 94.

⁶ Art. 2, pars. 1, 7; Quincy Wright, "United States Intervention in the Lebanon," 53 A.J.I.L. 112 ff. (1959); "International Law and Civil Strife," 1959 Proceedings, American Society of International Law 145 ff.

⁷ *Ibid.*

Goa by the argument that the end of eliminating colonialism justified the means used, an argument reminiscent of the medieval doctrine of "just war," but clearly not permissible under the United Nations Charter, which seeks to exclude the merits of the case from the problem of breach of peace.⁸ He also sought to bring the action within the accepted permissions to use force under the Charter, *i.e.*, in the exercise of domestic jurisdiction, for self-defense, or under the authority of the United Nations.

Domestic Jurisdiction

The Indian representative said that "the idea that these territories were integral parts of Portugal was really a remarkable myth." They were "integral parts of India," and "there could be no question of aggression against one's own frontier, against one's own people." The suggestion that a state's territory includes areas which are closely related geographically and inhabited by people that are closely related culturally, recalls the theory of nationality expounded by some Italian jurists during the period of the *risorgimento*.⁹ This theory has been made the basis for political demands for territorial transfers, especially in the Versailles Peace Conference of 1919, and has been developed in the principle of "self-determination" by plebiscite supported by the United Nations Charter.¹⁰ It is clear, however, in view of the many controversial boundaries and the many demands for territorial change on the basis of nationality, self-determination or geography, that the concept of "territorial integrity" as used in the United Nations Charter¹¹ must refer to internationally recognized boundaries, if it is to constitute a check on self-willed uses of force. Many boundaries may be arbitrary, many territorial changes may be desirable, but the Charter requires that international disputes be settled by peaceful means and that states refrain from the use or threat of force in international relations.

The concept that the settlement of boundary disputes in which the United States was involved was within its "domestic jurisdiction" was suggested by Senator Hale of Maine in the Senate debate concerning reservations to American acceptance of the League of Nations Covenant in 1918. This suggestion, however, was rejected by the Senate.¹² The Connally Reservation to United States acceptance of the Optional Clause of the Statute of the International Court of Justice permits the United States to exclude the jurisdiction of the Court in any case in which it is sued, by declaring that the matter is within its domestic jurisdiction, but

⁸ Italy advanced this argument to justify its invasion of Ethiopia in 1935. Q. Wright, "Test of Aggression in the Italo-Ethiopian War," 30 A.J.I.L. 55 (1936).

⁹ See Count Mamiani and P. S. Mancini supporting the concepts of Mazzini.

¹⁰ Sarah Wambaugh, *Plebiscites since the World War* (Washington, Carnegie Endowment for International Peace, 1933); Q. Wright, "Recognition and Self-Determination," 1954 Proceedings, American Society of International Law 23 ff.

¹¹ Art. 2, par. 4. See also note 23 below.

¹² Q. Wright, "Validity of the Proposed Reservations to the Peace Treaty," 20 Columbia Law Rev. 121 ff. (1920).

this is recognized to be a negation, not an interpretation, of the rule of law in international relations.¹³ Thus, even if India had a good claim to Goa, the contention made by the Soviet representative that the issue was within India's domestic jurisdiction could not be sustained.

Domestic jurisdiction, according to the definition supported by the Permanent Court of International Justice in the *Tunis-Morocco Nationality Decrees Case*,¹⁴ does not refer to a state's normal jurisdiction within its territory, over its ships at sea, or over its agencies and nationals abroad. Such jurisdiction may be limited by obligations of general international law or treaties, and the interpretation and application of such obligations cannot be finally decided by the state bound by them. If they could, "international law" would cease to be a law. A state's "domestic jurisdiction," therefore, concerns its jurisdiction in situations in which it is not bound by any international obligations. Since Members of the United Nations are bound by obligations to settle disputes by peaceful means and to refrain from the use of force, the contention that India had used force contrary to these obligations was an international question, not within its domestic jurisdiction. This conclusion is supported by the opinion of the International Court of Justice in the *Right of Passage Case*.¹⁵

Self-Defense

During the Security Council debate, the Indian representative said:

In the early morning hours on December 17, while the Secretary-General was appealing for peace, Portuguese colonialist forces attacked Indians inside Indian territory. The measures taken by India were for the protection of the Goan people, who were in revolt against Portugal. Portugal has concentrated 12,000 soldiers in Goa where they also had mined public buildings. . . . The Charter provides that force can be used in self-defense—for the protection of the people of a country—and certainly the Goans were as much Indians as any other Indians.

The argument in this statement seemed to be that military defense was permissible: (1) to defend Indian territory outside of Goa attacked by Portuguese forces; (2) to defend the Goan people within Goa against Portuguese oppression; and (3) to defend buildings within Goa from destruction by mines.

The Charter permits "self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Article 2, paragraph 4, requires Members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent

¹³ Resolution, Institute of International Law, 48 *Annuaire* 881 (II, 1959); Q. Wright, *The Role of International Law in the Elimination of War* 80, 84 (Manchester University Press, 1961).

¹⁴ P.C.I.J., Ser. B, No. 4; 1 Hudson, *World Court Reports* 143.

¹⁵ Note 2 above.

with the Purposes of the United Nations." It has usually been assumed that "armed attack" refers only to an attack on the territory of a state or perhaps against its armed forces at sea, and that the duty to respect the "territorial integrity" and "political independence" of other states bars any right to invade foreign territory with armed forces to defend citizens or even public agencies in that territory. It is true that military interventions have occurred in the past to protect citizens and public agencies in foreign territory in grave danger, and the suggestion has even been made that certain public agencies or even citizens abroad are to be regarded as part of the national domain.¹⁶ While international law permits diplomatic protest if citizens abroad are denied justice or are endangered because of a lack of due diligence in police protection by the state of residence, or if public agencies are denied the immunities to which they are entitled in international law, the Charter clearly prohibits armed invasion of foreign territory if such protests prove ineffective.

The Indian argument, however, goes even further and claims a right to use armed force to protect Goans, who in law were not Indian citizens, and to protect Goan buildings in the territory of Goa. Clearly this extension of the concept of self-defense has no basis in international law.¹⁷ India, however, seemed to claim also that it was defending its territory against Portuguese armed attack, though it left it somewhat ambiguous whether the territory referred to was Indian territory outside Goa or Goa itself. There can be no doubt that, if Portuguese forces in Goa invaded Indian territory outside Goa, India had a right of self-defense. An Indian press release just before the invasion¹⁸ declared:

Portuguese colonialism in Goa has, in addition to repression of the peoples under her subjection, been engaged, more particularly in recent weeks in repeated and continuous actions of aggression on the territory of the Indian Union, has attacked Indian shipping and killed Indian citizens engaged in their normal avocations, raided Indian villages, shooting at the inhabitants. . . . As a result of the more recent acts of violence and aggression, the Government of India was forced to take steps to protect the territory of the Union.

Apart from the incredibility of the suggestion that, in its extremely vulnerable position, the Portuguese Government of Goa would deliberately engage in provocative action of this kind, there seems to be no authoritative evidence that any deliberate attack authorized by that government occurred. Newspaper reporters on the spot asserted that, although there

¹⁶ It is now recognized that even diplomatic establishments are not to be regarded as "extraterritorial" bits of the national domain. Herbert Briggs, *The Law of Nations* 789 ff. (2nd ed., New York, Appleton-Century-Crofts, 1952).

¹⁷ The attempt of the United States to protect Martin Koszta, an Hungarian national domiciled in the U. S., from seizure in Smyrna in 1850, could, it was acknowledged, be justified only on the ground that he was a protégé of the U. S. Consulate which enjoyed extraterritorial jurisdiction under treaty between the United States and Turkey. 3 Moore, *Digest of International Law* 844 (Washington, 1906).

¹⁸ Indian Press Information Bureau, release issued in Belgaum, Dec. 18, 1961, about 1 a.m.

was tension because of the mobilization of large Indian forces on the frontier, and there were sporadic shots across the frontier by individual sentries or Goan enthusiasts, one of which killed an Indian fisherman, Goa was orderly and peaceful up to the Indian attack. Prime Minister Nehru described these incidents as trivial, "some foolish sentry had done it." There had been no re-enforcement of the relatively small Portuguese forces in Goa which lacked both aircraft and tanks.¹⁹ The Indian Government has not published any detailed evidence of Portuguese aggressive action outside of Goa.

The Indian claim to a right to defend its territory seems, however, to have referred mainly to Goa itself, rather than to Indian territory outside Goa. India's claim that Goa could properly be defended by Indian forces has been supported on the grounds: (1) that Portugal had no title to Goa because good title could not be acquired by military occupation; (2) that respect for territorial integrity, claimed by Portugal in respect to Goa, referred only to territory to which Portugal had good title, not to territory which it merely occupied; (3) that the Indian right to defend Goa when it was attacked in 1510 continued, even though the exercise of this right had been abandoned for over four centuries; and (4) that, whatever may have been the situation earlier, resolutions of the General Assembly in 1960 and 1961 interpreting Article 73 of the Charter had recognized India's right to defend Goa.²⁰

The first of these arguments overlooks that, whatever may be the law today concerning "no fruits of aggression," this was not the law in 1510, when Albuquerque conquered Goa, and, furthermore, that, even if Portuguese title had been dubious in 1510, four and a half centuries of uncontested occupation and general recognition had established a good title in 1961. In this connection, it is interesting to read the contention of the Indian Commission on the Ladakh boundary dispute with China. The latter had asserted that there could be no boundary without a treaty ratified by both parties. The Indian Commissioner, however, wrote:

¹⁹ Newspapers reported that Goa was taken in 86 hours; 83 Portuguese and Indians were killed and an equal number wounded, no Goans were killed. India is said to have had two divisions (30,000 troops) on the border, and the Indian representative in the Security Council said Portugal had 12,000 soldiers in Goa. The overwhelming superiority of Indian forces and the newspaper reports make unlikely the Portuguese statement in the Security Council that "Indian bombing raids on Goa caused heavy casualties."

²⁰ Apart from the arguments of the Indian representative in the Security Council, Mr. Krishna Menon, Indian Defense Minister, said, in an address before the Indian Society of International Law in New Delhi, on Jan. 20, 1962: "Portugal had claimed sovereignty over Goa by right of conquest, but India had never accepted this claim. . . . India had not violated any one's integrity—Portugal had not been conquered nor had her independence been challenged." Mr. B. K. Nehru, Indian Ambassador to the United States, in a television appearance in the United States on Feb. 11, 1962, said: "India's action in Goa was not aggression but redemption and reunion of Indian territory." Press reports, *The Statesman*, Delhi; see also note 32 below.

It is unprecedented in the history of international relations that after one state has publicly exercised full administrative jurisdiction for several centuries over certain regions, another state should raise a dispute regarding their ownership.²¹

It would appear that under international law Portugal had a good title to Goa.

As for the second argument, it seems clear that the Charter reference to territorial integrity means *de facto* possession, not *de jure* title. If this were not true, and a state were free to occupy territory in the *de facto* possession of another state, to which territory it believes it has legal title, attacks would be permissible in every boundary dispute, and the barriers by which the Charter seeks to protect territorial integrity would be broken down.²² International lawyers have drawn an analogy between the modern international guarantee of territorial integrity and the medieval assizes to prevent baronial war. Sir John Fischer Williams wrote that the League of Nations' guarantee of territorial integrity sought "to give international society that stability of possession which Henry II (in the Assize Novel Disseisin) sought to give to twelfth century England." In both cases the "paramount importance of peace" urged that "legal protection be given to possession," even though that possession has resulted from "a tortious seisin."²³ Thus, even if Portuguese title to Goa could be questioned, India would be obliged by the Charter to respect Portuguese *de facto* possession of the territory.

The third argument raises a more difficult problem: When does the inherent right of self-defense merge into a dispute about possession or title to a territory? An armed attack across an established frontier can be resisted by force, whether the frontier had been permanently established by treaty or uncontested possession for a long time, or had been temporarily established by an armistice or cease-fire agreement. But suppose that defense is not undertaken at once, because of difficulty of access, lack of adequate forces, or other reasons, or that defense operations have been abandoned. How long does it take for the aggressor to acquire such possession that an attack to dispossess him would be a violation of his territorial integrity forbidden by the Charter, and the original defender would have only a claim to territory which, according to the Charter, must be settled by peaceful means? It would appear that Article 51 of the Charter, requiring states engaged in defense immediately to report to the Security Council, giving that organ competence to maintain and restore international peace and security, makes this period a short one. A state that neglects to defend its frontiers against hostile encroachments soon loses its right to do so, and can rely only on negotiation or action by the United Nations to restore its rightful possession and thus to remove a threat

²¹ 1 Indian Journal of International Law 545 (1961); see also note 2 above.

²² See notes 11, 12 above.

²³ "Sovereignty, Seisin and the League," 7 Brit. Year Bk. of Int. Law 35 ff. (1926); Q. Wright, Mandates under the League of Nations 370 (University of Chicago Press, 1930); The Role of International Law, *op. cit.* note 13, p. 13.

to international peace and security. While this period of time might vary according to the accessibility of the boundary in question or other circumstances, it seems clear that a concept of continuing aggression by Portugal against Goa beginning in 1510 and giving India a right to engage in defense of the territory, even though that right had not been exercised for 450 years, has no legal merit.

The fourth argument refers to the resolution of the General Assembly on December 14, 1960, declaring that states administering non-self-governing territories must hasten their emancipation;²⁴ the resolution of December 15, 1960, declaring that Spanish and Portuguese overseas territories (claimed by these countries to be provinces of the homeland) were non-self-governing territories, on which Spain and Portugal must report;²⁵ and the resolution of November 27, 1961, calling on all states administering trust or non-self-governing territories to "take action without further delay with a view to the faithful application and implementation" of the declaration of 1960.²⁶ An Assembly resolution of December 19, 1961, after the taking of Goa, condemned Portugal for non-compliance with Article 73 of the Charter, set up a committee to examine the situation as a "matter of urgency," and called upon Members to use their influence to secure Portuguese compliance with its obligations.²⁷ The Fourth Committee had approved this resolution on November 13, 1961. These resolutions were passed almost unanimously by the General Assembly, under the pressure of Asian and African states, in order to implement Article 73 of the United Nations Charter. This article declares that:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories and, to this end:

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive de-

²⁴ Res. 1514 (XV), approved Dec. 14, 1960 (90-0-9). General Assembly, 15th Sess., Official Records, Supp. No. 16 (Doc. A/4684), p. 66; 8 U. N. Review 7 (Jan., 1961).

²⁵ Res. 1542 (XV), Dec. 15, 1960. General Assembly, 15th Sess., Official Records, Supp. No. 16 (Doc. A/4684), p. 30; 8 U.N. Review 52, 57 (Jan., 1961), 20 (July, 1961); 9 *ibid.* 41 (Jan., 1962). Spain agreed to transmit information, but Portugal did not.

²⁶ Res. 1654 (XVI), Nov. 27, 1961. General Assembly, 16th Sess., Official Records, Supp. No. 17 (Doc. A/5100), p. 65; 8 U.N. Review 12-13, 52 (Dec., 1961). This resolution passed by a vote of 97 to 0, with France, the United Kingdom, South Africa and Spain abstaining. Portugal was absent. A Soviet amendment, which would have proclaimed 1962 "the year of the end of colonialism," was rejected by a vote of 19-46-36. In the 15-day debate on the question, many speakers deprecated the slow pace of colonial emancipation.

²⁷ Res. 1699 (XVI), Dec. 19, 1961. General Assembly, 16th Sess., Official Records, Supp. No. 17 (Doc. A/5100), p. 38; 8 U.N. Review 15, 39, 57 (Dec., 1961); 9 *ibid.* 41, 73 (Jan., 1962). The resolution was adopted by a vote of 90 to 3 (Portugal, Spain, South Africa), with France and Bolivia abstaining.

velopment of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

It is not necessary to go into the controversy in the United Nations concerning this article. The administering Powers at first insisted that it imposed no legal obligations upon them, but left them discretion to determine what territories were non-self-governing and what should be done to advance the welfare and self-government of the peoples, subject only to the duty:

to transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible. . . .²⁸

The General Assembly has never accepted this interpretation. It has, on the contrary, held that non-self-governing territories are different in legal status from the home territory of the administering state, and that the latter is under definite legal obligations in respect to them. It has also held that it alone has competence to decide when a territory, once submitted by the administering state, has become self-governing, and to decide, as it did in the cases of Spanish and Portuguese overseas territories, that a territory not submitted by the administering state is in fact a non-self-governing territory. It has also held that it has competence to supervise the administration of the non-self-governing territories and to criticize and advise the administering authority, especially in regard to steps taken to realize self-government in the territory, which, according to the General Assembly, may take the forms of full self-government as part of the metropole (as in the cases of Hawaii and Alaska), full self-government with a special status within a state (as in the cases of Puerto Rico and the Dutch West Indies), or as an independent state (as in the cases of the Congo and numerous other former colonies in Asia and Africa which have been emancipated and admitted to the United Nations).²⁹

It has been held in several international controversies concerning a particular non-self-governing territory that threats to the peace, arising because of a self-determination movement in the territory, could best be solved by recognition of the independence of the territory. Indonesia, Tunis, Morocco and Algeria were assisted to independence by United Nations resolutions, though France did not admit that Algeria was a non-self-governing territory. The United Nations has had a more powerful rôle in effecting the independence of Libya, submitted to it by the Italian Peace Treaty, and the trusteeship territories, and is attempting such a rôle with respect to the mandated territory of South West Africa.

The United Nations undoubtedly recognizes the duty of administering Powers to emancipate their colonies and the moral right of the inhabitants

²⁸ Art. 73, sec. c.

²⁹ See Wright, note 10 above.

of these colonies to self-determination, but it has never suggested that an outside state, on its own initiative, could invade a colony and annex it. In fact, the explicit assertion in Article 73 that obligations concerning non-self-governing territories are, "within the system of international peace and security, established by the present Charter" seems to prevent such an interpretation.

Legally, Goa was under the administration of Portugal, Portugal was under the obligation to promote self-government in the territory, and the General Assembly was competent to see that this obligation was fulfilled, but India had no legal right to invade and annex the territory on grounds of self-defense. It should also be emphasized that even if grounds for self-defense had existed, this would permit action only to frustrate the aggression, not to annex the territory. This was explicitly recognized in the Geneva Protocol of 1924,³⁰ and may be implied from the obligation to respect the territorial integrity of other states and to subordinate self-defense activities to the jurisdiction of the Security Council in order to maintain international peace and security.³¹ Defense can never be a justification for aggression.

International Authority

India argued in the Security Council:

If the Portuguese had regard for the Charter, they would behave in accordance with the United Nations resolutions, particularly with the declaration on colonialism adopted at the General Assembly session in 1960. . . . Indian troops had entered Goa to help the freedom movement there against Portuguese suppression.

This argument suggests that Indian action compelling Portugal to get out of Goa was under the authority of the United Nations because Portugal had not fulfilled the Assembly's resolutions to treat Goa as a non-self-governing territory, and had not promoted the freedom of the Goans as required by the Charter. India referred to the rejection by Portugal for 14 years of its effort to effect a peaceful transfer of Goa, thus differing from the French, who had agreed to transfer Pondicherry and other territories in the Indian peninsula. India apparently assumed that the objectives of colonial emancipation and self-determination, supported by the Charter, permitted military self-help for their realization after peaceful means had failed. Had peaceful means really been exhausted? Would Portuguese intransigence permit Indian resort to forcible self-help?

Portugal became a Member of the United Nations in 1955, and the General Assembly decided that its overseas territories were non-self-governing territories in December, 1960. India had long sought negotiation on the subject, and the General Assembly had passed several general resolutions pressing Portugal to abandon colonialism, but India had never placed

³⁰ Geneva Protocol for Pacific Settlement of International Disputes, 1924, Art. 15, par. 2. 19 A.J.I.L. Supp. 16 (1925); 2 Hudson, *International Legislation* 1890 (Washington, 1931).

³¹ Charter, Art. 2, par. 4; Art. 51.

the Goa matter before the United Nations as a situation "which might impair friendly relations among nations," although it was competent to do so under Article 14 of the Charter. While the General Assembly could only make recommendations and could not decide on the transfer of the territory, it seemed likely, in view of the overwhelming anti-colonial sentiment in the General Assembly, that India could have obtained more than a two-thirds vote against Portuguese colonialism in Goa. Such a resolution might have brought effective pressure upon Portugal. In view of these possibilities, it can hardly be said that India had exhausted peaceful methods in the matter.³²

Even if peaceful methods had been exhausted, however, there would be no justification in the Charter for military action on the ground that such action was implementing "justice" or "purposes of the United Nations" referred to in Article 2, paragraphs 3 and 4 of the Charter, or that Portugal could not complain because it did not have "clean hands" and was liable to reprisals.

³² A pamphlet issued by the Ministry of External Affairs of India on Oct. 18, 1960, entitled "Goa and the Charter of the United Nations," emphasized the suppression of freedom in Goa; the Indian character of the territory geographically, linguistically and culturally; the movements for self-determination among Goans since 1854; the right to self-determination under the Atlantic Charter and the United Nations Charter; the status of Goa as a non-self-governing territory under Art. 73 of the Charter and the "Factors Resolution" of the General Assembly in 1953, in spite of the Portuguese legislation of 1951 professing to change the status of its overseas territories from "colonies" to "provinces" and the Portuguese insistence, in reply to notes from the U.N. Secretary General, that Portuguese territories did not come under Art. 73 because of this constitutional provision, irrespective of their actual condition. In spite of the emphasis upon "self-determination" in this document, more than a year before the taking of Goa, it is possible that India was reluctant to press for a resolution which, instead of urging transfer of Goa to India, might have urged "self-determination" for Goa, a principle which India has refused to apply in Kashmir. Furthermore, while Indian propaganda has emphasized Portuguese discrimination and oppression in Goa (see note 20 above, and address by Sardar K. M. Panikkar, former Indian Ambassador to China and Vice Chancellor of Jammu and Kashmir University, to the Indian School of International Studies, New Delhi, Jan. 20, 1962), and has suggested that the Goans generally desired union with India, articles have appeared in the Indian press noting the lower cost of living, the greater abundance of imported consumer goods, and the more easy-going atmosphere in Goa under the Portuguese regime, as well as the allegiance of many Goans to the paternalistic Catholic Church closely related to the Portuguese regime. These reports raise a doubt of how a fair plebiscite would have gone. (See Dennis Bloodworth, *The Statesman*, Delhi, Jan. 6, 1962; S. B. De Silva, *The Times of India*, Delhi, March 27, 1962.) A group of Goans in Nairobi, Kenya, voted 477 to 6 for withdrawal of Indian troops and a free plebiscite in Goa to decide its future. A leader of this group said such a vote should decide whether "Goans wish to retain their identity as a nation or be submerged in the teeming millions of India." (*The Statesman*, Delhi, Feb. 12, 1962.) As was to be expected, the incorporation of Goa in India has encountered difficulties. More than three months after the take-over, Prime Minister Nehru said in the *Lok Sabha* (Parliament) that he did not know how long it would be before military government could end and Goa could have "some measure of autonomy" as promised. He admitted that difficulties had arisen from Goans who had not reconciled themselves to the ending of Portuguese rule, and he did not wish "to hustle people who had been used to another system whether good or bad, for a long time." (*The Statesman*, March 31, 1962.)

The reference to "justice" in Article 2, paragraph 3, was inserted under the pressure of smaller states at San Francisco to prevent another "Munich," not to permit self-help on the basis of self-judgment. This paragraph requires that only peaceful means be used to settle international disputes and, furthermore, that even peaceful means must not sacrifice "justice" by sacrificing a smaller state to preserve peace among great Powers. It is impossible to read into this paragraph a permission for a state to use non-peaceful means in order to obtain justice according to its own interpretation. The Charter puts peace ahead of such self-determined justice.

Article 2, paragraph 4, requires Member states to refrain from the threat or use of force "against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations." This article cannot be construed to permit a state in its own discretion to use force in order to effect purposes of the United Nations. The determination of the means to effect these purposes belongs, according to the Charter, not to the Members individually but to the organs of the United Nations. It is true that a state is permitted to use force in response to a decision of the Security Council or a recommendation of the Security Council or the General Assembly specifically authorizing "provisional measures" or "enforcement measures" against or within a state in order to maintain or restore international peace and security or to enforce decisions of the International Court of Justice. But no such decisions or recommendations had been made authorizing Indian action against Portugal in Goa.

The doctrine of "clean hands" prevents equitable relief to a complainant who has injured the defendant by the same delinquency of which he complains. Judge Hudson suggested its applicability in international law in the *River Meuse* Case between Belgium and The Netherlands, but it has never been suggested that it constitutes a ground for forcible self-help contrary to the explicit obligations of the Charter.⁸³ While the doctrine of "reprisals" formerly permitted self-help to remedy a legal wrong after peaceful means had been exhausted, and if the reprisals would inflict no more serious injuries than the wrong complained of,⁸⁴ this doctrine never justified the forcible acquisition of new rights, and it was the object of Article 2, paragraphs 3 and 4, of the Charter to eliminate all military reprisals from international relations.⁸⁵

This elaborate discussion of the argument concerning the legality of India's action in Goa may seem superfluous. No interpretation of the Charter provides a legal justification.

⁸³ See Q. Wright, "Legal Aspects of the U-2 Incident," 54 A.J.I.L. 936 ff. (1960); *Diversion of Water from the River Meuse* (1937), P.C.I.J., Ser. A/B, No. 70, p. 70; 4 Hudson, *World Court Reports* 232.

⁸⁴ *Naulilaa Incident*, Portugal-Germany, *Arbitral Decision*, July 31, 1928. Briggs, *The Law of Nations* 951.

⁸⁵ Briggs, *op. cit.* 960 ff., referring to League of Nations action in respect to Italian "reprisals" in the Corfu incident of 1923; and Philip Jessup, *A Modern Law of Nations* 157 ff.

The Attitude of Asian and African States

The significant feature, however, of the Goa situation was that many of the new states, and also the Soviet Union, felt that colonialism was such an evil that the use of force to eliminate it should be tolerated. The argument was, in fact, political and moral rather than legal. It has been suggested that a major motivation of the Indian Government in undertaking the action was the pressure brought by the African states at the Belgrade Conference in the autumn of 1961, suggesting that India was not taking effective action to eliminate Portuguese colonialism, which these states regarded as of major importance, especially in relation to Angola and other Portuguese territories in Africa.⁸⁶

This attitude of the recently emancipated states raises a fundamental problem of international law in view of the dominant rôle which those states have acquired in the General Assembly. To what extent can it be argued that "injustice" arising from the application of rules of positive international law demonstrates the invalidity of those rules? Is "natural justice," as perceived by a majority of the community of nations, a source of international law superior to such positive sources as treaties and custom?

Throughout Asia and Africa it is argued that ex-colonial peoples cannot be expected to accept the validity of the claims of colonial Powers to overseas territories acquired and maintained by force, on the theory, prevalent in the age of discoveries, that territories not in the possession of a Christian prince were "*territorium nullius*" subject to acquisition by Papal grant or by discovery and occupation without regard to the wishes of the native inhabitants.⁸⁷ These peoples, it is argued, submitted because

⁸⁶ It seems to have been suggested that India was lukewarm on the colonial issue during the preliminary conference at Cairo in September, 1961. It has also been suggested that the Indian action in Goa (which was said not to have been the result of a formal Cabinet decision) was to manifest a strong policy to counteract parliamentary criticism of the ineffective policy against Communist China's aggressions on the Northern frontier; to help Krishna Menon, the Defense Minister, in his campaign for election in Bombay; and from apprehension that Portugal might seek to embarrass India by ceding a naval base in Diu or Goa to Pakistan or some other Power. Whatever may have been the motivation, articles vilifying Portugal's administration of Goa and accusing that country of aggression in India began to appear in the Indian press in late November, 1961, after speeches on the subject by Prime Minister Nehru in the *Lok Sabha* on Nov. 25, 1961, and by Defense Minister Krishna Menon in Bombay on Nov. 27, 1961. This press campaign, summarized in *Indian Foreign Affairs*, Dec., 1960, pp. 11 ff., aroused such a vigorous popular opinion, previously quiescent on the Goa situation, that the government, trapped by its own propaganda, felt obliged to send a large force to the Goan border. Once there, this force could not turn back without serious loss of morale by the soldiers and loss of confidence by the public.

⁸⁷ Francis of Victoria and other writers of the Naturalist School of international law did not accept this theory, but held that Montezuma of Mexico and other non-Christian states had equal rights under natural law. Practice in the age of colonial expansion, however, accepted the theory stated by Chief Justice John Marshall in the United States that: "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity, in exchange for unlimited independence" (*Johnson v. Mackintosh*, 8 Wheaton 543 (1823)).

of military weakness, but never accepted the justifying theories of European jurists. They therefore argue that it is "just" to nullify the claim of the colonial Powers as soon as the opportunity arises, especially when the basic injustice of colonialism has been recognized by the Charter and by General Assembly resolutions. This argument distinguishes between acquisitions of overseas colonies based on self-serving theories of the European colonial Powers, and contiguous acquisitions by the doctrine of "conquest" accepted among themselves by the European states, and even among themselves by Asian and African states. That doctrine also, it is true, rests on the thesis that might makes right, but only in relations within a community of states all of which accept it.

The argument is, therefore, supported by the principle that positive international law rests on the express or tacit consent of the states bound by it. While European Powers may have recognized a customary rule permitting the acquisition of non-Christian territory by discovery and occupation, the rulers and peoples of such territories never recognized such a rule. Jurists in overseas colonies such as those in the Americas, Australia, New Zealand and South Africa, formed by settlement from Europe without regard for the native inhabitants, did, it is true, sometimes assert that, when these colonies were recognized as independent states, it was assumed that they accepted the entire body of international law established by custom or accepted principle within the European community of nations.³⁸ This position has not been accepted by jurists from the new states of Asia and Africa,³⁹ who conceive these states not as matured children but as emancipated slaves of their former colonial masters.⁴⁰

Such jurists, denying the validity of colonial titles, look to geography, history, culture and local opinion to determine the "just" political status of such territories. Applying these criteria only to colonial territories,

³⁸ According to Henry Sumner Maine, *International Law*, p. 38 (New York, 1888), American statesmen and jurists look upon the rules of international law "as a main part of the conditions on which a state is received into the family of civilized nations." The U. S. has sometimes refused to recognize new governments on the ground that they did not accept international law.

³⁹ S. N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" 55 *A.J.I.L.* 867 (1961); see also 12 *Österreichische Zeitschrift für Öffentliches Recht* 128 (1962). Sir Henry Maine (*op. cit.* 34) supports this position when he says the Christian nations, "by the vast superiority of their attainments in arts and commerce as well as in policy and government . . . have established a law of nations peculiar to themselves." Sir James Brierly has pointed out that, because of this attitude, some Asian nations "have begun to claim the right to select from among its rules only those which suit their interests or which arise out of agreements to which they have themselves been parties" (*The Law of Nations* (1949), p. 1). See also R. P. Anand, "Rôle of the 'New' Asian-African Countries in the Present International Legal Order," 56 *A.J.I.L.* 387 ff. (1962); J. J. G. Sytauw, *Some Newly Established Asian States and the Development of International Law* 18, 25, 200 (The Hague, Nijhoff, 1961); Quincy Wright, "The Strengthening of International Law," 98 *Hague Academy Recueil des Cours* 74 ff. (1959, III).

⁴⁰ Quincy Wright, *Mandates under the League of Nations* 3 ff. (University of Chicago Press, 1930).

they are not impressed by the argument that resort to such criteria would upset all international boundaries and nullify the Charter prohibitions against the use of force in international relations. They deny that colonial relations are international relations. Such attitudes account for the general conviction in India, and in Asia and Africa generally, that the taking of Goa was just, and for the general failure of these states to comprehend the shock to American and European opinion at an action which seemed obviously inconsistent with the basic obligation of the Charter to refrain from the use of force and to settle disputes peacefully, obligations which not only were voluntarily accepted by all Members of the United Nations, but were strongly endorsed by the Asian and African states at the Bandung Conference, and particularly by India in its support of the *Panch Shila*, and of the peaceful attitudes frequently expressed by Mahatma Gandhi and Prime Minister Nehru.

The situation presents a problem of bringing international law up to date so that it will adequately reflect the conceptions of justice prevalent among all the members of the community of nations. The Asian and African states believe that progress has been made in this direction by Article 73 of the Charter, and the generally accepted resolutions of the General Assembly implementing it.⁴¹

Conclusion

The issue remains: What, if anything, should the United Nations do in the situation? The principle that it should not permit any "fruits of aggression" has been generally supported, notably in the Suez crisis of 1956; but clearly the General Assembly would not support an effort to put India out of Goa, and it may be, in view of the principles of the Charter, that the elimination of Portugal from Goa is on the whole beneficial. Nor does it seem likely that a resolution calling for self-determination or a plebiscite would be feasible, even if it were desirable. A resolution that seemed to condone aggression would clearly be undesirable. The conclusion seems to be that no action is likely to be taken by the United Nations, in which case the states of the world will, doubtless, recognize or acquiesce in the Indian annexation of Goa.

It should be noted that while individual recognition of the fruits of aggression is forbidden by Charter principles, as it was by the Stimson Doctrine of 1932, the United Nations itself may recognize a situation which it regards as, on the whole, beneficial, even if this situation originated in illegality. This it seems to have done in the case of Israel, which in 1948 by military force occupied territory beyond that which the United Nations resolutions of 1947 had assigned to it.⁴² In principle it must be

⁴¹ See notes 24-27 above.

⁴² The United Nations seems to have acquiesced not only in Israel's forcible acquisition of territory, but also in that country's refusal to accept the policy, several times affirmed by the General Assembly, for the internationalization of Jerusalem. It has also acquiesced in the partition of Korea and Kashmir contrary to its asserted policy of unification of these areas by plebiscite.

recognized that the international community should have a procedure according to which such a situation can achieve legal status. This procedure was formerly that of cumulative recognitions by states acting individually. As that procedure is no longer permissible under the Charter, it may be argued that the United Nations itself should, on a balance of judgment, decide whether a new situation arising from illegality, which appears to be generally beneficial, should be legally recognized.⁴³

⁴³ Courts have on occasion recognized that the kidnaping of a child at the instigation of the mother, or of a criminal when extradition is not possible, should be tolerated. The Delhi police were puzzled as to the proper action to take on the complaint of Mr. Satish Bhatnagar that his wife, a British national, had kidnaped their son Kavi and taken him to England in March, 1962. (The Statesman, Delhi, March 3, April 12, 1962.) Governments have sometimes withheld demands for restoration of persons kidnaped in their territory for trial abroad, as did Argentina in the Eichmann case (1961), after gaining moral support in the United Nations; and courts have often held, as did the Israeli court in the Eichmann case, that they were not prevented from assuming jurisdiction in a criminal trial because custody of the accused was illegally obtained. *Ker v. Illinois* (1886), 119 U. S. 436; Briggs, *op. cit.* 579.

THE OFFICE OF THE LEGAL ADVISER:

THE STATE DEPARTMENT LAWYER AND FOREIGN AFFAIRS

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As "house counsel" to the Department of State, the Office of the Legal Adviser exerts a major influence on the views and policies of the United States Government concerning matters of international law. It plays a significant rôle as well with respect to a broad range of domestic law matters related to the international dealings of the United States and its citizens. Nevertheless, few people—even attorneys active in the international law field—are aware of the Office's importance and what it does.¹

More widespread public knowledge of the Office's functions seems desirable for several reasons. First, such knowledge may be of assistance to the growing numbers of private practitioners who are becoming involved in international transactions and need information as to what the Department of State and the Office of the Legal Adviser can and cannot do for them. Second, it may prove helpful to foreign offices of other nations by giving them some understanding of the procedures by which the Department of State handles international law problems and of the practical considerations which influence its decisions in this field. Finally, a discussion of the Office's work may be of interest to persons generally concerned with international law by providing some insight into the way foreign offices such as the State Department actually develop and implement international law.

This article will describe something of the organization, functions and operations of the Office; its rôle within the Department of State; its relations with private practitioners, other government agencies and the courts; and the means by which it helps to influence both domestic and international law.

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The views expressed in this article are solely the writer's and do not necessarily reflect those of the Office of the Legal Adviser or the Department of State. In particular, the Office is in no way bound by the writer's interpretations or opinions of its attitudes and policies.

¹ Very little has been written concerning the Office. A brief recent discussion appears in Gross, "Operation of the Legal Adviser's Office," 43 A.J.I.L. 122 (1949). See also Stowell, *The Legal Adviser of the Department of State* (Digest Press, 1936) (monograph); Woolsey, "The Legal Adviser of the Department of State," 26 A.J.I.L. 124 (1932); Hackworth, "The Legal Adviser of the Department of State," Address delivered before Georgetown University Law School, Dept. of State Press Release, May 14, 1932.

GENERAL FUNCTIONS AND A BIT OF HISTORY

The Office of the Legal Adviser furnishes legal advice to the Secretary of State and the Department of State, including the Foreign Service and diplomatic and consular posts abroad, with respect to all legal problems involving either domestic or international law which arise in the course of the Department's work. Its task thus generally corresponds to that of the various Offices of General Counsel of other Executive branch agencies. Since the Department of State has primary responsibility for carrying out the foreign policy and conducting the international relations of the United States,² the bulk of the Office's work relates in some way to international matters.

While the Department of State was established in 1789, the Office of the Legal Adviser has a much briefer history. In the early days of the Republic, the legal work of the Department was often handled personally by such Secretaries of State as Jefferson, Monroe and Madison, who were able lawyers. The particular duty of processing and handling international claims, however, soon became quite burdensome, and in 1848 Congress authorized the appointment of a clerk within the Department with the exclusive function of dealing with such claims. The number of such clerks was gradually increased until by 1866 this function was considered sufficiently important to warrant establishment of a special official within the Department with the title of Examiner of Claims. With the establishment of the Department of Justice in 1870, the Attorney General assumed principal responsibility for the legal work of the Department of State, among other agencies, and the Examiner was placed under his supervision. One of the most eminent of these Examiners was Francis Wharton, who served from 1885 to 1889.

In 1891, the Office of Solicitor of the Department of State was established. As was the case with the Examiner of Claims, the Solicitor, though physically located within the Department, remained on the payroll of the Department of Justice. The position of Solicitor was held by such men as James Brown Scott (1906-1910), J. Reuben Clark (1910-1913), Lester H. Woolsey (1917-1920), Fred K. Nielsen (1920-1922), Charles Cheney Hyde (1923-1925), and Green H. Hackworth (1925-1931).

In 1909, Congress created the high-level position of Counselor of the Department, whose functions were to include the study of international law questions. John Bassett Moore at one time filled this post. However, the Counselor's political responsibilities soon came to dominate his legal ones, and the Solicitor remained the official primarily responsible for legal matters.³

² This special responsibility of the Department was established by one of our earliest statutes, Act of July 27, 1789, 1 Stat. 28, from which the present statute, R. S. 202 (5 U.S.C. 156), is derived. It has since become recognized as an established part of American government tradition. For a recent discussion of the Department's organization and functions, see Price (ed.), *The Secretary of State* (American Assembly and Columbia University, 1960).

³ The position of Counselor still exists. The Counselor, ranking equally with Assistant Secretaries of State, serves as Senior Adviser and Consultant to the Secretary

In 1931, the Office of the Solicitor was abolished and the position of The Legal Adviser was established by statute.⁴ Since that time this position has been held by eight Legal Advisers.⁵

Despite the establishment of the Office in 1931, the process of absorbing legal positions within the Department into the Office was not completed until after World War II. Prior to that time, a number of attorneys were hired by, and worked directly for, the various Departmental bureaus and were not under the direct supervision of the Legal Adviser. At present, however, most legal positions within the Department are within the Office of the Legal Adviser.⁶

A postwar development of considerable significance to the Office was the decision in 1954 that its personnel should not be included in the general reorganization of the Department of State and "integration" of Departmental officers into the Foreign Service which occurred at that time pursuant to the so-called "Wriston Report" recommendations. As a result of that decision, attorneys of the Office, in contrast with most of the other

and Under Secretary and other senior officials on diplomatic and foreign affairs problems, and assists in the handling of complex international negotiations and consultations. He serves also as Chairman of the Policy Planning Council. He does not now, however, have any formal responsibilities in the legal field.

⁴Sec. 7 of the Act of Feb. 23, 1931, 46 Stat. 1214, as amended by Sec. 6(d) of the Act of Oct. 15, 1949, 63 Stat. 881 (5 U.S.C. 152a); and see 5 U.S.C. 151b(a).

⁵Green H. Hackworth (1931-1946); Charles Fahy (1946-1947); Ernest Gross (1947-1949); Adrian Fisher (1949-1953); Herman Phleger (1953-1957); Loftus Becker (1957-1959); Eric Hager (1959-1961); Abram Chayes (1961-).

⁶An important exception is the various attorneys of the Passport Office of the Bureau of Security and Consular Affairs. The Chief Counsel of that Office, the attorneys of its Legal and Foreign Divisions, and the administrative Board of Review on Loss of Nationality of the United States still operate in practice relatively independently of the Office, though they are, by the provisions of the Immigration and Nationality Act, "under the general direction of the Legal Adviser." The functions of these attorneys include the administration of the passport laws and regulations and also various matters related to those provisions of the nationality laws which charge the Secretary of State with determination of the nationality status of persons abroad. In matters involving important policy considerations in this area, however, such as the recent issuance of passport regulations implementing the provisions of the Internal Security Act of 1950 with respect to issuance of passports to Communist party members, the Office of the Legal Adviser is generally consulted.

The Visa Office of the Bureau of Security and Consular Affairs also employs a number of lawyers, particularly in its Advisory Opinions branch, though these are for the most part classified as "adjudicators." However, the General Counsel of the Visa Office, which is a statutory position created by the Immigration and Nationality Act, is now within the Office of the Legal Adviser. It may also be noted that some Foreign Service Officers are lawyers by training and may, on occasion, in the course of their duties perform essentially legal functions.

As used throughout this article, the term Department of State does not include the Agency for International Development or the Peace Corps. While these agencies are technically within the Department and under the direction of the Secretary of State, their operations are for the most part conducted independently and they maintain separate legal staffs.

personnel of the Department, are presently covered by Civil Service legislation rather than by the Foreign Service Act.⁷

ORGANIZATION

The Legal Adviser is appointed by the President by and with the advice and consent of the Senate, and holds a position in the Department equivalent to that of an Assistant Secretary of State. Some sixty attorneys in the Office are presently under his supervision. The Legal Adviser is assisted in his duties by two Deputy Legal Advisers and a small "front office" staff, which includes an Executive Assistant and a Special Assistant. In general, one Deputy Legal Adviser supervises the so-called functional branches of the Office, and the other the regional and United Nations branches.

Under the "front office," the attorneys of the Office are separated into twelve branches, each of which is headed by an Assistant Legal Adviser. These branches, which broadly correspond to the various major regional and functional bureaus and offices into which the Department itself is divided, are as follows: Administration and Foreign Service; African Affairs; Inter-American Affairs; International Claims; Cultural Relations and Public Affairs; Economic Affairs; European Affairs; Far Eastern Affairs; Near Eastern and South Asian Affairs; Special Functional Problems; Treaty Affairs; and United Nations Affairs.⁸ In addition, the

⁷ See Report of the Secretary of State's Public Commission on Personnel (June, 1954) ("The Wriston Report"). The report recommended measures to terminate a pre-existing situation under which the Department was primarily staffed by Departmental Civil Service specialists not assigned overseas, and the embassies and consulates were staffed by Foreign Service Officers rarely assigned back to Washington. As a result of "Wristonization," most officers of the Department were "integrated" into the Foreign Service, and there is now a regular rotation of duties for all Foreign Service Officers between the Department and the field.

The basis for the Legal Adviser's decision to oppose "Wristonization" of the Office of the Legal Adviser was reportedly the failure to get guarantees from the Foreign Service that the "Wristonized" attorneys would be used solely in legal capacities, would remain under the supervision of the Legal Adviser, and would retain promotion opportunities equal to those of the non-specialized Foreign Service personnel. The decision not to integrate was thus important in retaining the Office's status and independence. However, because of certain pay and other advantages conferred by the Foreign Service Act as contrasted with Civil Service legislation, Department attorneys are in a somewhat disadvantageous position as compared with Foreign Service personnel of corresponding rank and responsibilities. Moreover, Office attorneys are not, as are Foreign Service Officers, regularly assigned to embassies overseas.

⁸ The regional branches provide general legal advice to their respective regional bureau clients, particularly as regards protection problems arising in their areas. Some other major categories of problems of each regional branch are as follows: *Inter-American Affairs*.—All extradition matters wherever arising; OAS; U. S.-Mexican border problems. *European Affairs* (includes Canada and the U.S.S.R.).—Berlin; St. Lawrence Seaway; Austrian State Treaty; German war claims; EURATOM; OECD. *Far Eastern Affairs*.—SEATO; problems concerning Laos, Vietnam, Taiwan, and Okinawa; West New Guinea dispute; Philippine Military Base Agreement; Bonin Island claims. *Near East and South Asian Affairs*.—Baghdad Pact; Suez Canal; Goa; Arab-Israeli dispute; separation of Syria from the U.A.R. *African Affairs*.—

Legal Adviser supervises the work of the General Counsel of the Visa Office and of a second Special Assistant who has been principally engaged in matters concerning aerial incidents involving Soviet-bloc countries and related international litigation. All of the attorneys of the Office are stationed in Washington, though on occasion they go abroad to assist at international negotiations and conferences or to work on specific problems.

The Legal Adviser acts as personal attorney to the Secretary of State and is directly responsible to him for the Office's performance of its duties. He frequently speaks for the Department of State and, on occasion, for the Government as a whole on matters of domestic or international law with which the Department is concerned. In cases involving the United States before the International Court of Justice, the Legal Adviser usually acts as "agent" (counsel) for the United States Government.

The scope of work of particular Legal Advisers has varied according to their different concepts of their proper rôle—particularly as regards the extent to which they should seek personal and direct involvement in policy matters. Some Legal Advisers have taken a restrictive view of their rôle and have stressed their duties as legal counselors rather than as policy

Congo problems; Ghana Volta River dam project; problems relating to Portuguese Angola and Southwest Africa.

The principal responsibilities of the functional desks are as follows: *Economic Affairs*.—Attorney for Bureau of Economic Affairs; foreign aid and economic development; trade agreements (including GATT); commercial policy and tariffs; commodity problems and P. L. 480; monetary and financial matters (including IBRD, IMF, etc.); antitrust and restrictive trade practices; literary and industrial property; trade controls; FCN treaties; labor; shipping; aviation; telecommunications. *Treaty Affairs*.—All aspects of international agreements, particularly technical and procedural; choice of treaty or executive agreement; internal Department procedures under Circular 175; preparation and submission of treaty instruments; treaty publication and registration; maintenance of treaty records; performance of U. S. depositary functions. *United Nations Affairs*.—Attorney for Bureau of International Organizations; all matters concerning the U. N., its Specialized Agencies, and the International Court; "Connally Amendment"; space law; U. S. trust territories; nuclear weapons test discontinuance conferences. *International Claims*.—All aspects of international claims by U. S. against foreign governments and vice versa, including claims for nationalization, confiscation, breach of contract, war damage, wrongful death, expulsion, and imprisonment (such as Cuban takings; Polish and Rumanian claims settlement agreements; Iraqi indemnity for Americans killed by Baghdad mob in 1958). *Special Functional Problems*.—Legal adviser on selected group of important problems, particularly involving military and related matters; military base and status of forces agreements (e.g., British "Polaris" submarine base and Girard case); laws of war and Geneva Conventions of 1949; law of the sea (including Law of Sea Conventions and Santa Maria Case); sovereign immunity; general atomic energy matters; immigration, nationality and passports. *Cultural Relations and Public Affairs*.—Attorney for Bureau of Educational and Cultural Affairs and Bureau of Public Affairs; various international exchange acts and programs, such as U. S.-U.S.S.R. Cultural Exchange Agreement; U. S. educational foundations abroad; information and public relations problems. *Administration and Foreign Service*.—Attorney to Under Secretary of State for Administration and to Administrator of Bureau of Security and Consular Affairs (except Passport and Visa Offices); personnel matters; Foreign Service Act; loyalty-security program; consular matters and conventions; judicial assistance; procurement; Department appropriations; executive privilege; diplomatic privileges and immunities (including Vienna Convention).

advisers. Most Legal Advisers, however, have become heavily involved in high-level policy questions having legal implications.⁹ As a result, the routine work of the Office is usually supervised by the Deputy Legal Advisers and performed by the Assistant Legal Advisers and their staffs, with only the more important questions being brought to the Legal Adviser's attention.

The organization of the Office into branches corresponding to the organization of the Department is designed to permit the development of a "lawyer-client" relationship between these branches and the respective policy bureaus which they service. The Department's policy officers are encouraged to seek advice directly from the attorneys assigned to do their legal work, and to regard those attorneys as speaking directly for the Office of the Legal Adviser. At its best, this system tends to create close and informal working relationships between the Office and the various policy bureaus, which enable the particular attorneys concerned to recognize and call attention to legal problems as they arise in operations and to better understand the practical context and consequences of these problems. It thus tends to favor an active and creative rôle on the part of Office attorneys, rather than a passive or "waiting to be consulted" rôle. On the other hand, the fact that all Office attorneys are physically located together in the Legal Adviser's area of the Department, rather than being located with their respective bureau clients, fosters a sense of independence on the part of the attorneys and a spirit of Office cohesion which permits the development and implementation of an over-all Legal Office policy. It also encourages a healthy exchange of information and views among the attorneys servicing different bureaus.

Particular problems or areas of problems do not, of course, always fall within the ambit of a single branch of the Office. In such cases, various aspects of the problem may be handled by different branches according to their special expertise. Thus, various branches share responsibility for different aspects of Cuban questions: the Claims Branch deals with expropriation problems; the Inter-American Branch handles questions involving the Organization of American States, the Rio Treaty, the Guantanamo Bay Naval Base, and general protection problems; the Economic Branch is concerned with questions relating to economic controls, trade matters, sugar, the seizure of the United States-owned Nicaro plant, and miscellaneous matters involving aviation, tele-communications, and shipping; the Special Functional Problems Branch deals with "Act of State" and sovereign immunity questions; and the United Nations Branch handles such matters as the various Cuban complaints in the U. N. Security Council and General Assembly.

There is also an occasional tendency for "pools of expertise" to develop

⁹ A particular Legal Adviser may by virtue of special abilities, judgment, or close relationship with high-ranking policy officers become deeply involved in, and exert a strong influence on, matters almost wholly without the legal field. The major rôle the Office played in the handling of the later stages of the Suez crisis was perhaps not unrelated to the close working relationship between Secretary Dulles and Mr. Phleger.

within a particular branch unrelated to its formal assignments, and for that branch to gradually absorb work in that area. This has occurred, for example, in the case of the Inter-American Branch, which has assumed responsibility for all questions involving extradition.

A measure of co-ordination is achieved both within the Office and between the Office and the Department as a whole through various interlocking staff meetings, which provide informal channels through which information and ideas may flow between the higher and lower levels and different bureaus and offices of the Department.

In addition to the direct operating responsibilities of the Office, Miss Marjorie Whiteman, Assistant Legal Adviser for Inter-American Affairs, is, with the help of a small staff, currently preparing a new *Digest of International Law*, which will appear in the near future. The new *Digest* will make available Departmental and other international law precedents covering the years 1940 to 1960, and will supplement Moore's *Digest*, which covered the period 1776 to 1906, and Hackworth's *Digest*, which covered the period 1906 to 1940.

THE WORK OF THE OFFICE

In carrying out its job of furnishing legal assistance to the Department, the Office is called upon to perform a number of related but analytically distinct functions. Some of these are similar to the functions of any private lawyer or "house counsel" to a large corporation. Others are peculiar to the Office's special rôle as counsel for a Government agency.

These various functions might be outlined as follows:

a. *The Office as Counselor.* The Office, through its various branches, works closely with the policy desks of the Department in every aspect of their daily work, and is continually available for consultation as to any legal problems which might arise in the course of Departmental operations. It gives formal and informal legal opinions as required on questions of international and domestic law, including the interpretation of international agreements, statutes, and various legal documents. These may range from opinions concerning the legal basis for our presence in Berlin or the constitutionality of particular passport legislation or regulations, to views on the sufficiency of a particular published notice of material disposal by the General Services Administration under the provisions of the Strategic and Critical Materials Stockpiling Act. Often the speed at which events move is such that these legal opinions are required within a period of minutes or hours. The Office also assists the desks in the preparation of, and reviews and "clears," memoranda, letters, diplomatic notes, and instructions to the embassies and consulates involving legal questions.

b. *The Office as Draftsman.* The Office's particular expertise as draftsman is in the area of the preparation of treaties and other international agreements. But its responsibilities frequently involve it also in the drafting of legislation, executive orders, proclamations, and Departmental regulations. Thus, it has played a major part in the drafting of the

various foreign aid and trade agreements acts, and regularly drafts executive proclamations implementing trade agreements.

c. *The Office as Advocate and Negotiator.* The Office is responsible for the actual litigation of any case in which the United States is involved before the International Court of Justice. It has not, however, in recent years represented either the Department of State or the U. S. Government in domestic or foreign national courts, this function being reserved by statute and tradition to the Department of Justice.¹⁰

However, despite the fact that the Office does not often appear in court to actually litigate cases, its rôle as advocate and negotiator remains an important one; for the Office is frequently called upon to urge or argue the position of a desk, the Department, or the Government itself in the various intra-government and international fora where much of the actual business of government and international relations is carried on. Thus, it may assist a particular geographic desk in persuading other officials in the Department to "clear" a diplomatic note of protest to a foreign government; it may seek to convince the Treasury to change its views toward certain overseas accommodation exchange practices by U. S. disbursing officers; it may argue in the Inter-Agency Group on International Aviation in favor of particular instructions to the U. S. Delegation to an air conference; it may negotiate with private companies the terms of a government guarantee for a foreign dam construction project; it may help to present the Department's position at a Congressional hearing; or it may carry the burden of debate for the adoption of particular provisions in a proposed treaty at an international conference. In addition, the Office exercises operational control over the positions taken by the U. S. Delegation in the Sixth Committee of the United Nations General

¹⁰ See 5 U.S.C. 49, 306, 310, and 316, and 28 U.S.C. 507; and see Hart and Wechsler, "Note on Control of Government Litigation," *The Federal Courts and Federal System* 1136 (1953).

When any case arises in which the Department is plaintiff or defendant or otherwise has an interest (such as filing a suggestion of immunity with respect to a foreign sovereign, or intervening to uphold the validity of an international agreement), it will normally request the Department of Justice to take any necessary action. The Office staff will, however, usually consult with the Department of Justice with respect to the case, and will on occasion help in the preparation of briefs or other papers. The Department may also be called upon to furnish the Department of Justice information, documents, names of witnesses, etc., in connection with suits against other government agencies in the Court of Claims (see 5 U.S.C. 91).

Cases arising abroad involving the Department or the U. S. Government are ordinarily handled by the Department of Justice's Foreign Litigation Division, which will normally retain local counsel. See Leonard, "The U. S. as a Litigant in Foreign Courts," 1958 Proceedings, American Society of Int. Law 95; Doub, "Experiences of the United States in Foreign Courts," 48 A.B.A.J. 63 (Jan., 1962). By statute (22 U.S.C. 810), the Secretary of State may authorize a principal officer at foreign service posts to procure legal services for the protection of Government interests or to enable the post to carry out its responsibilities.

Most litigation directly involving the Department concerns suits to determine citizenship, fraudulent visa applications, suits to compel issuance of passports, and suits by former employees for reinstatement, damages, or other relief.

Assembly, which is responsible for legal questions. In interdepartmental meetings or international negotiations, persuasion may be the only available means to achieve an objective, and the lawyer's skill in the clear and forceful presentation of a position an invaluable weapon.

d. *The Office as Judge.*¹¹ In performing its function of giving opinions on legal questions, particularly those involving international law, which arise in the course of the Department's work, the Office inevitably acts to some degree as judge. In many cases, its opinion may determine the question, either because other agencies and the courts typically defer to its decisions in such matters, or simply because there is in practice no appeal to the courts or other agencies from its decisions. Thus, in determining the legal merits of the complaint of an American citizen against a foreign country as a preliminary to possible espousal of his claim, the existence or non-existence of a "state," the location of an international boundary, the legal basis for denial of a particular visa, or the legality of a particular use of foreign currencies accrued under "P. L. 480," the Office's opinion may in effect decide the matter.

e. *The Office as International Law Expert.*¹¹ Because of the Office's special expertise in international law, it is frequently called upon by other governments, other U. S. Government agencies, Congress, the courts, State officials, and private companies and individuals for information or its views concerning questions of international law. Thus, the Office is frequently asked by Federal and State courts for an interpretation of particular treaties or its views on particular questions of customary international law, and it has been asked by a State Attorney General whether his State may discriminate against foreign producers or products in its public purchases without being in violation of U. S. international agreements. As will be later discussed, while the Office's views as "expert" generally are not binding, at least as regards addressees of its opinions outside of the Executive branch, these views will usually have great influence with respect to the determination of the matter.

f. *Non-Legal Functions of the Office.* There are various "services" the Office frequently performs for the Department of a somewhat amorphous, primarily non-legal, but nevertheless useful and important nature, particularly in the context of Government bureaucracy. Thus, the Office tends to provide an element of stability and continuity in certain areas where the "Wristonization" program and consequent frequent rotation of policy personnel has resulted in the loss of a backlog of experience concerning long-run policy problems. Further—perhaps partly because of the Office's professional independence and partly because of its separateness from the Foreign Service—the Office has not been reluctant to criticize, to question, and to suggest new approaches to accepted Depart-

¹¹ The Office's functions as "judge" and "international law expert" are discussed in more detail below, in the sections dealing with the Office's relations with courts and with private practitioners. And see generally, regarding interpretation of international agreements in the United States, Am. Law Inst., Restatement, Foreign Relations Law (Proposed Official Draft, May 3, 1962) (hereafter cited as A.L.I. Restatement), Secs. 152-155.

ment policies and policy objectives, particularly where they bear on the Office's long-run interest in the development of international law. Moreover, the variety of the Office's problems and experience permits it occasionally to see a particular matter in a broader context and to suggest more "over-all" solutions than may be apparent to a policy officer immersed in that problem alone. Finally, since the Office's work brings its attorneys into constant and informal contact with each other, with both high and low-level Department policy officers, and with the legal offices of other agencies, it tends to form a unique channel of communication between various bureaus and agencies. It frequently can use this network of contacts to cut red tape, bridge bureaucratic chasms, and lay the groundwork for solutions to inter-bureau or inter-agency problems.

Of course, in practice these various functions overlap and are simply aspects, often indistinguishable, of the Office's total activity with respect to a given problem. In many complex problems, such as the possible imposition of restrictions on textile imports into this country or the drafting of major foreign aid or trade legislation, the Office plays virtually all of these rôles.¹²

The problems in which the Office becomes involved are almost unlimited in variety. They may concern such diverse areas as atomic energy and airplane hijacking; foreign bases and agricultural surplus disposal; satellites and shrimp fishing; the legal status of Okinawa and rights of performing artists to protection from unauthorized exploitation of their performances; arms shipments to the Congo and pollution of the sea by oil.¹³ These problems tend, however, to fall into the following principal categories:

¹² The preparation, presentation, and passage of such major Executive branch bills of concern to the Department as the Foreign Assistance Act of 1961 (22 U.S.C. 2151 *et seq.*) or the new trade agreements legislation require a major effort in organization, and involves months of hard and painstaking work by scores of Department and other Executive branch personnel from the lowest to the highest level. The Office will typically participate in all phases of this process. General policies must be determined as to all the many substantive and administrative matters covered by the bill; drafts reflecting these positions must be prepared and cleared with the White House and all interested agencies and offices; voluminous written materials and oral testimony must be prepared for committee hearings; and proposed objections or amendments must be analyzed and either accepted, countered, or compromised. In particular, since even the most detailed bill cannot cover all questions with which the Department may be confronted after enactment in implementing it, great care must be taken that the "legislative history" of the Act provides an adequate basis for subsequent necessary action.

¹³ Some idea of the potential range of these problems may be seen from the examples of the branches' responsibilities set out in note 8 above. It may also be inferred from the fact that the United States presently conducts diplomatic relations with over 100 foreign countries; that the Department currently (as of April, 1962) operates some 97 embassies, 4 legations, 6 missions, 68 consulates general, 93 consulates, and 18 consular agencies in other countries; and that official representatives of the United States attend some 400 international conferences each year. It may also be noted that some 675 thousand Americans live abroad more or less permanently, and about 2 million more travel abroad (exclusive of Mexico and Canada) each year; and that some 8 million aliens live in this country more or less permanently, and about 1.5 million more

a. *Does the United States have a valid complaint against a foreign government under international law by reason of particular action or prospective action by that government?* The alleged violation may principally affect the United States Government itself, as in the case of Soviet action in Berlin; or it may principally affect private United States citizens, as in the case of Cuban expropriation of American property, or allegedly discriminatory taxation of an American firm in a foreign country contrary to the provisions of a commercial treaty.

b. *Does a foreign government have a valid complaint against the United States under international law by reason of particular action or prospective action by the United States?* Again, the alleged violation may principally affect the foreign government itself, as in the case of the U-2 reconnaissance flights over the U.S.S.R.; or it may principally affect private citizens of the foreign government, as in the case of the wartime seizure by the United States under the Trading With the Enemy Act of the assets of the Swiss-owned but allegedly German-controlled General Aniline and Film Company (the *Interhandel* Case), or the denial of social security benefits earned in the United States to a citizen of a foreign country with which the United States has a commercial treaty containing provisions relating to social security.

c. *May the Department or the United States Government take a particular course of action consistently with domestic and international law?* The Department or the United States Government may contemplate taking some action having a bearing on foreign relations which raises legal questions. The proposed measure may pose solely questions of international law, as in the case of the proposed orbiting of a reconnaissance satellite; solely domestic law questions, as in the case of the proposed denial of a passport to a newspaper reporter intending to go to Communist China; or both, as in the case of the possible denial by the Civil Aeronautics Board on economic grounds of permission to a foreign air carrier to operate a particular route allegedly covered by a bilateral air transport agreement, despite a provision of U. S. law requiring the Civil Aeronautics Board to exercise its powers consistently with international agreements.

d. *How may a general policy objective be achieved consistently with domestic and international law?* In connection with the making of policy decisions by the Department, the Office becomes involved in the examination of various legal means of reaching the desired result, including the possibility of new or amended legislation or international agreements. Thus, such legal instruments as the Foreign Assistance Act of 1961 and the Convention establishing the Organization for Economic Co-operation and Development, in the preparation of both of which the Office played a considerable part, were essentially legal means of implementing certain

travel to this country each year. For examples of Office opinions, see Maurer, "Legal Problems Regarding Formosa and the Offshore Islands," 39 Dept. of State Bulletin 1005 (1958), and various unclassified opinions set forth in the "Contemporary Practice" section of recent issues of this JOURNAL.

foreign policy objectives. Similarly, implementation of foreign policy objectives regarding Cuba and the Dominican Republic was a factor in the preparation of various amendments to the Sugar Act; and the United States commitment pursuant to a U. N. resolution to prevent Americans from participating in arms shipments to the Congo led to an amendment of Department of Commerce Export Control Regulations and Transportation Orders to prohibit such shipments.¹⁴

As a result of the breadth of the Office's work, its practice embraces almost every kind of law. Because of the Department's special rôle in foreign relations, the Office is concerned particularly with international law (including the increasingly important field of "international organiza-

¹⁴ As to the sugar problem, see P. L. 86-592, 74 Stat. 330 (July 6, 1960), and P. L. 87-15, 75 Stat. 40 (March 31, 1961), amending Sec. 408 of the Sugar Act of 1948 as amended (7 U.S.C. 1158 b). As to amendment of Transportation Order T-1, see 26 Fed. Reg. 2711 (March 31, 1961), 82A C.F.R. (1962 Supp. 130), and Dept. of State Press Release No. 174 of March 30, 1961.

The "cold war" has given rise to many new and difficult legal problems for the Office under domestic as well as international law. In many cases, legislation has failed to keep up with these new problems, and adequate solutions to urgent problems are sometimes found, if at all, only through tortuous routes and complex statutory interpretations. Thus, the Mutual Defense Assistance Control Act of 1951 ("Battle Act") (22 U.S.C. 1811 *et seq.*), which prevents the granting of U. S. financial, economic, or military assistance to foreign nations shipping strategic materials to Soviet-bloc countries, has created constant problems for the Department as regards the achievement of flexible foreign policy objectives regarding such Eastern European countries as Poland. Similarly, broad import or transactions-control authority has typically been available only through utilization of the provisions of Sec. 5 (b) of the Trading with the Enemy Act of 1917, as amended (50 App. U.S.C. 5 (b)), which (leaving aside the diplomatic problems raised by any use of an act so entitled) requires for its exercise a Presidential declaration of national emergency. See, however, with respect to Cuba, Sec. 620(a) of the Foreign Assistance Act (22 U.S.C. 2370(a)) and Proclamation 3447 of Feb. 3, 1962, 27 Fed. Reg. 1085.

Some overhaul of this "cold war" legal authority so as to provide a more flexible range of tools for the implementation of policy seems long overdue. One interesting question which arises in this area is the extent of Constitutional power and existing legal authority to control Americans either at home or abroad whose actions may interfere with foreign policy, and the desirability or undesirability of the assertion of such power. See for some existing peace-time powers, Ch. 45 (Foreign Relations) of the U. S. Criminal Code (18 U.S.C. 951-969), which prohibits, *inter alia*, enlistment in foreign military service, expeditions against friendly foreign nations, and conspiracy to injure property of a foreign government; 22 U.S.C. 252-254, prohibiting suits against ministers and their domestics; 18 U.S.C. 112, concerning assaults on public ministers; Sec. 5 of the U.N. Participation Act of 1945, as amended (22 U.S.C. 287c), vesting in the President broad powers to enforce economic sanctions imposed by the Security Council under Art. 41 of the U.N. Charter; Sec. 3(a) of the Export Control Act of 1949, as amended (50 App. U.S.C. 2023(a)); various legislation dealing with passports (22 U.S.C. 211a, 213, 217a; 50 U.S.C. 785; 8 U.S.C. 1185; and see 22 C.F.R. 51.135-136); Sec. 5(b) of the Trading with the Enemy Act of 1917, as amended (50 App. U.S.C. 5(b)), conferring broad emergency power in the President to control transactions with foreign countries and their nationals; and the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611 *et seq.*). And see *U. S. v. Peace Information Center*, 97 F. Supp. 255 (D.D.C., 1951); and note the possibility of official misuse inherent in the vague provisions of the "Logan Act" (18 U.S.C. 953), under which no person has ever been prosecuted.

tion law"), and is the Government legal office primarily engaged in the "practice" of that law.¹⁵ But since the Department must conduct its operations in accordance with the Constitution, various statutes, executive orders, and its own regulations, it is also deeply involved in questions of domestic public law.¹⁶ And as a result of the Department's continuing responsibility for the protection and advancement of American interests abroad, as well as its responsibility to foreign governments for the protection of their interests in this country, the Office becomes frequently involved as well in matters of domestic private law, private international law, comparative law, and foreign law.¹⁷

The Office must also deal with a great variety of people—officers of the Department and Foreign Service, officials of the White House and of other government agencies, foreign officials, Senators and Congressmen, judges, State officials, and United States and foreign private citizens and companies. Two of these relationships may be briefly commented upon—

¹⁵ The Office is, however, while the most important, not the only government legal office concerned with international law questions. The Department of Justice and the legal offices of such agencies as A.I.D., the Peace Corps, U.S.I.A., the Atomic Energy Commission, and the Departments of Defense, Commerce, Labor, Interior, and Treasury also frequently become involved in problems in this field. See "How Many International Legal Questions in the Operation of the United States Government?", Report of the Committee on International Law of the Association of American Law Schools.

¹⁶ These include extremely interesting questions concerning the President's special Constitutional authority in the conduct of foreign relations and the permissible scope of delegation of authority from Congress to the President in the area of foreign affairs. See generally, Corwin, *The President: Office and Powers*, Ch. V (4th ed., 1957). And see *The Aurora*, 11 U. S. (7 Cranch) 382 (1812); *U. S. v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936); *U. S. v. Pink*, 315 U. S. 203 (1942); *Field v. Clark*, 143 U. S. 649 (1892); *Hampton & Co. v. U. S.*, 276 U. S. 394 (1928); *Star-Kist Foods Inc. v. U. S.*, 275 F. 2d 472 (C.C.P.A., 1959); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 634 (1952) (Jackson J., concurring).

The Department also plays a major part in the administration and implementation of such legislation as the Foreign Assistance Act, U. S. Information and Educational Exchange Act, Mutual Educational and Cultural Exchange Act of 1961, Agricultural Trade Development and Assistance Act (P.L. 480), Foreign Service Act, International Organization Immunities Act, Reciprocal Trade Agreements Act, Immigration and Nationality Act, and the passport laws. See, generally, Title 22 of the U. S. Code, "Foreign Relations." It is also closely concerned with certain aspects of other legislation such as the Export Control Act, Mutual Defense Assistance Control Act ("Battle Act"), Trading With the Enemy Act, Shipping Acts, Federal Aviation Act, Atomic Energy Act, and the customs and antitrust laws.

¹⁷ The negotiation of a treaty of friendship, commerce and navigation (commercial or "FCN" treaty) may require a detailed examination of laws of both the United States and its treaty partner in such varied fields as religious freedom, corporate establishment, eminent domain, entry into professions, workman's compensation, inheritance and access to courts. The arrest of an American abroad may require study of the criminal laws and procedures of the foreign country. A foreign embassy may request information in such fields as corporate, securities, small loan, or antitrust law (or, in one case, "quit-rents") as an aid in preparing its own legislation. Or an American consulate may request information or guidance on such matters as the recognition by American State courts of foreign divorces as an aid in rendering advice to Americans overseas.

the Office's dealings with other government agencies and its relations with Congress.

Since the Department's responsibilities frequently overlap those of other government agencies, effective policy requires constant interdepartmental consultation and negotiation, in which the Office as well as the Department's policy desks play a part.¹⁸ The most important of such continuing relationships are those with the Agency for International Development (A.I.D.) and the Peace Corps, the United States Information Agency (U.S.I.A.), the Departments of Commerce, Treasury and Defense, the Atomic Energy and Tariff Commissions, and the Export-Import Bank. In addition, the Office has frequent dealings with the Department of Justice in connection with that Department's rôle as chief legal adviser to the President, lawyer for the Government in suits in national courts, and Executive branch arbiter of Constitutional and legal questions;¹⁹ with the Bureau of the Budget, which plays a vital rôle as chief co-ordinator of Executive branch positions on legislative and policy matters and with respect to certain budgetary and apportionment problems; and with the General Accounting Office, which exercises great power as "Congressional watchdog" through its authority to disallow agency expenditures.²⁰

As a consequence of the regular interaction between the Executive and Legislative branches under our Constitutional system, the Department is also continually engaged in matters involving the Congress. The De-

¹⁸ Inter-agency relationships constitute one of the most demanding and fascinating aspects of the government attorney's practice, and an insight into the governmental process and skill in working in this bureaucratic context is one of his most valuable assets. It is, of course, well known that different agencies tend to reflect different group interests and pressures, and that it is through the process of inter-agency compromise that the Executive branch as a whole resolves and adjusts these interests. In a few extreme cases, inter-agency dealings may almost partake of the character of international dealings, with agency "alliances," use of "power politics," and negotiation by instructed delegates. However, unlike the international arena, the inter-agency arena has arbitral machinery in the Bureau of the Budget, a legal court of appeal in the Attorney General, and a court of last resort in the President.

¹⁹ The Attorney General has the final say within the Executive branch as regards questions of domestic law, and also plays a very substantial rôle as regards questions of international law, though he will in the latter case normally accord great weight to the Department of State's views. See Deener, *The United States Attorneys General and International Law* (1957); and see, generally, 5 U.S.C. 303-306; Hart and Wechsler, "Note on the Opinions of the Attorney General," *The Federal Courts and Federal System* 82 (1953); and Nealon, "The Opinion Function of the Federal Attorney General," 25 N.Y.U. Law Rev. 825 (1950). The U. S. Attorney General may also resolve conflicts between agencies as to the government position in litigation by the exercise of his general supervisory power over such litigation, 28 U.S.C. 507(b). The U. S. Solicitor General may similarly resolve such conflicts under the authority which he shares with the Attorney General to control litigation in the Supreme Court, 5 U.S.C. 309.

²⁰ Concerning the Bureau of the Budget, see Merriam, "The Bureau of the Budget as Part of the President's Staff," *Annals, Am. Acad. Pol. and Soc. Sci.* (Sept. 1956) 16. Concerning the General Accounting Office, see Hauser, "The Investigatory Powers of the Comptroller General of the United States," 59 Mich. Law Rev. 1191 (1961); Note, "The Control Powers of the Comptroller General," 56 Columbia Law Rev. 1199 (1956).

partment has, of course, a recurrent need to seek particular legislation in order to secure authority and appropriations to carry on its business and perform its functions.²¹ Less generally realized is the fact that it must also exercise continuing vigilance against the potential enactment of other legislation which would not be in accord with Executive policy.²² Moreover, the Department has frequent contact with the Senate pursuant to the Constitutional requirement that the Senate give its "advice and consent" to the ratification of treaties.²³ Finally, the Department is often involved in various Congressional committee hearings or investigations concerning matters relating to its operations.

As a consequence of this interaction, all bureaus and offices of the Department are concerned with Congressional matters, and all conduct their operations with Congressional relations constantly in mind.²⁴ But since many of the problems which arise call particularly for legal skills, the Office plays an especially important rôle in this area. For instance, among the Office's most difficult assignments is its responsibility for assisting in the handling of requests or demands by Congressional committees

²¹ See Surrey, "The Legislative Process and International Law," 1958 Proceedings, American Society of Int. Law 11.

²² Thus, the Department is frequently in the position of opposing legislative proposals which, if enacted, would violate U. S. international obligations or restrict the Executive's or the Department's traditional authority regarding the negotiation of international agreements. Since many of the most important legislative proposals originate within the Executive branch, the Department is usually in a position to make any comments it has on such proposals either directly to the proposing agency or through the regular Bureau of the Budget clearance procedure. As regards legislation of concern to the Department not originating within the Executive branch, the Department is frequently asked for its comments by the Congressional committee assigned the proposal, or it may itself take the initiative in making its views known to that committee. The Department has a final opportunity to register its opposition to particular legislation when the enrolled bill is sent to the President for signature, at which time the Bureau of the Budget usually circulates the bill to interested agencies for comments, which may include a recommendation for veto.

²³ In connection with the "Bricker Amendment" hearings, Secretary of State Dulles, in testimony before the Senate Committee on the Judiciary on April 6, 1953, stated:

"The Constitution provides that the President shall have power to make treaties by and with the advice and consent of the Senate. This administration recognizes the significance of the word 'advice.' It will be our effort to see that the Senate gets its opportunity to 'advise and consent' in time so that it does not have to choose between adopting treaties it does not like, or embarrassing our international position by rejecting what has already been negotiated out with foreign governments." "Treaties and Executive Agreements," Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 1 and S.J. Res. 43 (83d Cong., 1st Sess.), p. 825.

²⁴ Department awareness of the importance of Congressional relations is reflected in a number of ways, ranging from the broad clearance authority of the Department's Congressional Relations Staff and special handling given Congressional correspondence, to the practice of advance consultation with various committees or committee chairmen regarding important prospective negotiations or other Department action. The Department's Congressional relations task is not made easier by the inherent difficulty in bringing home to the American people and Congress the importance of what are frequently complex and seemingly remote foreign policy problems. Nor is it made easier by the fact that the Department, almost alone among government agencies, has no organized interest group of "constituents" to plead its cause.

for information or documents which could give rise to a claim of "executive privilege."²⁵ Such requests may place the Department and Office in a dilemma; for while in some cases compliance with these demands and publication of the information may have serious repercussions on foreign policy, non-compliance may have equally serious results in terms of adverse Congressional relations.²⁶

THE OFFICE'S RÔLE IN THE MAKING OF INTERNATIONAL AGREEMENTS

In view of the Department's unique rôle in the negotiation and conclusion of international agreements,²⁷ some discussion of this aspect of the Office's work may be of interest. As is often pointed out, such international contractual arrangements have in recent times become of increasing importance as a method of regulating international conduct.²⁸

²⁵ See generally the January, 1959, issue of the *Federal Bar Journal*, which is devoted entirely to the subject of "Executive Privilege" (Vol. 19, No. 1); Twenty-Fifth Report by the House Committee on Government Operations on "Executive Branch Practices in Withholding Information from Congressional Committees" (H.R. No. 2207, 86th Cong., 2d Sess. Aug. 30, 1960); Statement by Attorney General Rogers before a Subcommittee on Constitutional Rights of the Senate Judiciary Committee, March 8, 1958, reprinted in Rogers, "The Papers of the Executive Branch," 44 A.B.A.J. 941 (1958).

²⁶ See, for instance, Sec. 634(c) of the Foreign Assistance Act of 1961 (22 U.S.C. 2394(c)), which provides in general that funds made available under the Act cannot be used in any country or for any project or activity with respect to which the General Accounting Office or a Congressional committee has requested information, unless the information is furnished or the President certifies that he has forbidden the information to be furnished and gives his reason for doing so.

²⁷ While the State Department jealously guards the principle of its traditional prerogative as regards the negotiation and conclusion of international agreements and maintains some control over all such negotiations, there are certain specialized fields in which, as a practical matter, the burden of preparation, and occasionally negotiation, are assumed by other agencies. Thus, the Atomic Energy Commission normally prepares and negotiates agreements for co-operation in the peaceful uses of atomic energy; the Agency for International Development prepares and negotiates aid bilaterals; the National Aeronautics and Space Agency prepares and negotiates agreements for co-operation in the space field; the Foreign Tax Division of the Internal Revenue Service prepares and negotiates treaties for the avoidance of double taxation; the Civil Aeronautics Board plays an important rôle in the negotiation of air transport agreements; and the Department of Agriculture participates heavily in the preparation of agreements for the sale of surplus agricultural commodities. By special legislative authorization (5 U.S.C. 372), the Post Office Department possesses the unique power in our Government of negotiating, concluding, and even interpreting international agreements on postal matters without reference to the State Department. Agencies other than the State Department also may negotiate and sign, without reference to the State Department, so-called "agency-level" agreements, which are not considered to be international agreements binding on states, but are typically in the nature of contracts between government agencies of different governments covering such matters as leases, purchases and sales, and personnel exchanges, or arrangements to implement a previously concluded international agreement.

²⁸ See, for example, Metzger, "A Contract Approach to International Law," 16 *Louisiana Law Rev.* 725, 727 (1956), where he states: "... it is fair to say that contract rules—or treaty law as it is sometimes called—have far overshadowed customary international law rules, from the viewpoint of coping with the main problems of

Thus, the United States is presently party to more than 3,000 international agreements with foreign countries, and during the year 1961 alone, the Office reviewed the texts and assisted in the preparation of some 361 such agreements. In fact, the United States has during the last 25 years entered into about three times as many treaties and other international agreements as it entered into during the entire previous period of its history.

The Office appears to have certain characteristic attitudes as regards the negotiation of international agreements. When there is a clear need for international legal regulation and the general lines of the required rules are reasonably well established, the Office exhibits a receptivity to proposals for a specific international agreement as the most expeditious and flexible means of dealing with the problem. However, it tends to oppose the writing of international agreements in fields where international regulation is not felt to be necessary,²⁹ and is skeptical as to the potential efficacy of international agreements in areas in which there is no real underlying basis for agreement in terms of either shared or reciprocal interests. There is also a strong belief in the necessity of sound preparatory work and carefully drawn drafts in order to achieve the maximum narrowing of issues prior to the commencement of formal negotiations for an international agreement.³⁰

With respect to the problem of bilateral *versus* multilateral agreements, the Office recognizes the desirability of multilateral negotiation where the problem is clearly best resolvable by multilateral action and where there is substantial agreement among countries on the measures required. However, in any case where there are likely to be strong differences among countries as to the acceptable level of international regulation, the Office tends to prefer bilateral arrangements. This is because a bilateral approach is generally more likely to maximize the level of benefits reciprocally traded than is a multilateral approach, which tends to establish the trade at the level of the "lowest common denominator."³¹

modern international relations. . . . This shift in emphasis has had many and varied effects. So far as lawyers in a country's foreign office are concerned . . . it has made the burden of their work counselling."

²⁹ The Department has, for instance, opposed granting priority in the work of the Legal Committee of the International Civil Aviation Organization to continued study of the proposed Draft Convention on Aerial Collisions on the grounds that provision of limitation of liability concerning collisions in international air transportation is unnecessary in terms of the lack of frequency of such collisions and the lack of substantial importance of the international legal problems they raise.

³⁰ Major multilateral conferences, such as the Conference on the Law of the Sea, on Antarctica, and on Diplomatic Privileges and Immunities, are frequently preceded by years of preparation by special working groups, committees of experts, or commissions.

³¹ In the field of protection of private investment, for instance, the Department has generally preferred to negotiate substantive provisions for such protection on a bilateral basis in the context of its commercial treaty and investment guaranty programs, rather than in a multilateral context, where it has had doubts about the possibility of reaching meaningful agreement between capital-exporting and receiving countries as to applicable principles. See Metzger, "Multilateral Conventions for the Protection of Private Foreign Investment," 9 Journal of Public Law 133 (1960). And see, generally, references cited in note 60 below.

While the Office seeks to accomplish maximum United States objectives in all negotiations, there is also a realization that any attempt to "win" a negotiation—to try to "put something over" on the other party—may be self-defeating, since experience suggests that an unbalanced or one-sided agreement will in the long run tend to cause more disputes than it resolves. An agreement which is fair and confers benefits on both sides is thus the most profitable one for all parties.

Finally, it is important to note that the Office is limited by the Constitution and laws as to its authority to enter into international agreements. Moreover, even where such limitations are not applicable, the Office is reluctant to go beyond existing United States Federal and State law as regards the obligations incurred, and it generally attempts to tailor agreements so as to avoid as far as possible the necessity of seeking new Federal legislation or of overriding State law.³²

Proposals for entry into an international agreement on a particular subject may arise from a variety of sources—from within the Office, from a policy area of the Department, from another Government agency, from

³² As to the Constitutional scope of the international agreement power, see the discussion and quotations of statements by Secretaries Hughes and Dulles set forth in *Power Authority of New York v. Federal Power Comm.*, 247 F. 2d 538, 542-543, 548-549 (C.A.D.C., 1957); see also Henkin, "The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations," 107 U. Pa. Law Rev. 903 (1959), and A.L.L.I. Restatement, Secs. 120-124.

An example of Department policy with respect to overriding State laws is the U. S. failure to sign the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards on the grounds, among others, that it might override State arbitration statutes. See Czyzak and Sullivan, "American Arbitration Law and the United Nations Convention," 13 *Arbitration Journal* 197 (1958), where the authors remark: "It has become axiomatic that countries normally avoid treaty commitments going measurably beyond national laws" (at p. 201). Cf. Quigley, "Accession by the United States to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards," 70 *Yale Law J.* 1049 (1961); and Sultan, "The United Nations Arbitration Convention and United States Policy," 58 *A.J.I.L.* 807 (1959).

The Department has also in its recent treaties, as a result of expressions of Senate sentiment, omitted provisions on national treatment with respect to the practice of professions, which were argued to conflict with State prerogatives. See Note, "Reservations to Commercial Treaties dealing with the Alien's Right to Engage in the Professions," 52 *Mich. Law Rev.* 1184 (1954).

Another interesting aspect of this problem is illustrated by material contained in the Report of the Senate Committee on Foreign Relations on Ratification of the Convention establishing the Organization for Economic Cooperation and Development (87th Cong., 1st Sess., Exec. Rep. 1, March 8, 1961). As there indicated, in connection with those hearings, the Legal Adviser, at the request of the Committee, was required to submit a statement to the effect that: "... nothing in the Convention . . . confers any power on the Executive to bind the United States on substantive matters beyond what the Executive now has, or on the Congress to take action in fields previously beyond the power of Congress. Conversely, nothing in the Convention diminishes the power of the Executive or Congress in these respects." Letter of March 6, 1961, p. 20 of the Report; and see "Contemporary Practice" section, 55 *A.J.I.L.* 697 (1961).

Certain International Labor Organization conventions have also raised difficult problems for the Office, insofar as they have been directed at the establishment of standards relating to domestic labor conditions.

a foreign government or international organization, or from a private group. The Office is frequently called upon to comment on the proposal itself, and usually prepares or reviews the initial draft of the agreement.³³

Together with the work of preparing or reviewing such drafts, the Office is responsible for examination of the legal basis for entry into the proposed international agreement, and for recommending whether the agreement should be in the form of a treaty or of an executive agreement. This examination is usually conducted as part of a regular Departmental procedure, called the "Circular 175 procedure." Department of State Circular 175 provides that the Secretary or Under Secretary or his delegate must specifically approve: (1) the institution of every negotiation which might lead to an international commitment on the part of the United States, and (2) the signature of any agreement resulting from such negotiations.³⁴ Circular 175 also provides guidance as to when international agreements should be entered into in the form of treaties and when in the form of executive agreements.³⁵ The Office of the Legal Adviser acts generally as the guardian and overseer of the Circular 175 procedure. In particular, before negotiation or signature of any international agreement is authorized, it prepares a legal memorandum setting forth the legal authority for entry into that agreement and noting whether

³³ Many of the international agreements currently entered into by the United States are of standardized types, and are often "boiler-plate." This is the case, for instance, with commercial (FCN) treaties, tax treaties, and aid, aviation and "P. L. 480" agreements.

³⁴ The full text of Department of State Circular No. 175 of Dec. 13, 1955, is set forth in 50 A.J.I.L. 784 (1956). The issuance of Circular 175 was closely related to the "Bricker Amendment problem" and Department efforts opposing passage of such an amendment restricting the Executive's power to enter into international agreements. See, among the many articles on this subject, Whitton and Fowler, "Bricker Amendment—Fallacies and Dangers," 48 A.J.I.L. 23 (1954), and Finch, "The Need to Restrain the Treaty-Making Power of the United States within Constitutional Limits," *ibid.* 57. The "specter" of Brickerism is never quite dead, and forms an ever-present factor in Department treaty policy.

³⁵ See text of Circular 175, 50 A.J.I.L. 784, 785 (1956). In many cases the Department may utilize either the treaty or executive agreement procedure. See, generally, Byrd, *Treaties and Executive Agreements in the United States* (1960); McDougal and Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 Yale Law J. 181 and 534 (1945); Mathews, "The Constitutional Power of the President to Conclude International Agreements," 64 Yale Law J. 345 (1955); and A.L.I. Restatement, Secs. 120-124.

Circular 175 does not spell out the considerations which enter into a decision to use treaty rather than executive agreement procedures in a given case, but they may include the following: traditional handling of the subject matter by treaty; absence of either clear legislative delegation of authority to the Executive or Constitutional authority in the President for entry into executive agreement; intent that the agreement be self-executing as a matter of internal law; fact that the agreement will create important national commitments; and desirability of a high degree of formality in the agreement. The difficulty in precisely defining the legal and practical borderline between the use of one or the other form was indicated by Secretary Dulles in his testimony before the Senate Committee on the Judiciary on April 6, 1953, concerning the Bricker Amendment. See Senate Hearings on S. J. Res. 1 and S. J. Res. 43, *op. cit.* 828 (1953).

the agreement will affect existing Federal or State law.³⁶ While there has been some criticism of the Circular 175 procedure within the Department for certain of its bureaucratic aspects, which in some cases result in delay in commencing negotiations or effectuating agreements, it appears on balance to serve a useful purpose in requiring that proposals to enter into negotiations which might give rise to international commitments be carefully thought through in advance. In some cases, this review results in the substantial alteration or abandonment of the original proposal.

The customary process of negotiating a multilateral agreement, and in some cases a bilateral agreement, involves the designation of a United States Delegation specifically authorized and appointed for that purpose.³⁷ The Office frequently assists in the preparation and clearance of Delegation Instructions, which, in the case of more important negotiations, provide guidance to such Delegations as to the positions and actions they should or may take on the various issues involved.³⁸ These Instructions

³⁶ More specifically, an internal legal office memorandum prescribes that the legal memorandum accompanying the "Circular 175 request" must show, in the case of a proposed treaty: (1) whether or not the subject matter is within traditional limits; (2) whether or not the treaty will be self-executing; (3) if it is not self-executing, the part or parts which may require legislation and the plans contemplated with respect to the formulation and presentation of such proposed legislation; (4) the extent, if any, to which the treaty is intended to prevail over existing Federal or State laws; and (5) information as to groups in opposition or in support of the contemplated change. In the case of a proposed executive agreement, the legal memorandum must contain: (1) a citation to the pertinent legislative or treaty provisions, if any, constituting authority for the making of an executive agreement on the subject; (2) if no antecedent legislative or treaty authority exists, a statement as to whether or not the agreement is to be made subject to legislation by the Congress; or (3) the Constitutional powers of the President relied on.

³⁷ The U. S. delegations to important international conferences of a "regulatory" type will frequently include Congressional advisers and advisers from the private industries or professions potentially affected. Thus, at the 1961 Rome Conference on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("Neighboring Rights"), the U. S. Delegation was accompanied by a member of the House of Representatives and by advisers representing the basic copyright interests, the performers, the phonograph companies, the film companies, and the major broadcasters. At times, the interests of such advisers conflict, with resultant difficulties for the delegation itself.

³⁸ States frequently are represented at multilateral international conferences and participate in the discussion and drafting of international instruments produced by such conferences even when there is considerable doubt as to whether they will become parties to the instruments; for the rules established by such agreements may affect them or their citizens indirectly, if not directly, even if they are not parties. In a few cases participation in such conferences may raise questions of "good faith." Thus, in the case of the Guadalajara Aviation Conference, 1961, which drew up the so-called "Hire, Charter and Interchange Convention," the U. S. Delegation was instructed to bring to the early attention of the conference the fact that the U. S. Government was at that time engaged in a re-examination of its position on the Warsaw Convention and Hague Protocol (to which the proposed convention would be supplementary), and would not therefore be in a position to sign any agreed instrument until that study was completed.

may be very detailed and precise, or may give the Delegation considerable discretion. Frequently, as the negotiation develops, it is necessary for the Delegation to request a change in its Instructions in order to meet an unanticipated situation or to effect a compromise. The Delegation cannot, however, properly exceed the terms of its Instructions without authorization from the Department.

The Office always plays some part in the negotiation of international agreements, if only in a "backstopping" capacity. In the case of the negotiation of agreements dealing primarily with legal matters, the Legal Adviser or an Assistant Legal Adviser may serve as Chairman of the U. S. Delegation. And in the case of other negotiations of particular importance or complexity, an Office attorney is frequently assigned as legal adviser to a United States Delegation.

An Office attorney assigned to a Delegation will participate actively in all of its work, and will put his legal skills at the disposal of the Delegation in such matters as the interpretation of its Instructions, the drafting of proposals and statements, the analysis of proposals made by other countries (particularly those which might create difficulties under United States law or practice), and the handling of legal problems of a general nature which arise in the course of the negotiations.³⁹ In multilateral negotiations, he will usually also serve as the Delegation member of the Drafting Committee, which is responsible for embodying the agreed principles in a final text together with the so-called "final clauses" of the agreement (which relate to signature, ratification or acceptance, entry into force, adherence or accession, reservations, termination, and the like).⁴⁰ He also does his share in the lobbying activities which are an indispensable part of any negotiation. If a successful result is achieved in a negotiation, the Office typically assumes charge of any necessary procedural steps, such as signature and printing, and, in the case of a treaty, submission to the Senate, ratification, and deposit.

³⁹ For example, at the U. N. Sugar Conference, 1961, which prepared but did not finally agree to a Protocol to amend the International Sugar Agreement of 1958 (which was to expire in 1963, but whose quota provisions were to lapse and require renegotiation in 1961), questions arose, *inter alia*: as to whether acceptance of the proposed protocol by only a majority, but not all the parties, to the 1958 Agreement would have the effect of terminating the Agreement in its unamended form, or whether, alternatively, both the old Agreement and the Agreement as amended would remain in force, with slightly different membership and resultant complications; as to the rights and obligations attached to "provisional" membership in the Agreement by States undertaking to seek ratification, acceptance or accession in accordance with their constitutional procedures, but which had not yet actually secured such action by their legislatures; and as to the effect on the 5-year term Agreement of the lapse of the 3-year term quota provisions (which were its central feature), when the conference failed to reach agreement on new quotas.

⁴⁰ "Final Clauses" frequently raise not only complex and interesting legal and legal policy questions, but also political questions of great importance, particularly in the context of "cold war." Thus, the clauses in multilateral agreements relating to signature and accession—that is, which countries can become members—raise serious problems as regards regimes unrecognized by the United States, such as East Germany, Communist China, North Korea, and North Viet-Nam.

The final text of an international agreement is, of course, the result of compromise—often compromise reached only after hard bargaining and long and arduous discussion. As a consequence, the drafting and clarity of the provisions sometimes leave something to be desired. Often agreement on a particular matter will only be possible through the adoption of very broad language in the text, which in effect leaves the problem for later resolution. Other times, the need to accommodate differences in legal concepts or national languages will lead to awkwardness and lack of elegance. Moreover, as is the case in all legal documents, there is a considerable tendency to adopt wording used in earlier similar agreements both to economize effort and also to avoid the possibility of difference in interpretation from that accepted as to the earlier agreements.

THE OFFICE AND THE DEPARTMENT

The Office of the Legal Adviser is, of course, only one of many bureaus and offices within the Department of State, and the interests it speaks for are only some of a number of different interests which compete for recognition in the final determination of Departmental policy. The Office's ability to gain ultimate acceptance of its views in such cases depends on various factors, including the nature of the problem under consideration and the prestige of the Office at the time.

The Office's influence is most direct, of course, in connection with Department matters which raise clear and substantial legal questions. Thus, any matter involving the drafting or interpretation of a statute or international agreement will usually require either "action" or "clearance" responsibility by the Office. What is not generally realized is the breadth of this authority to pass on legal questions; for there are in practice few major decisions the Department makes which do not in some way raise such questions. This is in part a result of the proliferation of legislation in the foreign relations field (particularly in relation to economic matters) since World War II, and the great extent to which the Department's actions, including its entry into various types of executive agreements, are now either dependent on or limited by such broad statutes as the Foreign Assistance Act, the Mutual Defense Assistance Control Act, and "P. L. 480." In part this importance of legal questions is a result of the postwar tendency to subject more and more areas of international problems to regulation by international agreement, including such broad and comprehensive instruments as the United Nations Charter, the Charter of the Organization of American States, and the General Agreement on Tariffs and Trade (GATT).

Generally speaking, policy officers of the Department tend to regard the Office's legal opinions as controlling, particularly when the matter concerns a question of interpretation of a statute or treaty, and rarely propose that measures inconsistent with the Office's legal views be taken.⁴¹

⁴¹ In occasional cases, the Office may by accident or design never have an opportunity to pass on what may be essentially a legal question. Thus, a policy officer may not be aware that a legal question is involved, or he may know that the Office will oppose

The Office may thus in many instances exercise what amounts to a veto power over particular proposed courses of Department action, although its views may, of course, be overridden at the level of the Under Secretary or Secretary.

The influence of the Office may also on occasion extend beyond strictly legal matters. It is commonplace that the distinction between "law" and "policy" is, as a practical matter, hard to draw and harder to maintain. Most of the problems in which the Office becomes involved lie in fact in a "grey area" where a variety of types of judgments have a bearing. Thus, in terms of the realities of the counseling situation, the Office is frequently drawn into questions of substantive policy.⁴² In some of these situations, the Office's views on such policy matters may have considerable influence for several reasons. First, a particular Legal Adviser or attorney may exercise considerable influence as a result of his personal prestige and his clients' respect for his general judgment and knowledge of the subject matter. Second, in any problem situation the attorney's professional skills of analytic ability and articulateness may tend to give his views special force. Finally, as previously suggested, an attorney servicing a particular policy area may in time come to possess as much background and expertise in that area as frequently rotated policy officers.⁴³

As a result of the above factors, the influence of the Office on Department policy is substantial. Consequently, international legal considerations also tend to play an important rôle. The question arises, however, as to whether this is a good or bad thing. It has been argued, for instance, that in practice a number of states disregard international law whenever observance of it would prove inconvenient to their immediate objectives; and it is suggested that, in this political context, it is naïve,

the proposed course of action and consequently attempt to by-pass this obstacle by omission of the Office from the clearance process on this matter. When Office prestige is high, such instances will, of course, be rare.

⁴² See Metzger, "A Contract Approach to International Law," 16 Louisiana Law Rev. 725, 728 (1956), where he notes: "... 'policy' and 'law' in foreign relations, as in domestic law, are simply aspects of problems, and it is necessary for the lawyer to become aware of, and, at the very least, knowledgeable concerning all aspects of a problem if he is to be effective in his own job." Because of the special responsibilities of the government attorney, the conflict between his rôle as advocate for his client and his rôle as judge as to the legality of his client's proposed actions is typically more acute than is this conflict for the private practitioner. Thus, he is frequently faced with difficult questions as to whether he should permit policy considerations to influence his legal opinions on particular questions.

⁴³ Despite some feeling that Office attorneys "should keep their noses out of policy," most policy clients in practice expect their lawyers to contribute ideas, or at least help the client think through his own. Experienced Foreign Service officers make good use of their attorney's sensitivity to facts, habit of thinking in terms of contingencies, and ability to anticipate consequences. Nevertheless, as has frequently been pointed out, there is perhaps an innate difference in approach as between the lawyer and the operating officer, which may occasionally lead to differing views as to policy. Whereas the lawyer tends to think in terms of precedent, observance of general principles, and precise expression of obligations, the operating officer often thinks in terms of the single situation before him, *ad hoc* decisions, and the retention of maximum flexibility and freedom of maneuver in future situations.

impractical, and even dangerous for this country to unduly limit its choice of action in international affairs by rigidly adhering to a policy of respect for international law.⁴⁴ This suggestion points up the difficulties inherent in any situation where legal rules exist for whose enforcement there is no adequate machinery, and where law-breakers may consequently attempt to profit at the expense of those who abide by the law.

While there is no simple, wholly satisfactory answer to the question thus raised, several points may be suggested. First, it is incorrect to think of a policy of respect for international law as simply a moral position. Thus, most states do comply with international law and that law does in fact embody sanctions, some of which, such as retaliation, may have severe impact. Moreover, while in a particular situation compliance with law may impede the attainment of an immediate foreign policy objective, a policy of respect for international law has a very practical basis. Thus, such a policy seems indispensable to the general establishment of conditions necessary to the protection of our own citizens abroad, the effective conduct of international relations, and the ultimate achievement of the kind of world in which the people of this country wish to live.⁴⁵ Second, in view of the strongly moral and legal tradition of the American people, it may be unrealistic to think in terms of the United States adopting a fixed course of conduct in its foreign policy not based on respect for international law, however logical a course of illegality might be shown to be. That is, this country's national predisposition to think and conduct its activities in terms of law may, as a matter of domestic politics, preclude its officials from attempting to conduct its international relations on any other basis.⁴⁶

A national policy of respect for international law does not, however, mean that American foreign policy need be either legalistic, Utopian or rooted in a "*status quo*"; and it certainly does not imply that the State Department need ignore in its decisions the pragmatic necessities and common-sense realities of international politics and diplomacy. Foreign office legal advisers are well aware that there is no easy solution to world

⁴⁴ See also former Ambassador Kennan's observations questioning the realism and effectiveness of what he describes as the "legalistic-moralistic" approach to American foreign policy in *American Diplomacy (1900-1950)* 93 *et seq.* (Mentor ed., 1952). And note the questioning of certain traditional international law doctrines by various Communist states and some of the newly emerging nations, who argue that these doctrines reflect only "colonial interests" in maintenance of the *status quo*, and are therefore not to be regarded as generally binding upon nations.

⁴⁵ Some of these practical considerations are mentioned on page 679 below. And see President Eisenhower's statement in his address at New Delhi University, India, on Dec. 11, 1959, that: "It is better to lose a point now and then in an international tribunal and gain a world in which everyone lives at peace under the rule of law." *New York Times*, Dec. 11, 1959, p. 15, col. 4.

⁴⁶ See the statement by the present Legal Adviser, Mr. Chayes, quoted in note 108 below; and see citations to some of the many public statements concerning the U. S. commitment to the principle of respect for international law quoted in Jessup, *The Use of International Law* 4-8 (1959), and Bishop, "The International Rule of Law," 59 *Mich. Law Rev.* 553, 554-555 (1961).

problems through legal panaceas, and that basic differences between nations cannot be resolved by simply writing legal phrases on paper. They know that "world peace through law" requires more than lip-service and more than international conferences, and that there are limits to what international law can accomplish in any given historical context.

What a policy of respect for international law does mean is a seriously undertaken national dedication to compliance with existing law even when such a policy entails the risk that national freedom of action may thereby be limited to some degree, and a conscious decision that a continuing effort be made toward broadening wherever practicable the area of international conduct subject to that law. Such a policy cannot, of course, substitute for effective foreign policy decision and skillful use of diplomatic techniques to resolve the very real problems of a world undergoing profound change and to provide the flexibility essential to allow such change to take place peacefully. It can, however, if intelligently administered, help in the gradual development of agreed international techniques for dealing with more and more areas of such problems in ways and through rational procedures which do not threaten the disruption of international society.

THE OFFICE AND THE PRIVATE PRACTITIONER

The increasing rôle of international transactions in American business activities has involved private attorneys more and more frequently in matters of an international character. As a consequence, problems in this area are no longer the special preserve of a few New York and Washington law firms, but often arise in the general practice of the average lawyer.⁴⁷ The majority of these problems concern solely questions of private commercial law, and do not involve the Office of the Legal Adviser. In some cases, however, the attorney is faced with situations which bring him into contact with the Office either to seek its assistance or to oppose official action.

⁴⁷ The last few years have seen a new realization of the importance of international transactions in the private practitioner's work and a growth of interest in legal doctrine and government institutions affecting this area. See Bishop, "International Law and the American Lawyer," 28 Mich. State Bar J. 42 (1949); Rhyne, "International Law: A Field American Lawyers Should Know Better," 36 A.B.A.J. 376 (1950); Cowles, "The Need of Understanding International Law," 7 Journal of Legal Education 179 (1954); Dean, "The Role of International Law in a Metropolitan Practice," 103 U. of Pa. Law Rev. 886 (1955); and Ball, "The Lawyers' Role in International Transactions," 11 Record of the Assoc. of the Bar of the City of N. Y. 61 (1956).

See also Surrey (Reporter), Law Governing International Transactions (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1962); Katz and Brewster, The Law of International Transactions and Relations (1960); and such excellent compilations of articles as the Spring, 1959, issue of the Univ. of Illinois Law Forum on "Legal Problems of International Trade"; the October, 1959, issue of the Federal Bar Journal on "Private Foreign Investment"; and the March, 1961, issue of the Columbia Law Review on "Legal-Economic Problems of International Trade"; and see Stein and Nicholson (eds.), American Enterprise in the European Common Market: A Legal Profile (2 vols., 1960-1961).

The most important of these situations may be briefly described, together with an indication of the way in which the Office or other areas of the Department deal with them, and, in particular, what the Office can and cannot do to assist the private attorney.

a. *Requests for general information.* The private attorney may simply wish information from the Office: for instance, whether a matter which he is handling may be affected by particular statutes or regulations for which the Department is responsible, by Department practices or position, or by customary international law or agreements to which the U. S. is a party; and where to find such materials. He may wish to know whether particular international agreements are in force and the parties to them. He may also ask for references to competent attorneys in a particular foreign country.

While it is not within the province of the Office to do research for private lawyers or their clients, the Office attempts to furnish information when it is not readily available to the private attorney, is available to the Office, and is not of a confidential nature. Thus, it will frequently give technical information concerning customary international law or particular international agreements.⁴⁸ However, in the usual case the

⁴⁸ Treaties and other international agreements effected subsequent to Dec. 31, 1949, are published in annual volumes of United States Treaties and Other International Agreements (cited as U. S. Treaties). Prior to that date they were published in U. S. Statutes at Large (indexed up to 64 Stat. in 64 Stat. B 1107). Since 1945, such treaties and agreements have also been published by the Department in separately numbered pamphlet prints of the Treaties and Other International Acts Series (T.I.A.S.). Prior to 1945, they were issued in separately numbered prints of the Treaty Series (T.S.) and Executive Agreements Series (E.A.S.). The texts of earlier treaties and agreements may also be found in the four-volume publication entitled *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1987* (Washington, Govt. Printing Office, 1910, 1923, 1938), and in *Miller's, Treaties and Other International Acts of the United States of America* (Washington, Govt. Printing Office, 1931-1948) (8 volumes to date covering period 1776-1863). The project for an English edition of treaties from 1776 to 1949, estimated to fill 16 volumes, is still in abeyance due to a lack of funds. The Department also publishes annually *Treaties in Force*, which lists all bilateral and multilateral treaties and other international agreements in force for the United States as of January 1 of the year of publication. Information concerning the current status of any treaty or international agreement to which the U. S. is a party may also be obtained by communicating directly with the Assistant Legal Adviser for Treaty Affairs. For an excellent discussion of treaty materials, see Hynning, "Treaty Law for the Private Practitioner," 23 U. of Chicago Law Rev. 36, 67-70 (1955), in which, among other things, he criticizes the lack of accessibility of such materials and the time lags in making them available. The Department presently is publishing agreements four to six weeks after entry into force.

As to international law generally, and particularly Departmental precedents, see *Moore's Digest of International Law* (1906) and *Hackworth's Digest of International Law* (1940-1944). As noted, a new digest covering the years following 1940 is currently in preparation in the Office. See also the three volumes of Hyde, *International Law* (2d ed., 1945).

Statutes primarily concerning foreign relations appear in Title 22 of the U. S. Code. Departmental regulations of general interest are published in Title 22 of the Code of Federal Regulations. Detailed regulations for the internal use of the Department and

Office will not furnish to individuals legal opinions concerning matters of a solely private nature, is not generally able to furnish information on, or texts of, foreign laws, and cannot supply confidential information or negotiating history from the Department's files.⁴⁹ In certain cases the Office may alert attorneys to the possible applicability to their matters of particular statutes, regulations, customary international law, or international agreements, though it will expect the attorney to consider the matter on his own and to take responsibility for any advice he ultimately gives his client. As to assistance in securing legal representation abroad, the appropriate country desk of the Department will not recommend particular attorneys but can usually supply a list of attorneys in a particular foreign country.

b. *Requests for procedural assistance.* The private attorney may wish some procedural help from the Office, such as assistance in contacting foreign officials; in taking foreign testimony or obtaining foreign documents; in transmitting American testimony or documents to foreign courts; or in obtaining consular, notarial or other services. Requests of this general type are typically handled not by the Office but rather by the local consulates and by the Protection and Representation Division, and the Property Claims, Estates, and Legal Documents Division of the Bureau of Security and Consular Affairs of the Department. These divisions may arrange in appropriate cases for local embassies to extend "good offices" in facilitating contact between American citizens and foreign officials. They may also arrange for the rendering of notarial services, and will, where appropriate, assist in the transmittal to foreign tribunals of letters rogatory issued by United States courts.

The Department has, however, in the absence of explicit Congressional

Foreign Service are contained in the Foreign Affairs Manual (F.A.M.), which is not published.

The Department of State Bulletin, published weekly, contains extremely useful material in the international field, including speeches, policy statements, articles, press releases, notations of treaty actions and publications, and references to Congressional and U.N. documents of particular interest.

⁴⁹ The Department's law library does not contain any extensive collection on foreign law. However, major foreign law collections are accessible at the Law Library of the Library of Congress, the Los Angeles County Law Library, the Law Library of the Association of the Bar of New York, and the law libraries of the principal law schools. The Bureau of Foreign Commerce of the Department of Commerce may also in some cases have material bearing on certain aspects of foreign law.

Regulations concerning access to, and use of records are set out in 5 F.A.M. 1850-1855. In particular, 5 F.A.M. 1855 requires that no Department records be produced or testimony concerning them be given to a Congressional committee, court, or quasi-judicial tribunal without the specific authorization of specified high-ranking Department officers. As to the particular problem of requests for or discovery of Departmental documents for use in judicial proceedings, see, generally, Carrow, "Government Nondisclosure in Judicial Proceedings," 107 U. of Pa. Law Rev. 166 (1958). As to access to documents for study and research, see 22 C.F.R. Part 133. Security and classification questions are governed by Exec. Order 10501 (18 Fed. Reg. 7049), as amended by Exec. Order 10964 (26 Fed. Reg. 8932). Concerning questions of Executive privilege, see note 25 above.

authorization, generally refused to act as an intermediary between foreign tribunals and courts, officers, and agencies in the United States.⁵⁰ It has also refused to "represent" or serve as agent or lawyer for private individuals in the conduct of their private business, or to press through government channels purely private claims. Thus, it has refused to complain to the Canadian Government about the alleged failure of some Canadian citizens to pay automobile negligence default judgments rendered by American State courts.

c. *Protests and requests for assistance with regard to allegedly illegal action on the part of foreign governments.*⁵¹ The private attorney may seek the Department's assistance or diplomatic intervention on behalf of an American citizen client with respect to particular action of a foreign government alleged to be in violation of international law or agreements.⁵²

⁵⁰ See, generally, on judicial assistance, Longley, "Serving Process, Subpoenas, and Other Documents in Foreign Territory," 1959 Proceedings, ABA Section of Int. and Comp. Law 34; Doyle, "Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory," *ibid.* 37; Jones, "International Judicial Assistance: Procedural Chaos and a Program for Reform," 62 Yale Law J. 515 (1953); McCusker, "Some United States Practices in International Judicial Assistance," 37 Dept. of State Bulletin 808 (1957); Surrey, Law Governing International Transactions, *op. cit.* 334-350; and see 28 U.S.C. 1781, 1782, and 1783, and Fed. Rules of Civ. Procedure 28(b) and 29. Problems of international judicial assistance are currently under study by the Presidential Commission on International Rules of Judicial Procedure. See Finch, 53 A.J.I.L. 432 (1959).

⁵¹ For material on the international legal problems mentioned in this and the next paragraph, see, generally A.L.I. Restatement, Pt. IV, "Responsibility of States for Injuries to Aliens"; and Sohn and Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens," 55 A.J.I.L. 545 (1961). See also Wetter, "Diplomatic Assistance to Private Investment," 29 U. of Chicago Law Rev. 275 (1962).

⁵² Many attorneys are not aware of the many international agreements, to which the United States is a party, which provide benefits or protection for American citizens in their international dealings, and for foreign citizens in their dealings in this country. Thus, our network of friendship, commerce and navigation treaties ("commercial treaties"), in force with some 39 countries, confers rights and privileges with respect to such varied matters as freedom of religion; rights of entry for commercial purposes; establishment of businesses; conduct of commercial activities; ownership and protection of property; social security and workman's compensation; taxation; inheritance; trade; shipping; and other activities. See Wilson, *United States Commercial Treaties and International Law* (1960); Metzger, "Commercial Treaties of the United States and Private Foreign Investment," 19 Fed. Bar J. 367 (1959); Meekison, "Treaty Provisions for the Inheritance of Personal Property," 44 A.J.I.L. 313 (1950); and various articles by Herman Walker, including his "Modern Treaties of Friendship, Commerce and Navigation," 42 Minn. Law Rev. 805 (1958). The Universal Copyright Convention, Industrial Property Convention, Double Taxation Conventions, and the trade rules contained in the General Agreement on Tariffs and Trade (GATT) are sources of numerous other rights. See, e.g., Sargoy, "UCC Protection in the United States," 33 N.Y.U. Law Rev. 811 (1958).

Generally speaking, such agreements are aimed at preventing discrimination on the basis of nationality as between citizens of the parties or of third states in "like situations," and are most usually cast in terms of such standards as "national treatment," "most-favored-nation treatment," "reciprocity," or, occasionally, "fair and equitable treatment." Interesting problems arise as to deciding what standard should be provided as the measure of obligation in a given situation in drafting an agreement,

Thus, the attorney may allege that the taxation by Italy of an art critic's bequest of foreign property to an American university, or the refusal of the French Government to permit an American firm to practice accounting, violates applicable treaties; that the denial of protection to a manufacturer's trademark in Colombia violates a trademark convention; that the imposition of certain restrictions on the showing of American films in a European country violates the trading rules of the General Agreement on Tariffs and Trade (GATT); or that the imprisonment of his client without a fair hearing on charges of smuggling violates general international law.⁵³

The Office expects the private claimant to do all he can himself to resolve the problem before bringing it to the Department. However, if the claimant has diligently pursued the matter without result, and the Office, after investigation, study, and consultation with the appropriate American Embassy, concludes that the claim may be meritorious, steps will be taken to bring the situation to the attention of foreign officials concerned. If a satisfactory solution is not found on an informal basis, the claim may be "espoused" or pursued through formal diplomatic channels.⁵⁴ If a

as to defining the "like situations" which are often the test of the standard, and also as to the applicable standard when a state in fact discriminates as between its own citizens (i.e., Is the alien entitled to "most-favored-national treatment"? See, on a related point, *Bacardi Corp. of America v. Domenech*, 311 U. S. 150, 164-165 (1940)).

Congress has directed the President to accelerate the program of negotiating commercial and tax treaties and also to seek, consistent with the national interest, compliance by foreign governments with such treaties (22 U.S.C. 2351(b)(2) and (3)).

⁵³ The attorney who believes he has a valid complaint of this nature should usually first communicate with the Office of the Legal Adviser, setting forth a full statement of the facts and circumstances concerning the problem, as well as the alleged international law or other basis for Department action. In the particular case of claims for the taking of property, he should communicate with the Claims branch of the Office setting forth the complete facts, including the nationality of the owner and nature of his interest; the nature of the property taken; when and how it was acquired; where located; circumstances of the taking, including any asserted basis in foreign law; measures taken to date by the owner to secure recovery; and proof of value at time of taking. See "General Instructions for Claimants and Suggestions for Preparing Claims" (For Personal Injury or Loss of Life, July 1, 1955; For Loss of or Damage to Property, March 1, 1961), available for distribution from the Department of State, and Note on "Practical Suggestions on International Claims," in Bishop, Cases and Materials on International Law 738-743 (2nd ed., 1962). See also Lillich and Christenson, *International Claims: Their Preparation and Presentation* (Syracuse U. Press, scheduled publication, Fall, 1962), and Christenson, "International Claims Procedure before the Department of State," 13 *Syracuse Law Rev.* 527 (1962).

The Office is concerned with a great number of such claims each year. For instance, in connection with the recent Polish claims settlement negotiations, over 15,000 claims were registered with the Foreign Claims Settlement Commission. It is estimated that there are in existence over 40,000 war-damage claims against Germany on the part of U. S. citizens.

In the case of wrongful imprisonment of an American citizen by a foreign government, the President has specific statutory responsibility to attempt to secure his release (22 U.S.C. 1732).

⁵⁴ A state which espouses a claim of one of its nationals has traditionally been deemed to be asserting its own claim. *Mavrommatis Palestine Concessions*, P.C.I.J., Ser. A, No. 2, p. 12 (1924); 1 *Hudson, World Court Reports* 293. Professor Bishop points out,

solution still is not reached, there may, in a few instances, be a decision to resort to international arbitration or adjudication of the issue.

It may be emphasized that the Office will not ordinarily consider pressing such a claim unless there has been either an exhaustion of local remedies or it is shown that an attempt to resort to local courts or administrative agencies would clearly be pointless under the circumstances.⁵⁵ Moreover, the Office has traditionally refused to function as a "collection agency" for private contract claims against foreign governments or government agencies where a direct breach of international law or a "denial of justice" is not involved.⁵⁶ Thus, the Office has generally refused to render assistance as regards defaulted foreign government bonds or other debt obligations of foreign governments.⁵⁷ In such cases, the Department's assistance will generally be limited to "good offices" in facilitating contact between the American citizen and the foreign government.

d. *Protests against allegedly illegal action on the part of the Department or the United States Government.* The private attorney may claim

however, that "the practice of international tribunals comes closer and closer to dealing with these cases as if it were the individual alien who has the right." Bishop, *Cases and Materials*, *op. cit.* 737 (2nd ed., 1962).

Satisfactory resolutions of such questions are in fact frequently reached by diplomatic means, except in cases such as Cuba and various Sino-Soviet-bloc countries where political difficulties may at least for the time being diminish the practical efficacy of diplomatic measures. As to Cuban claims, see State Dept. Memo., reprinted in "Contemporary Practice" section, 56 A.J.I.L. 166-167 (1962). In the cases of Yugoslavia, Rumania and Poland, the Department has reached so-called "lump-sum" claims settlement agreements. See, generally, the International Claims Settlement Act of 1949, as amended (22 U.S.C. 1621 *et seq.*); A.L.I. Restatement, Reporter's Note on "Claims Settlement Agreements of the United States and the Work of the Foreign Claims Settlement Commission," Sec. 219, pp. 731-732; Rode, "The International Claims Commission of the United States," 47 A.J.I.L. 615 (1953); Re, "The Foreign Claims Settlement Commission," p. 728, below; Christenson, "The United States-Rumanian Claims Settlement Agreement of March 30, 1960," 55 A.J.I.L. 617 (1961); Lillich, *International Claims: Their Adjudication by National Commissions* (1962); and see, generally, among the many works on nationalization questions, Domke, "Foreign Nationalizations," 55 A.J.I.L. 585 (1961).

⁵⁵ Under the doctrine of exhaustion of remedies, a state is not required to consider a claim presented on behalf of an alien injured by conduct attributable to the state and wrongful under international law, if the alien has not exhausted domestic remedies made available by the state, unless it is either shown that there are in fact no local remedies to exhaust or that such exhaustion would in practice be futile. *Interhandel Case*, [1959] I.C.J. Rep. 27; 5 Hackworth, *Digest of International Law* 501-526 (1943); A.L.I. Restatement, Secs. 211-215; *cf. Panevezys-Saldutiskis Railway Case*, P.C.I.J., Ser. A/B, No. 76 (1939); and see State Dept. Memo., reprinted in "Contemporary Practice" section, 56 A.J.I.L. 166-167 (1962).

⁵⁶ On occasion, the Department may be faced with extremely strong domestic pressures from private interests in this respect. It is interesting to note that Sec. 620(c) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(c)) provides that: "No assistance shall be provided under this Act to the government of any country which is indebted to any United States citizen for goods and services furnished, where such citizen has exhausted legal remedies and the debt is not denied or contested by such government."

⁵⁷ The Department has, however, sponsored and worked closely with the Foreign Bondholder's Protective Council, Inc., which is primarily concerned with seeking to arrange settlements on defaulted foreign-currency bonds.

on behalf of either a United States or foreign citizen client⁵⁸ that particular action of the Department violates U.S. law or that action of some United States Government agency or of some State agency violates international customary law or international agreements. Protests against the Department itself usually involve passport denials, rulings concerning loss of American nationality, or discharge of Departmental employees. Protests against action by some United States Government agency may be based on such claims as that the imposition of a customs duty on a particular import violates a trade agreement; that application of the Buy-American Act to a foreign company's bid on a government dam project violates a commercial treaty; or that certain provisions of the Trading with the Enemy Act which deny a judicial hearing in the case of seizure of an enemy alien's property violate a commercial treaty or international law. Protests against action by State agencies may be based on discriminatory legislation allegedly contrary to commercial treaties, such as laws in force at one time in several Southern States requiring stores selling Japanese goods to post signs in their windows to that effect.⁵⁹

Claims against the Department itself are normally handled by the Department first through Departmental procedures, and then, if suit is commenced, by reference to the Department of Justice. If a private attorney's protest against action by other agencies alleged to violate international law or agreements is considered meritorious, the Office will in appropriate cases take action to bring its views to the attention of the agency concerned, and may consult with that agency with a view to securing modification of its position.

e. *Requests for assistance of a general legal nature.* Even where no violation of national or international law may be involved, private attorneys may seek the assistance of the Department or Office in bringing about a change in United States or foreign law or policy or the negotiation of new or amended international agreements favorable to their clients' par-

⁵⁸ Aliens are, of course, protected in this country under the provisions of international law and specific agreements, such as commercial and consular treaties, and have frequently invoked the aid of U. S. courts in securing such rights. See, e.g., *Todok v. Union State Bank*, 281 U.S. 449 (1930); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Santovincenzo v. Egan*, 284 U.S. 80 (1931); and *Clark v. Allen*, 331 U.S. 503 (1947). Aliens are in general also within the protection of the Fifth and Sixth Amendments of the U. S. Constitution, *Wong Wing v. U.S.*, 168 U.S. 228 (1896), and also the Fourteenth Amendment, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); and see 42 U.S.C. 1981. See, generally, Konvitz, *The Alien and the Asiatic in American Law* (1946); Note, "Validity of State Restraints on Alien Ownership of Land," 51 Mich. Law Rev. 1053 (1953); Note, "Constitutionality of Restrictions on the Alien's Right to Work," 57 Columbia Law Rev. 1012 (1957); Comment, "The Alien and the Constitution," 20 U. of Chicago Law Rev. 547 (1953); and see Vagts, "The Corporate Alien: Definitional Questions in Federal Restraint on Foreign Enterprise," 74 Harvard Law Rev. 1489 (1961).

⁵⁹ The provisions of commercial treaties frequently apply to State as well as Federal Government action. Generally speaking, aliens aggrieved by alleged local or State infringements of treaty rights should first exhaust judicial remedies before seeking State Department assistance. See *Aerovias Interamericanas de Panama, S. A. v. Bd. of County Commrs.*, 197 F. Supp. 230 (D.C.S.D. Fla., 1961) at 249-250, citing references.

ticular interests. Thus, they may ask assistance in fostering action by foreign governments to curb the copying of American cigarette-lighter or other designs in Japan or the printing of unauthorized editions of U. S. copyrighted textbooks in Taiwan; they may urge administrative action by the United States Government to prevent rate-cutting by certain foreign airlines, or legislative action to amend the Trading With the Enemy Act so as to exempt certain political persecutees from the vesting provisions of that law; or they may attempt to persuade the Department to support the negotiation of a particular type of multilateral convention for the protection of private investment.⁶⁰

In deserving cases where corrective action seems appropriate and practicable, the Department will, in co-operation with other agencies concerned, seek solutions to such problems.⁶¹ For example, the Office, in co-operation with the Department's Special Assistant for Atomic Energy and the Atomic Energy Commission, has for several years been concerned with measures of various kinds to secure third-party limited liability protection for American suppliers of nuclear reactors or equipment abroad. These measures have included the encouragement of foreign legislation and participation in the preparation of several multilateral conventions.⁶²

f. *Requests for Department intervention or other assistance as regards judicial or administrative proceedings.* A private attorney may seek to have the Office actively intervene in particular judicial or administrative proceedings either in the United States or in foreign courts. Or he may attempt to persuade the Office to furnish a letter, affidavit or other statement concerning international law or foreign policy questions raised by such proceedings. Thus, he may request an opinion from the Department on the interpretation of a particular provision in the Philippine Trade Agreement at issue before a Philippine court; or he may ask a CAB Hearing Examiner to request the Office's views on the meaning of a clause in a particular air transport agreement; or he may seek to have the Office

⁶⁰ As to this last problem, see Round Table on "Proposed Convention to Protect Private Foreign Investment," 9 Journal of Public Law 115 (1960); Miller, "Protection of Private Investment by Multilateral Convention," 53 A.J.I.L. 371 (1959); and Lauterpacht, "The Drafting of Treaties for the Protection of Investment," Int. and Comp. Law Q., Supp., Pub. No. 3 (1962) at p. 18; and see IBRD Staff Report on "Multilateral Investment Insurance" (March, 1962).

⁶¹ The Office's own consideration of such requests can be greatly speeded by detailed and carefully documented memoranda setting forth the facts and background, the exact nature of the request, and legal grounds or policy reasons supporting it. Areas of the Department typically concerned in such matters may include not only the Office but also the appropriate "country desk" and such functional divisions as those concerned with Aviation, Shipping, Commercial Treaties, and International Business Practices (which handles such matters as copyrights, patents, trademarks, and restrictive business practices).

⁶² This general problem is discussed in Eicholz and Konz, International Problems of Financial Protection Against Nuclear Risk (Atomic Industrial Forum, 1959). For other aspects of this problem, see Hardy, "International Protection Against Nuclear Risks," 10 Int. and Comp. Law Q. 739 (1961); and Berman and Hydeman, "International Control of the Safety of Nuclear-Powered Merchant Ships," 59 Mich. Law Rev. 233 (1960).

indicate to a United States court that it should adjudicate a case involving Cuban expropriations without regard to the "Act of State" doctrine.

While in certain cases the Office may be willing to take action of this type, intervention in adjudicatory proceedings raises difficult problems of legal policy. Some of the measures the Department may take in such a situation and the considerations bearing upon its decisions will be later discussed.⁶³

A private practitioner may be interested in the extent to which his dealings with the Office or the Department in such matters are subject to regular administrative procedures, or, in the event of decisions adverse to his client's interests, appeal to the courts. The answer seems to be—to only a very limited extent.

The Department has considered itself to be generally exempt from the provisions of the Administrative Procedure Act⁶⁴ by virtue of the exception in Section 3 (Public Information) as to "any function of the United States requiring secrecy in the public interest"; the exceptions in Section 4 (Rule Making) and Section 5 (Adjudication) as to "any . . . foreign affairs function of the United States" and "the conduct of . . . foreign affairs functions";⁶⁵ and the exception in Section 10 (Judicial Review) as to "agency action . . . by law committed to agency discretion." Moreover, it has in general resisted attempts to apply the Act more broadly to its actions. The basis for its position is that the Department does not deal primarily with the regulation and adjudication of private rights; and the imposition of such requirements would not be appropriate to the Department's functions, since its activities principally involve considerations of foreign policy, often concern persons in foreign countries, and may involve confidential information.

In a few situations, regular administrative procedures of an "APA-standard" are provided by law or regulation. Thus, in passport cases and cases involving the loss of American nationality, the Department has

⁶³ See pp. 675-678 below.

⁶⁴ Administrative Procedure Act of 1946 (60 Stat. 237, as amended; 5 U.S.C. 1001 *et seq.*).

⁶⁵ The Senate and House Reports on the Administrative Procedure Act state: "The phrase 'foreign affairs functions,' used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences." Sen. Rep., p. 13, H.R. Rep., p. 23 (Sen. Doc., pp. 199, 257). See also Representative Walter's statement on the floor of the House, 92 Cong. Rec. 5650 (Sen. Doc., p. 358). The Attorney General's Manual on the Administrative Procedure Act (1947) comments that: "It is equally clear that the exemption is not limited to strictly diplomatic functions, because the phrase 'diplomatic function' was employed in the January 6, 1945 draft of S. 7 (Sen. Comp. Print of June, 1945, p. 6; Sen. Doc., p. 157) and was discarded in favor of the broader and more generic phrase 'foreign affairs functions.' In the light of this legislative history, it would seem clear that the exception must be construed as applicable to most functions of the State Department and to the foreign affairs functions of any other agency." (pp. 26-27.)

established detailed procedures by regulation; and, under statute and judicial decision, the private party may have at least a limited recourse to the courts.⁶⁶ A more limited administrative procedure is also available under Department regulations with respect to visa applications;⁶⁷ but there is no appeal to the courts in visa cases.

However, no established administrative procedures are in effect with respect to Department decisions regarding the "espousal" or prosecution of claims of American nationals against foreign governments. Nor is judicial review available in such cases. The Department has traditionally taken the position that it has complete discretion as to whether to "espouse" or cease to "espouse" such a claim at any time,⁶⁸ and that it has complete discretion to waive or settle such a claim without the consent of the American national.⁶⁹

Moreover, the Department has considered that the President, acting through the Department, has absolute discretion in the making of all decisions relating to the general conduct of foreign relations, even though, as in the case of the negotiation of a particular commercial treaty or a decision to intervene in some way in a particular court or administrative action, that decision may indirectly affect private rights.

The absence of formal administrative safeguards in certain areas where private rights may be directly or indirectly affected by Department action places a particular burden of responsibility on the Office of the Legal Adviser to see that this discretion is not abused and that decisions are reached on a reasonable and impartial basis. As regards its own actions, the Office frequently consults with and receives memoranda from private parties before reaching decisions. Internal Departmental review and "clearance" procedures, Congressional interest in specific cases, and the presence of industry advisers at some negotiations afford additional checks.

The question arises, however, as to whether "good faith" and informal administrative checks are in fact adequate safeguards to the protection of private rights. To the extent that considerations relating to foreign

⁶⁶ The procedures relating to the denial of passports are set out in 22 C.F.R. Pts. 51 and 58, and particularly 51.137-170. For judicial review, see, *e.g.*, *Worthy v. Herter*, 270 F. 2d 905 (D.C. Cir., 1959). The procedures relating to loss of nationality are set out in 22 C.F.R. Pt. 50. For judicial review, see, *e.g.*, *Rusk v. Cort*, 369 U. S. 367 (1962). Sec. 10 of the Administrative Procedure Act probably applies in both cases.

⁶⁷ The regulations relating to visas are set out in 22 C.F.R. Pts. 40-44, and see particularly 42.130 and 42.134. As to aliens departing from the U. S., see 22 C.F.R. 46.4 and 46.5.

⁶⁸ See *Distribution of the Alsop Award*, Op. of J. Reuben Clark, Solicitor of the Department of State, 7 A.J.I.L. 382 (1913); A.L.I. Restatement, Sec. 217; and as to the Foreign Claims Settlement Commission, see *De Vegvar v. Gilliland*, 228 F. 2d 640 (D. C. Cir., 1956), cert. den., 350 U. S. 994 (1956); and Coerper, "The Foreign Claims Settlement Commission and Judicial Review," 50 A.J.I.L. 868 (1956).

⁶⁹ See Cardozo, "Attempts to Transmute Indemnity into Discharge of Claims in Executive Agreements," 49 A.J.I.L. 560 (1955); Oliver, "Executive Agreements and Emanations from the Fifth Amendment," *ibid.* 362; and *Williams v. Heard*, 140 U. S. 529 (1891); and see generally, A.L.I. Restatement, Sec. 218. In the Rumanian Claims Settlement Agreement of 1960, the United States agreed not to espouse certain categories of claims not satisfied by that agreement.

relations and confidential information are in fact involved in Department decisions of this nature, there may be, of course, no realistic alternative to Department self-discipline. In terms of the broader requirements of the general public interest, it may simply not make sense in such cases to put the Department in the position of being required to subject foreign policy decisions to formal administrative procedures.

Nevertheless, the number of matters involved, the importance of the private interests affected by Departmental action, and in certain cases the small importance that foreign policy and confidential information actually play in such decisions, not to mention our traditional democratic prejudice against unchecked governmental power, suggests that the Office might usefully give further thought to these problems. If the principle of "government under law" is to be observed, it would seem desirable that the maximum procedural protections consistent with Departmental operations—if only an opportunity to know what is happening and to present views—be afforded wherever possible to private parties in any matter in which their interests are substantially affected.⁷⁰

THE OFFICE AND THE COURTS

The function of interpreting and applying international law and agreements is, of course, performed not only by foreign offices such as the Department of State, but also by both international and national courts.⁷¹ In United States international law practice, the Office of the Legal Adviser

⁷⁰ It may be noted that under Sec. 4 of the Trade Agreements Act of 1934, as amended (19 U.S.C. 1354), "Before any foreign trade agreement is concluded with any foreign government . . . , reasonable public notice of the intention to negotiate an agreement with such government . . . shall be given in order that any interested person may have the opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe; . . ." These hearings are held by the Inter-Departmental Committee on Reciprocity Information. See also 19 U.S.C. 1351 (f). The Department has also sought public views in other instances, such as in the case of the current reconsideration of the U. S. position as to the Warsaw Convention and Hague Protocol. See FAA Notice in 26 F.R. 9684, Oct. 13, 1961, and Dept. of State Press Release of the same date. For an example of useful public discussion which can be stimulated by such disclosure, see panel discussion on "International Aviation Policy: The Warsaw Convention, The Hague Protocol, and International Limitation of Liability," 1962 Proceedings, American Society of Int. Law (in course of publication).

This problem is particularly acute in the area of sovereign immunity, where a case may well be won or lost in the Department rather than in the courtroom. See Jessup, "Has the Supreme Court Abdicated One of its Functions?", 40 A.J.I.L. 168 (1946); Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court," 67 Harvard Law Rev. 608 (1954), where the author suggests that the Department should afford the plaintiff a hearing before making its decision as to whether or not to make such a suggestion; and Jessup, *The Use of International Law* 83-84 (1959), where he says: "The State Department is totally unequipped to handle such [sovereign immunity] questions." See also Note, "The Sovereign's Immunity and Private Property: A Due Process Problem," 50 Georgetown Law J. 284 (1961). In practice, the plaintiff is notified by the Office and is given an opportunity to be heard before a decision is made by the Office whether to file a suggestion of immunity.

⁷¹ See, generally, Jessup, *The Use of International Law*, Chs. III and IV (1959).

shares its functions in this regard with Federal and State courts, and occasionally with certain Federal administrative agencies which perform quasi-judicial functions, such as the Civil Aeronautics Board and the National Labor Relations Board.

It is not always appreciated, however, that the over-all influence of adjudicative agencies on international law is in general considerably less important than that exercised by foreign offices. The number of international law questions passed on by international or United States tribunals is probably no more than a fraction of the number of such questions passed on by the Office of the Legal Adviser in any equivalent period,⁷² and the types of such questions considered by courts are generally of comparatively minor significance in the broad context of international regulation. Moreover, the nature of adjudicative techniques, which are restricted to disputes which have already arisen and which can deal only with such questions as the litigants choose to bring before tribunals, inherently limits their capacity to establish broad and flexible means of regulation for complex and changing international situations. Finally, even in this area of supposedly independent judicial influence with respect to international law, the opinions and policies of the Office frequently exert considerable weight on decisions reached by courts. Thus, despite the important rôle played by judicial agencies in certain areas of international law, the Department of State and its Office of Legal Adviser in practice tend to carry the main burden of vindicating the international rights and obligations of the United States and its citizens,⁷³

⁷² For instance, to date (April, 1962) there have been 48 cases on the General List of the International Court. 12 of these cases involved a request for an Advisory Opinion (1 such request is presently pending). 36 of these cases involved contentious proceedings (3 such cases are presently pending). Of the 33 contentious cases disposed of: 10 were removed from the Court's list due to total absence of acceptance of compulsory jurisdiction; 2 were removed from the Court's list because of failure of acceptance of compulsory jurisdiction to cover the particular case; 6 were voluntarily withdrawn; 1 was disposed of on the grounds of non-admissibility of the application; and only 14 cases were disposed of on the merits. See "General List of the Court," [1960-1961] I.C.J. Yearbook 43.

⁷³ The great importance of foreign office practice as compared with national and international adjudication in the practical operation and development of international law has not been generally reflected in the traditional teaching of international law. As a consequence, traditional courses centering on adjudicative materials tend to have only a limited relevance to the practical international law problems with which government legal offices and private practitioners are confronted, and in some cases the academic attitudes engendered may in fact constitute a disadvantage in finding solutions to such matters. A useful and realistic approach (which is being employed in a few law schools) might include, insofar as materials are available, more emphasis on foreign office practice. This could perhaps be done through the medium of a "problem" system of presentation, permitting the student to see how international law problems arise and are handled at various levels of controversy, including that of the private practitioner and the foreign office as well as that of courts. See, generally, Carlston, "The Teaching of International Law in Law Schools," 48 Col. Law Rev. 516 (1948); Bishop, "International Law in American Law Schools Today," 47 A.J.I.L. 686 (1953); and Sohn, "The Present Importance of Teaching International Law and Organization," 7 Journal of Legal Education 199 (1954).

and play the principal creative rôle in this country in implementing and developing international law.

It may nevertheless be of interest to see how the Office influences and is influenced by these various tribunals. At the international adjudicatory level, the Office is primarily concerned with judicial functions performed by the International Court of Justice and by various permanent or *ad hoc* arbitral tribunals. Decisions of such tribunals in cases in which they have jurisdiction over the United States bind the United States as a matter of international law, though their status as a matter of domestic law is more complex and may depend on legislative or other internal implementation. Decisions by these tribunals also influence the Office, even when the United States is not a party to the particular dispute, since there is an inevitable tendency to treat such decisions as precedents, despite the fact that under international law they are binding only on the parties to the case.

The Office, in turn, exercises a considerable influence on international courts by its decisions whether or not to submit particular disputes to such tribunals for adjudication. Since the jurisdiction of international tribunals is "consensual" (*i.e.*, dependent on the consent of the parties either to the general jurisdiction of the tribunal or to reference of the particular dispute to it), the business of such tribunals—the number and type of disputes they can act on—is inevitably determined by foreign office decisions. Also, since the Office acts as "agent" or lawyer for the United States in cases before international tribunals, it generally influences, through its strategy and the positions it takes, the course of any litigation involving the United States which comes before such courts.

While international arbitration played a significant part in the conduct of American foreign affairs during the nineteenth and first part of the twentieth centuries, in recent years international tribunals have played a rather limited rôle in the resolution of international disputes involving the United States. The United States has been party to some ten cases before the International Court of Justice, of which only three were adjudicated on the merits;⁷⁴ and has during the last two decades been in-

⁷⁴ The United States has been a party to 10 out of the 36 contentious cases brought before the International Court of Justice. In 3 of these cases, contentious proceedings were brought against the United States: Case Concerning Rights of Nationals of the U. S. A. in Morocco (*France v. U. S. A.*); Case of the Monetary Gold Removed From Rome in 1943 (*Italy v. France, U.K., and U. S. A.*); and Interhandel Case (*Switzerland v. U. S. A.*). An adjudication on the merits was rendered in the Rights of Nationals Case ([1952] I.C.J. Rep. 176) and the Monetary Gold Case ([1954] *ibid.* 19). The Interhandel Case was disposed of on the ground of non-admissibility of the application pending disposition of the case in the U. S. courts ([1959] *ibid.* 6). In 7 of these cases, all of which concerned various aerial incidents involving loss of aircraft in Soviet-bloc countries, the U. S. instituted contentious proceedings: Treatment in Hungary of Aircraft and Crew of U. S. A. (*U. S. A. v. Hungary*, [1954] I.C.J. Rep. 99, and *U. S. A. v. U.S.S.R.*, *ibid.* 103); Aerial Incident of March 10, 1953 (*U. S. A. v. Czechoslovakia*, [1956] *ibid.* 6); Aerial Incident of October 7, 1952 (*U. S. A. v. U.S.S.R.*, *ibid.* 9); Aerial Incident of July 27, 1955 (*U. S. A. v. Bulgaria*, [1960] *ibid.* 146); Aerial Incident of September 4, 1954 (*U. S. A. v. U.S.S.R.*, [1958] *ibid.* 158); Aerial

volved in very few significant international arbitrations. This is despite the fact that a great number of United States treaties and other international agreements contain specific provision for compulsory adjudication and arbitration, and that the United States has accepted the "compulsory jurisdiction" of the International Court of Justice under Article 36(2) of the Court's Statute, albeit with certain reservations.⁷⁵

The reluctance of the United States (and generally other countries as well) to make greater use of international tribunals appears to be based on various factors.⁷⁶ It may in part reflect a continuing fear by substantial segments of the public and the Congress that any widespread resort to, and growth of influence of, international courts will somehow impinge on "national sovereignty." This is illustrated in the case of the United States by the "Connally Amendment" and the failure thus far of efforts to withdraw this crippling reservation.⁷⁷ Moreover, in disputes involving

Incident of November 7, 1954 (U. S. A. v. U.S.S.R., [1959] *ibid.* 276). All of these cases in which the U. S. instituted contentious proceedings were removed from the Court's list due to total absence of acceptance of compulsory jurisdiction, except for the Aerial Incident of July 27, 1955, which was voluntarily withdrawn. The United States has also filed a statement in each of the 12 cases in which the International Court granted a request for an Advisory Opinion, and in several of these cases entered an appearance.

⁷⁵ Congress has also declared it to be "the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided . . ." (22 U.S.C. 261). Obligations regarding the peaceful settlement of disputes are also contained in Arts. 2(3) and 33 of the U.N. Charter. A full listing of "Texts Governing the Jurisdiction of the ICJ" is contained in Ch. X, [1960-1961] I.C.J. Yearbook 189-347.

⁷⁶ For recent discussions on the rôle of international adjudication and the International Court, see, generally, *e.g.*, Lauterpacht, *The Development of International Law by the International Court* (1958); Sohn, "The Role of International Institutions as Conflict-Adjusting Agencies," 28 *Chicago Law Rev.* 205 (1961); Gross, "Some Observations on the International Court of Justice," 56 *A.J.I.L.* 33 (1962); Bloomfield, "Law, Politics and International Disputes," *International Conciliation*, No. 516 (1958); and Stone, "The International Court and World Crisis," *International Conciliation*, No. 536 (1962). And see, on the question of enforcement, Schachter, "The Enforcement of International Judicial and Arbitral Decisions," 54 *A.J.I.L.* 1 (1960).

⁷⁷ By the Connally Reservation to its acceptance of the so-called "compulsory jurisdiction" of the I.C.J. pursuant to Art. 36(2) of the Statute of the Court (the "optional clause"), the United States reserved the right to decide unilaterally whether a dispute concerning it was within its own domestic jurisdiction and thus beyond the jurisdiction of the Court. See Declaration by the President of the United States of America, August 14, 1946, Respecting Recognition by the United States of America of the Compulsory Jurisdiction of the I.C.J., par. 2(b) (61 Stat. 1218; T.I.A.S., No. 1598); and see, generally, "Symposium on the Connally Amendment" in the January, 1961, issue of the *American Bar Association Journal* (47 *A.B.A.J.* 57 *et seq.*); "Compulsory Jurisdiction, International Court of Justice," Hearings before the Committee on Foreign Relations, U. S. Senate, 86th Cong., 2d Sess., pp. 10-23 (Herter) and pp. 24-38 (Rogers); Briggs, "The United States and the International Court of Justice: A Re-examination," 53 *A.J.I.L.* 301 (1959). Both the present and the previous Administrations have urged withdrawal of the Connally Reservation. See President Eisenhower's "State of the Union" Message, Jan. 7, 1960, 42 *Dept. of State Bulletin* 111, 117-118 (1960); Hearings, above; and 1960 Democratic Party Platform. The American Bar Association has similarly consistently supported withdrawal of this reservation.

politically sensitive (and particularly "national security") questions, the majority of states have not been willing to take the risk and consequences of judicial decisions adverse to their interests,⁷⁸ and have preferred instead to attempt to resolve such disputes through diplomatic negotiation and compromise over which they retain control. Other considerations, such as expense, unfamiliarity with international court procedures, the alleged uncertainty of customary international law, the lack of effective sanctions to enforce decisions, and perhaps a lack of confidence in the International Court's impartiality may also have some bearing. As a result of such considerations, most states have tended to submit to international tribunals only cases of relatively limited consequence, or occasionally cases of more importance which they are in fact willing to lose but cannot compromise in negotiation without "losing face" at home or abroad.

At the domestic level, the Office becomes involved in the business of Federal and State courts and also of certain Federal administrative agencies performing judicial functions. These courts and agencies interpret and apply international law and agreements and various statutes with which the Department is concerned as a "by-product" of deciding specific cases and controversies which come before them.⁷⁹ In general, both Federal and State courts have jurisdiction to pass on matters involving customary international law and international agreements,⁸⁰ and

It may be noted that the Department was subjected to heavy criticism as a consequence of its refusal first to arbitrate the Interhandel case with the Swiss Government under an existing Arbitration Treaty with Switzerland, and again when it invoked the "Connally Reservation" with respect to the limited issue of its right to sell or otherwise dispose of General Aniline and Film Co. shares after Switzerland had taken that case to the I.C.J. See Briggs, "Towards the Rule of Law?", 51 A.J.I.L. 517 (1957); Jacoby, "Towards the Rule of Law?", 52 *ibid.* 107 (1958); Mason, "The General Aniline and Film Company case," 1958 Proceedings, American Society of Int. Law 114; and Becker, "Some Political Problems of the Legal Adviser," *ibid.* 267, 38 Dept. of State Bulletin 832 (1958). As to the disposition of this case, see Judgment of March 21, 1959 (Preliminary Objections), [1959] I.C.J. Rep. 6; Briggs, "Interhandel: The Court's Judgment of March 21, 1959, on the Preliminary Objections of the United States," 53 A.J.I.L. 547 (1959); and Simmonds, "The Interhandel Case," 10 Int. and Comp. Law Q. 495 (1961).

⁷⁸ The situation may, of course, be different where a party either considers that it has an "airtight" case, or is virtually certain the other party will not accept jurisdiction and thus hopes to gain a propaganda advantage by offering to submit the dispute without expecting to actually have the case adjudicated.

⁷⁹ It has long been established that U. S. courts will directly apply both treaties and customary international law in their decisions of cases. See, e.g., *The Paquete Habana*, 175 U. S. 677, 700 (1900); *Aerovias Interamericanas de Panama, S. A. v. Bd. of County Comm'rs.*, 197 F. Supp. 230 (D.C.S.D. Fla., 1961); and Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 U. Pa. Law Rev. 26, 792 (1952-1953).

⁸⁰ The judicial power of the United States extends to cases at law and equity arising under treaties made under the authority of the United States Constitution, Art. III, Sec. 2, par. 1. The Judicial Code contains a number of provisions conferring jurisdiction on Federal courts with respect to treaty and other international matters. As to the Supreme Court, see 28 U.S.C. 1251, 1254, and 1257. As to the District Courts, see generally, 28 U.S.C. 1331, 1332, 1350, 1351, and 1441. With respect to suits against

may do so without any reference whatsoever to the Department.⁸¹ The decisions of Federal courts are binding on the Executive branch as a matter of domestic law. Decisions of State courts and the various administrative agencies are not formally binding on the Department in the sense that a Federal court decision is, but they may nevertheless influence Department actions. American court or administrative agency decisions do not, however, receive unquestioned assent by other countries in the international sphere, nor necessarily determine the Department's views or actions in the strictly intergovernmental arena.⁸² As a consequence, such decisions may require action by the Executive branch in the domestic sphere potentially inconsistent with what the Executive branch considers to constitute international obligations of the United States.

Since national courts can act only as to such cases or controversies as come before them and concern parties over whom they can establish jurisdiction, their rôle is inherently limited as respects the resolution both of disputes which are essentially intergovernmental, and of disputes between private parties and foreign governments to the extent that such governments are protected from the exercise of jurisdiction by doctrines of sovereign immunity. Thus, American courts, from the nature of their jurisdictional powers, operate more as a forum to protect the rights of aliens against domestic State or Federal action contrary to international law, than as an instrumentality to protect the rights of United States citizens against foreign states.

The Office, in turn, influences national courts and administrative agencies in various ways, but principally through the operation of certain established traditions of judicial deference to the Department of State's views in matters affecting foreign relations and international law.⁸³ The degree of deference accorded by the courts to the Department's views

the U. S., see 28 U.S.C. 1346, 1491, 1502, and 2502. And see Morse, "The Jurisdiction of the Court of Claims and Claims of International Import," 1957 Wisconsin Law Rev. 222 (1957); and Domke, "Access to American Courts by Foreigners," 1957 Proceedings, ABA Section on Int. and Comp. Law 23.

⁸¹ The Department is from time to time placed in a difficult position by the failure of some foreign governments to understand the American Constitutional doctrines of separation and division of powers, and the legal inability of the U. S. Government to compel particular action by the courts. Thus, some foreign governments tend to view American court action as if it were executive action. Problems of this nature arose, for instance, when American courts refused to enjoin picketing of the Egyptian flag vessel *Oleopatra*, which picketing caused repercussions throughout the Middle East, see *Khedivial Line, S.A.E. v. S.I.U.* 278 F. 2d 49 (C.A. 2, 1960); and when American State courts attached aircraft of Cubana Airlines and other Cuban assets in proceedings by private claimants, see, for instance, *Harris & Co. Advertising v. Republic of Cuba*, 127 So. 2d 687 (Fla., 1961); *Rich v. Naviera Vacuba, S. A.*, 197 F. Supp. 710 (E.D. Va., 1961), *aff'd.*, 295 F. 2d 24 (C.A. 4, 1961); and "Contemporary Practice" section, 56 A.J.I.L. 526-529 (1962).

⁸² See A.L.I. Restatement, Foreign Relations Law, Sec. 152.

⁸³ An interesting discussion of this general question appears in the Proceedings of the Third Summer Conference on International Law held at Cornell Law School (1960), on the topic of International Law in the National Courts. See Note, "Judicial Deference to the State Department on International Legal Issues," 97 U. of Pa. Law Rev. 79 (1948).

differs as between at least two types of situations: those in which the Department speaks essentially as the President's agent in executing foreign relations functions, and those in which the Department speaks primarily as an administrative agency with special expertise in the field of foreign relations and international law.

In general, when the Department speaks in its rôle of Presidential agent charged with responsibility for the conduct of foreign relations, the courts treat the question as a "political" one and tend to defer completely to its views without examination into the merits.⁸⁴ Thus, the courts will generally treat any views expressed by the Department as definitive as regards such questions as: recognition of foreign governments and states; duration of a state of war; resolution of disputed boundaries; sovereignty over territory; whether a particular international agreement is in force; and whether a foreign state has violated an international agreement, and, if so, the effect of such violation.

The various reasons put forward for such judicial abstention include: a fear of embarrassing foreign relations and "imperiling amicable relations between governments and vexing the peace of nations"; a recognition of the need for discretion by the Executive in the "delicate and complex" field of foreign relations; a desire not to force the Executive's hand in such matters; the inability of the courts to get the facts necessary to just decision, particularly in view of the frequently confidential nature of such facts; the inability of the courts to deal with possible consequences of their decisions in the international arena; and, finally, the courts' awareness of the need for the United States Government to "speak with one voice" in matters of foreign relations.⁸⁵

When the Department speaks only as an expert in the field of foreign relations and international law, however, the courts will not automatically defer to its views, but will nevertheless generally accord them "great weight."⁸⁶ This doctrine comes into play in such areas as the interpreta-

⁸⁴ See, generally, Hart and Wechsler, "Note on Political Questions," *The Federal Courts and Federal System* 192 (1953); Dickinson, "The Law of Nations as National Law: 'Political Questions,'" 104 *U. of Pa. Law Rev.* 451 (1956); and Franck, "The Courts, the State Department, and National Policy: A Criterion for Judicial Abdication," 44 *Minn. Law Rev.* 1101 (1960); and cases enumerated in Judge Bazelon's dissent in *Briehl v. Dulles*, 248 *F. 2d* 561, 589-590 (C.A.D.C., 1957).

⁸⁵ In *U. S. v. Curtiss-Wright Export Corp.*, 299 *U. S.* 304, 319-322 (1936), the Court discussed some of these considerations and referred to "the very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations. . . ." And the Supreme Court has stated in a number of cases that American courts "should not act so as to embarrass the executive arm in its conduct of foreign affairs." *E.g.*, *Republic of Mexico v. Hoffman*, 324 *U. S.* 30, 35 (1945); *Ex parte Peru*, 318 *U. S.* 578, 588 (1943); and see *U. S. v. Lee*, 106 *U. S.* 196, 209 (1882); *Terlinden v. Ames*, 184 *U. S.* 270, 288-290 (1902); *Jones v. U. S.*, 137 *U. S.* 202, 212 (1890); *Oetjen v. Central Leather Company*, 246 *U. S.* 297, 302 (1918); and *U. S. v. Belmont*, 301 *U. S.* 324, 330 (1937). See also *C & S Airlines v. Waterman Corporation*, 333 *U. S.* 103, 111 (1948).

⁸⁶ See *Sullivan v. Kidd*, 254 *U. S.* 433, 442 (1920); *Charlton v. Kelly*, 299 *U. S.* 447, 468 (1913); *Argento v. Horn*, 241 *F. 2d* 258, 262-263 (C.A.6., 1957), cert. den., 355 *U. S.* 818 (1957); and *BOAC Service to Tokyo Case*, CAB Order E-13629, March

tion of customary international law or international agreements. The reason for the "great weight" doctrine is essentially that of "agency expertise"—a recognition of the Department's special experience in such areas, its frequent rôle as negotiator of such agreements, and its access to confidential facts.⁸⁷ In addition, a fear of embarrassing foreign relations probably plays a rôle in this area as well as in that of "political questions."

The relative scope of these two doctrines and the appropriate conditions for their application is still far from clear and much debated. This is particularly true as regards the proper application of these rules in areas such as "sovereign immunity"⁸⁸ and "Act of State."⁸⁹ Generally speak-

18, 1959. See also A.L.I. Restatement, Sec. 155, where the Reporter states concerning the "great weight" doctrine: "Its significance, in essence, is that under it the courts will require themselves to proceed with caution in interpreting international agreements, to make sure that they have as complete a picture as possible of the implications of their decisions, internationally as well as nationally."

For cases in which the Department's views were not followed, see *Vermilya-Brown Co. v. Connell*, 335 U. S. 377 (1948) (narrowly construing the Department's views), further discussed in *Foley Bros. Inc. v. Filardo*, 336 U. S. 281, 293-294 (1949); *U. S. v. Louisiana*, 363 U. S. 1, 62-64 (1960); *Application of Quantas Empire Airway Ltd.* (CAB Docket 11826, Hearing Exam. Op., 1961).

⁸⁷ See *Skidmore v. Swift & Company*, 323 U. S. 134, 139-140 (1944) for a general discussion in another context of such considerations of "agency expertise."

⁸⁸ The courts have generally followed the Department's views on sovereign immunity questions. As a result, the Department's decision to file a suggestion of sovereign immunity usually disposes of a plaintiff's case. Compare *National City Bank of New York v. Republic of China*, 348 U. S. 356 (1955); *Ex Parte Peru*, 318 U. S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U. S. 30 (1945); and *Berizzi Bros. v. S. S. Pesaro*, 271 U. S. 562 (1926); and note particularly the Hoffman opinion's criticism of the Pesaro decision for not following the Department of State's views as to immunity. But see *Stephen v. Zivnostenska Banka, Nat'l Corp.*, 28 Misc. 2d 855, 109 N.Y.S. 2d 797 (Sup. Ct., 1960); 213 N. Y. S. 2d (Sup. Ct., 1961), *aff'd*, 222 N.Y.S. 2d 128 (App. Div., 1961). See, generally, A.L.I. Restatement, Secs. 68-75; various papers on "Current Developments in the Law of Sovereign Immunity," 1961 Proceedings, American Society of Int. Law 89 *et seq.*; Note, "Procedural Aspects of a Claim of Sovereign Immunity by a Foreign State," 20 U. of Pittsburgh Law Rev. 126 (1958); Timberg, "Sovereign Immunity, State Trading, Socialism, and Self-Deception," 56 Northwestern U. Law Rev. 109 (1961); and Note, "Jurisdictional Immunity of Foreign Sovereigns," 63 Yale Law J. 1148 (1954). As to the State Department's position, see statement of Mr. Yingling, Assistant Legal Adviser for Special Functional Problems, Proceedings, Third Cornell Law School Summer Conference on International Law 4. Concerning the tendency to limit the application of the doctrine with respect to state-controlled business enterprises, see the "Tate Letter" cited in note 93 below; Sucharitkul, *State Immunities and Trading Activities in International Law* (1959); and Setser, "Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties," 1961 Proceedings, American Society of Int. Law 89.

⁸⁹ Under this doctrine the courts have generally refused to review the validity under our public policy of foreign acts of state, subject to the exception that the Department of State can relieve them of this restraint in a particular case. Compare *Bernstein v. Van Heyghen Freres, S.A.*, 163 F. 2d 246 (C.A. 2, 1947), *cert. den.*, 332 U. S. 773 (1947), with *Bernstein v. N. V. Nederlandsche-Amerikaansche, etc.*, 210 F. 2d 375 (C.A. 2, 1954). And see, generally, on the "Act of State" doctrine, A.L.I. Restatement, Secs. 41-46; Zander, "The Act of State Doctrine," 53 A.J.I.L. 826 (1959); Hyde, "The Act of State Doctrine and the Rule of Law," *ibid.* 685; Reeves, "Act of

ing, there appears to be developing a tendency by the courts to examine underlying questions more closely and take a less restrictive view of their function in cases where rights of private American citizens are directly involved.⁹⁰

Procedurally, there are various ways in which the Office can seek to influence judicial action through the operation of these judicial attitudes:

1. *The Office as "Post Office."* The Office may simply serve as a conduit for transmitting a foreign government's views to the tribunal, without expressing any particular opinion or view of its own or thereby intending itself to intervene in any way in the proceeding.⁹¹ Thus, in the early stages of the recent *Sea-Level* case before the National Labor Relations Board involving the "flag of convenience" question, the Department, at the request of the Panamanian, Honduran, and Liberian Governments, transmitted to the Board "for such consideration as the Board may wish to give them," certain diplomatic notes from those governments protesting any assertion of jurisdiction by the Board over ships flying their flags.⁹²

2. *General policy statements.* The Office or Department may issue a general statement of its policy or position with respect to a certain question, in the expectation that this may be taken into consideration by tribunals adjudicating disputes involving that question. Thus, the well-known "Tate letter" indicated that the Department would henceforth follow the so-called "restrictive theory" of sovereign immunity, and would

State Doctrine and the Rule of Law: A Reply," 54 *ibid.* 141 (1960); and Comment, 58 Mich. Law Rev. 100 (1959). For recent cases involving the act of state doctrine in relation to the Cuban expropriations, see *Banco Nacional v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y., 1961) and *Pons v. Republic of Cuba*, 294 F. 2d 925 (D.C. Cir., 1961).

⁹⁰ See *Stephen v. Zivnostenska Banka, Nat'l. Corp.*, cited in note 88 above. The "passport cases" are interesting examples of the courts' conflict between a desire to accommodate the Executive in its foreign policy objectives and a desire to protect private rights. See, for example, *Schactman v. Dulles*, 225 F. 2d 938 (D.C. Cir., 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.C., 1952); *Briehl v. Dulles*, 248 F. 2d 561 (D.C. Cir., 1957); *Kent v. Dulles*, 357 U. S. 116 (1958); *Dayton v. Dulles*, 357 U. S. 144 (1958); *Worthy v. Herter*, 270 F. 2d 905 (D.C. Cir., 1960); and Note, "Beliefs, Associations and Passports," 27 Geo. Wash. Law Rev. 77 (1958).

⁹¹ A foreign government may properly communicate with a court either directly or through its counsel and may participate in a suit as party or as *amicus curiae*. See, for instance, as to assertions of a claim of sovereign immunity, *U. S. v. Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199, 200 (S.D.N.Y., 1929), where the French Ambassador wrote directly to the court. And see *Lauritzen v. Larsen*, 345 U. S. 571 (1953), for an example of intervention as *amicus* by the Danish Government, and *Romero v. International Terminal Operating Co.*, 358 U. S. 354 (1959), for intervention as *amici* by the Danish and United Kingdom Governments.

⁹² See *West India Fruit and Steamship Company*, 130 N.L.R. B. No. 46 (1961). See also the statement by Foreign Secretary Eden transmitted through the Department to the Grand Jury investigating the alleged cartel of the major international oil companies, *In re Investigation of World Arrangements with Relation to the Production, etc. of Petroleum*, 13 F.R.D. 280, 289 (D.D.C., 1952). Such transmittals have the defect of leaving the court guessing as to the Department's position. In some cases, the Department's refusal to take a positive position on the matter may be subject to the danger of being interpreted by the court as in effect a denial of the claim made in the communication.

not suggest immunity in cases where the foreign government was involved in acts of a private nature (*jure gestionis*).⁹³ And in the so-called "Bernstein letter," the Department indicated its view that the "Act of State" doctrine was not applicable to cases involving discriminatory actions of the Nazi regime.⁹⁴

3. *Independent action bearing on court proceedings.* The Department may take some independent action of its own which it believes may influence the courts in certain ways. Thus, as part of the Yugoslav, Rumanian and Polish Claims Settlement Agreements, it was agreed that the United States would lift so-called "Treasury Circular 655" restrictions on the sending of Government remittances to those countries, with the expectation that this change of United States Government policy might also have an effect on certain decisions of State courts preventing the remittance of private estates and other funds to nationals in those countries.⁹⁵ In another instance, the Department entered into an "agreed interpretation" with Yugoslavia concerning the meaning of certain provisions of a United States treaty with Yugoslavia which later came under litigation in a State court.⁹⁶

4. *Submission of views at the request of the tribunal.* The Office may, at the specific request of the court or administrative agency concerned, furnish a legal opinion or statement of policy to that tribunal. Thus, in the *Artukovic* case, the Office, at the request of the Supreme Court, gave its opinion on the interpretation of certain provisions of the United States-Serbian Extradition Treaty.⁹⁷ In one instance, an official of the Office testified as an expert witness before the Federal Communications

⁹³ This letter was written to the Acting U. S. Attorney General. 26 Dept. of State Bulletin 984 (1952). And see *National City Bank of New York v. Republic of China*, 348 U. S. 356 (1955).

⁹⁴ This letter was written to plaintiff's attorney. See Dept. of State Press, Release, No. 296 of April 27, 1949, on "Jurisdiction of U. S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," and *Bernstein v. N. V. Nederlandsche-Amerikaansche, etc.*, 210 F. 2d 375 (C.A. 2, 1954). And see for other examples, *Kennett v. Chambers*, 55 U. S. (14 How.) 38 (1852); *Bank of China v. Wells Fargo Bank and Union Trust Company*, 92 F. Supp. 920 (N.D. Cal., 1950), app. dismissed, 190 F. 2d 1010 (C.A. 9, 1951); *The Maret*, 145 F. 2d 431 (C.A. 3, 1944); *Latvian State SS Line v. McGrath*, 188 F. 2d 1000 (C.A.D.C., 1951), cert. denied, 342 U. S. 816 (1951); and *Banco Nacional v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y., 1961) (app. docketed C.A. 2).

⁹⁵ See 31 U.S.C. 123 and 31 C.F.R. 211; and see, generally, *e.g.*, Arenson, "International Procedural Problems in the Administration of Estates and Trusts," 1959 Proceedings, ABA Section of Int. and Comp. Law 60; Berman "Soviet Heirs in American Courts," 62 Col. Law Rev. 257 (1962); and *In re Offinger's Estate* (Application of Popovic), 215 N.Y.S. 2d 642 (N. Y. Surr. Ct., Nassau Cty., 1961).

⁹⁶ See *In re Stoich's Estate*, 220 Ore. 448, 349 Pac. 2d 255 (1960), rev'd. sub nom. *Kolovrat v. Oregon*, 366 U. S. 187 (1961).

⁹⁷ *Karadzole v. Artukovic*, 355 U. S. 398 (1958) (Per Curiam Opinion does not mention State Dept. Memo.). For course of this interesting extradition case, see *Artukovic v. Boyle*, 107 F. Supp. 11 (S.D. Calif., 1952), rev'd., *Ivancevic v. Artukovic*, 211 F. 2d 565 (C.A. 9, 1954), cert. denied, 348 U. S. 818 (1954); *Karadzole v. Boyle*, 247 F. 2d 198 (C.A. 9, 1957), rev'd., 355 U. S. 393 (1958). An example of a court specifically requesting the Department's views as to a question of sovereign immunity is found in *Sullivan v. State of Sao Paulo*, 122 F. 2d 355 (2d Cir., 1941).

Commission as to the meaning of certain provisions in the International Monetary Fund and International Bank for Reconstruction and Development constitutive agreements relating to privileges as to telegraphic transmissions.⁹⁸

5. *Direct or indirect intervention.* The Office may at its own instance or the instance of another government agency seek to directly influence the tribunal with respect to a particular case by requesting the Department of Justice to either intervene in the matter in an *amicus* capacity, or to transmit to the court certain views of the Department.⁹⁹ Thus, in the later stages of the recent *Sea-Level* case before the National Labor Relations Board, the Department (together with the Department of Defense) requested the Department of Justice to intervene for the purpose of filing an *amicus* brief discussing certain issues involved.¹⁰⁰ This same course was followed in a Federal case involving an attack on the constitutionality of the Warsaw Convention,¹⁰¹ and in a case involving the question of the continued force of the extradition treaty with Serbia.¹⁰² Again, in a Federal court case involving interpretation of the United States-Mexican Migrant Labor Agreement, the Department submitted to the court at the request of the Department of Labor a letter giving its view on the provisions in question,¹⁰³ and in a case involving the right of an alien to inherit under the United States-German Treaty of Commerce, the Department wrote a letter to the Attorney General setting out the Department's position, which was transmitted to the court.¹⁰⁴ The Department's practice of intervening in judicial proceedings to file suggestions of sovereign and diplomatic immunity is, of course, well known.

The Office's decision as to whether action of one of these various types is appropriate in a given situation is an extremely difficult one to reach. In appropriate cases, the Office has been willing to serve a purely "post office" function for foreign governments; has met specific requests for its views from Federal or State courts, administrative agencies, or other State and Federal officials; has been willing to intervene directly in a

⁹⁸ Testimony of Michael Cardozo, Assistant Legal Adviser for Economic Affairs, in *IBRD v. All American Cable and Radio et al.*, FCC Docket No. 9362, Nov. 20, 1951.

⁹⁹ See, generally, Note, "Federal Intervention in Private Actions Involving the Public Interest," 65 *Harvard Law Rev.* 319 (1961).

¹⁰⁰ *West India Fruit and Steamship Company*, 130 N.L.R.B. No. 46 (1961). Brief for the United States filed November, 1960.

¹⁰¹ *Pierre v. Eastern Airlines Inc.*, 152 F. Supp. 486 (D.N.J., 1957).

¹⁰² *Ivanecic v. Artukovic*, 211 F. 2d 565 (C.A. 9, 1954), cert. denied, 348 U. S. 818 (1954).

¹⁰³ *Loop Labor Coop. v. McDonald, etc.*, No. 2204, U.S.D.C., N.D. Texas, June 8, 1957.

¹⁰⁴ *Clark v. Allen*, 331 U. S. 503 (1947). For other instances, see *Rogers v. Cheng Fu Sheng*, 177 F. Supp. 281 (D.D.C., 1959), rev'd., 280 F. 2d 663 (C.A.D.C., 1960), cert. denied, 364 U. S. 891 (1960); *Vermilya-Brown Co. v. Connell, and Foley Bros. v. Filardo*, note 86 above. See also *Haas v. Humphrey*, 246 F. 2d 682 (C.A.D.C., 1957), cert. denied sub nom. *Haas v. Anderson*, 355 U. S. 854 (1957), for an example of a party's attempt to use a Department statement in later litigation. See *Anderson v. N. V. Transandine Handelsmaatschappij*, 289 N. Y. 9, 43 N.E. 2d 502 (1942), for an illustration of a detailed Department attempt to influence the court.

proceeding to file an indication either of sovereign or diplomatic immunity; and has been willing to intervene in an appellate proceeding to suggest the reversal of what it considers an incorrect interpretation of international law or an international agreement by a lower court. The Office has, however, been reluctant to furnish its unsolicited views to the courts in other instances, or to supply its views to private practitioners for use in litigation, except where special facts or circumstances justifying such action are present.

The considerations that bear on the Office's decisions in these respects probably include the following: on the one hand, since decisions of the courts or administrative agencies involving foreign affairs or international law vitally affect the Department's responsibilities in the field of foreign relations, the Office has a clear duty to see that any such decisions are made by the courts only after full exposure to, and careful study of, all the various factual, policy, and legal considerations involved. As the agency uniquely responsible for foreign policy, and possessed of special expertise and knowledge in the field of foreign relations and international law, the Department may alone be in a position to ensure such full consideration by the court. On the other hand, the Office is reluctant to take any action which might be construed as an attempt to interfere with or intrude upon the independence of such courts and agencies, and is sensitive to possible charges that it is taking sides in a private dispute or exerting its official weight unfairly. In addition, intervention, even at the request of the court, carries the risk of at least seeming to commit the Department to a particular position internationally, and may create considerable embarrassment for the Department if the court does not accept its view. Intervention may also involve the Office in difficult subsidiary questions, as where its views are based on confidential information which it cannot reveal to the court, or where a party demands to cross-examine the Department on its legal or policy views.¹⁰⁵

¹⁰⁵ Some of these problems are illustrated by the interesting recent case of Application of Qantas Empire Airways Ltd. (CAB Docket 11826), now before the Civil Aeronautics Board. Qantas' claim to fly to the United States on a certain route was in part dependent upon the interpretation of certain words in the U. S.-Australian Air Transport Agreement. The Hearing Examiner asked the Department for such an interpretation. The Department's opinion supported the right of the Australian carrier to fly the particular route under the agreement. However, the Hearing Examiner, on the basis of oral testimony and legal arguments elicited after the Department's opinion had been rendered, rejected the Department's view and denied the application. Without regard to the merits, it is interesting to note that procedures of this nature put the Department in the position of having publicly expressed itself on the issue, and that the rejection of the application can be argued by Australia to constitute a breach of international obligation already conceded by the Department. Moreover, although the Department studied material furnished by the litigants before rendering its opinion, the Department was not at that time exposed to the new testimony and legal arguments later developed. Finally, since its further views were not requested by the Hearing Examiner, the Department is placed in a position where it must take a positive initiative and affirmatively inject itself into the dispute, if it wishes either to revise or to defend its opinion, or else act at the level of Presidential approval if the Board rejects its views.

THE OFFICE AND INTERNATIONAL LAW—SOME FINAL OBSERVATIONS

It would be over-simplifying the situation to attempt to distinguish a characteristic Office "approach" or "point of view" toward international law. This article may be concluded, however, with some personal impressions concerning international law and the Office's practice of it which have resulted from experience in the Office and may possibly reflect at least certain Office attitudes in this respect.

First, an attorney cannot practice in the Office of the Legal Adviser without gaining a firm conviction of the reality of international law—an acute awareness of the extremely meaningful and generally effective rôle that international law actually performs in regulating the conduct of nations and in making the international community work.¹⁰⁶ The attorney becomes particularly aware both of the vast web of legal obligations which bind nations together¹⁰⁷ and of the fact that these obligations are generally respected and observed. As a consequence, the practice of international law takes on the character of a very serious and vital business with stakes of great consequence.

Experience in the Office tends also to impress one deeply with the logic in terms of national interest of a policy of compliance with international law. There is, of course, in the American tradition, a strong legal and moral element—a sense of commitment to law and order—that undoubtedly plays a great part in forming our attitudes toward such compliance.¹⁰⁸ But beyond this, an attorney who deals daily with such matters cannot fail to see the strongly practical considerations that require the same view. Thus, observance of at least minimum rules of the game is an essential precondition to achieving any sort of benefits

An awareness of these types of procedural difficulties plays a part in the Department's reluctance to become involved in such cases at the initial stage of the proceedings. However, it may be suggested that as a general rule it seems only fair to litigants that any opinion the Department may render in such a case set forth its arguments for its legal conclusions, even though this may open its opinion to attack.

¹⁰⁶ See Jessup, "The Reality of International Law," 18 *Foreign Affairs* 244 (1940). The fact that international law does not presently solve *all* world problems does not mean that it does not perform a most important, if often undramatic, function. Thus, at the height of the Berlin crisis, the U. S. mail, pursuant to international agreement, got through to Moscow.

¹⁰⁷ Some idea of the extent of this web of obligations can be gleaned from scanning the eight volumes of Hackworth's *Digest of International Law*, which cover only the years 1920 to 1940, or the 12 volumes (some 30 books) of *United States Treaties and Other International Agreements*, which cover only the years since 1950. United States treaties and international agreements with other countries range from the United Nations Charter and NATO Treaty to the Shrimp Fishing Convention with Mexico and the Agreement with Chile on Third Party Radio Broadcasting by Amateurs.

¹⁰⁸ The present Legal Adviser, the Honorable Abram Chayes, stated in a speech on April 29, 1961, before the American Society of International Law: "For us and our associates . . . whether we will profess to live by the law is not an issue of policy on which we have alternatives. The answer is inherent in our national tradition, in our culture, and it is implicit in our avowal at birth of 'a decent respect for the opinion of mankind.'" 1961 *Proceedings, American Society of Int. Law* 202, 205.

from international relations; and, over the long run, a nation must generally give in order to receive in the field of international dealings. If a country wishes good treatment for itself and its citizens from other countries, and desires to avoid possible discrimination and retaliation, its most reasonable course is to comply with international law. Moreover, international propriety and law-observance have assumed increased practical importance in both domestic and international politics in the present-day world. Finally, and perhaps most important, with the increasing dangers of resort to force as an instrument of settlement of international disputes, the development of international law as a means of settlement has become not only a wise investment but an urgent imperative to survival.

The task of finding ways to work out international disputes tends also to develop in the Office attorney what might be called a pragmatic or functional approach to international law—a tendency to view that law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems of international order. Perhaps as an outgrowth of common-law training, there is a working habit of viewing new and unique areas of problems on a case-by-case basis at first, and letting the law work itself out, rather than jumping immediately into the enunciation of broad principles.¹⁰⁹ In general, precedent and authority, while important, do not preclude analysis in terms of sensible result and workable rule.

Practice with the Office tends further to impart a deep sense of the practical limits that national attitudes—both our own and those of other nations—impose on the scope and possibilities of international law in any given world climate of opinion.¹¹⁰ One sees that it is an up-hill struggle to attempt to regulate through law conduct that states simply are not yet ready or willing to have regulated; that a ton of treaties will not solve a problem as to which an essentially political consensus has not previously been reached; and that any attempt to use the mechanisms of international law beyond their strength entails a risk of their breaking. On the other hand, experience with a sufficient number of unsuccessful negotiations or other efforts in international regulation teaches that the Republic does not in fact crumble if such experiments fail and that results sometimes exceed expectations.¹¹¹

¹⁰⁹ This is perhaps illustrated by the Office's somewhat skeptical attitude toward the establishment of definite limits to "airspace" and "outer space." See Becker, "United States Foreign Policy and the Development of Law for Outer Space," *Navy JAG Journal* (Feb., 1959), p. 4.

¹¹⁰ The importance of such practical limitations is reflected in such writings as Clarence Morris, "Peace through Law: The Role and Limits of Adjudication," 1960 Proceedings, American Society of Int. Law 15; 109 U. Pa. Law Rev. 218 (1960); De Visscher, *Theory and Reality in International Law* (trans. Corbett, 1957); Corbett, *Law and Society in the Relations of States* (1951); and Stone, *Quest for Survival: The Role of Law and Foreign Policy* (1961).

¹¹¹ The Antarctic Treaty is a good example of an undertaking, in which the Office played a major part, which many people said could not be successful. See Hayton,

Working each day in this field, the Office attorney sees particularly clearly the pressing need for a greater rôle for adjudicative techniques as an instrument in the settlement of international disputes,¹¹² and the desirability of expanding the use of the International Court at every opportunity. At the same time, one may become somewhat pessimistic as to the likelihood of adjudication performing a major rôle in this respect for some time to come. Many of the matters requiring resolution are of such political and social complexity as not to be conducive to usual adjudicative techniques.¹¹³ Moreover, experience suggests that when states are willing and ready to reach agreement on problems between themselves, they are generally able to do so now through existing techniques of diplomacy and negotiations;¹¹⁴ when they are not ready to do so, attempts to force the parties into adjudication may risk increasing rather than lessening tensions. In practice, the barrier to resolution of disputes seems less often the existence of honest disputes as to fact or law unresolvable by techniques other than formal adjudication, than deep differences in what states consider to be their national interest.¹¹⁵ In such cases, the imposition of a requirement of authoritative decision in favor of one or the other party may provide a less stable and satisfactory solution than continued attempts at negotiation and compromise.¹¹⁶

"The Antarctic Settlement of 1959," 54 A.J.I.L. 349 (1960); Taubenfeld, "A Treaty for Antarctica," *International Conciliation*, No. 531 (1961). See also U. S. Proposal on International Co-operation in Peaceful Uses of Outer Space, adopted unanimously by the U. S. General Assembly, Dec. 20, 1961, 46 Dept. of State Bulletin 185 (Jan. 29, 1962); reprinted below, p. 946.

¹¹² See, generally, references cited in note 76 above.

¹¹³ See Lon L. Fuller, "Adjudication and the Rule of Law," 1960 Proceedings, American Society of Int. Law 1.

¹¹⁴ Contrast, for instance, the Soviet Union's intransigent position in the lend-lease negotiations with its willingness to compromise and accommodate to U. S. needs during negotiation of the U. S.-Soviet aviation bilateral agreement, which was initiated by the parties but, as a result of political factors, has not yet been signed.

¹¹⁵ And see De Visscher, "Reflections on the Present Prospects of International Adjudication," 50 A.J.I.L. 467, 474 (1956), where he comments: "... all things considered, the present slowing down of judicial activities must be attributed much less to a deterioration in their spirit or to the imperfections of their method than to external failures of a strictly political nature which paralyze the role of all international law in international relations. Extreme political tensions today weigh heavily upon the attitude of governments, which are already little inclined to divest themselves of the settlement of their disputes in favor of international tribunals. They fear both the effect of the process and the repercussions, however distant, of the judgment. It is better to recognize this reality clearly than to wander afield in the search for procedural reforms which remedy nothing."

¹¹⁶ Professor Bishop has pointed out that "In our enthusiasm as lawyers for the use of the judicial process, we must not forget the need for orderly change in legal rights through negotiation assisted by political processes." Bishop, "The International Rule of Law," 59 Mich. Law Rev. 553, 574 (1961).

And see Metzger, "Settlement of International Disputes by Non-Judicial Methods," 48 A.J.I.L. 408 (1954); and Sohn, "The Role of International Institutions as Conflict Adjusting Agencies," 28 Chicago Law Rev. 205 (1961). Perhaps the most important rôle for the International Court of Justice in the near future will be not in

Experience with the State Department is also likely to make one particularly conscious of the extent to which the maintenance of sound international relations and the effective resolution of international problems frequently require a higher standard of comity and accommodation than existing international law may at any one time provide. This is particularly true in situations of overlapping or conflicting national jurisdiction.¹¹⁷

the area of resolution of disputes between states, but rather through the use of its advisory opinion function to strengthen the rôle and powers of international organizations such as the United Nations. The potential importance of this function is already obvious from the recent General Assembly request for the Court's advisory opinion concerning the binding character of the Assembly's assessments for United Nations peace-keeping operations, such as in the Congo, and the United Nations Emergency Force in the Near East (Financial Obligations of Members of the United Nations, L.C.J. Folio 49).

¹¹⁷ These cases of conflicting or concurrent jurisdiction, where one state may potentially require conduct another forbids, constitute one of the most interesting and difficult situations calling for practical accommodation. See, generally, A.L.I. Restatement, Ch. 3, Secs. 37-65.

An excellent case study in this area involves the application of various types of American laws, such as the National Labor Relations Act, to certain foreign-flag ships. See *Lauritzen v. Larsen*, 345 U. S. 571 (1953); *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138 (1957); *Navios Corp. v. NMW*, 402 Pa. 325, 166 A.2d 625 (1960), cert. denied, 366 U. S. 905 (1961); *Ineres Steamship Company v. LMWU*, 10 N.Y. 2d 218, 176 N.E. 2d 719 (1961), cert. granted, 368 U. S. 924 (1961); *West India Fruit & Steamship Co.*, 130 N.L.R.B. No. 46 (1961), and the series of subsequent N.L.R.B. cases applying the Labor Act to "flag-of-convenience" ships; and see *Sociedad Nacional de Marineros de Honduras v. McCulloch*, 201 F. Supp. 82 (D.C., 1962), and *Empresa Hondurena de Vapores S.A. v. McLeod*, 300 F. 2d 222 (O.A. 2, 1962), enjoining an election ordered in *United Fruit Co.*, 134 N.L.R.B. No. 25 (Petition for cert. filed by the Board in both cases, Oct. term, 1961). See, generally, on the "flag of convenience" problem, McDougal, Burke and Vlasic, "The Maintenance of Public Order at Sea and the Nationality of Ships," 54 A.J.I.L. 25 (1960); Comment: "The Effect of United States Labor Legislation on the Flag of Convenience Fleet," 69 Yale Law J. 498 (1960); and Note, "Panlibhon Registration of American Owned Merchant Ships," 60 Columbia Law Rev. 711 (1960). The Supreme Court may clarify this issue in its review of the *Ineres* case, cited above.

Another type of situation is presented by the application of American antitrust laws to foreign subsidiaries of U. S. firms, or to wholly foreign concerns. See, e.g., *U. S. v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S.D. N.Y., 1952), and *British Nylon Spinners Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780 (C.A.), [1954] 3 All E.R. 88 (Ch.); *U. S. v. Holophane Company*, 119 F. Supp. 114 (D.C. S.D. Ohio), aff'd, 352 U. S. 903 (1956); Note, "Extraterritorial Application of the Anti-trust Laws," 69 Harvard Law Rev. 1452 (1956); and Fugate, "Antitrust Law and International Trade," 1959 U. of Illinois Law Forum 387 (1959); Becker, "The Antitrust Laws and Relations with Foreign Nations," 40 Dept. of State Bulletin 272 (1959); Note, "Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach," 70 Yale Law J. 259 (1960).

A third type of situation involves demands by U. S. courts or regulatory agencies for documents in the hands of foreign concerns. See, e.g., *Société Internationale v. Rogers*, 357 U. S. 197 (1958); *Montship Lines Ltd. v. Federal Maritime Board*, 295 F. 2d 147 (D.C. Cir., 1961); *Application of Chase Manhattan Bank*, 192 F. Supp. 817 (S.D. N.Y., 1961); and in re *Grand Jury Subpoena Duces Tecum*, 72 F. Supp. 1013 (S.D. N.Y., 1947).

A fourth type of situation involving potential conflicts of criminal jurisdiction

In cases of this type, such extra-legal considerations as a general interest in amicable relations, a desire for reciprocal treatment, and a fear of retaliation will inevitably play an important rôle in bringing about the mutual accommodation of state interests.¹¹⁸ Of course, mutual abstention in situations of this nature itself constitutes a creative factor in international law.

Finally, a brief comment on the rôle of the Office of the Legal Adviser vis-a-vis the community of those interested in international law. As a consequence of the power and importance of the United States, its attitudes and actions as regards international law tend inevitably to influence strongly the general content and direction of development of that law. For this reason, those attitudes and actions are of importance not only to other foreign offices but also to American and foreign scholars and practitioners interested in this field, who look to the Office for leadership. They expect the Office to show initiative and imagination in seeking new ways to advance international law, and expect it to be responsive to any such ideas developed by others. It is not, however, clear that the Office has adequately performed this function. Some thought might be given to increasing its rôle in this area in the future.

As a minimum step in asserting such leadership, the Office might seek to develop closer relations and better communications with American professional societies, Bar Association committees, and law schools.¹¹⁹ Such closer liaison would potentially benefit not only practitioners and scholars outside the Office, but the Office itself. Thus, it is inevitable that

arising out of the stationing of United States military forces abroad has been in some cases handled by "status of forces" agreements. See, *e.g.*, Note, "Criminal Jurisdiction over American Armed Forces Abroad," 70 *Harvard Law Rev.* 1043 (1957); Baxter, "Jurisdiction over Visiting Forces and the Development of International Law," 1958 *Proceedings, American Society of Int. Law* 174, and comments following.

¹¹⁸ A former Legal Adviser pointed out: "We are under obligation to continue dealing with foreign governments, whether or not we agree rationally or legally with the arguments presented by their representatives. And there are definite limits to the extent to which we can impose our will upon them. The practice of diplomacy is more often accommodation than decision." Becker, "The Antitrust Laws and Relations with Foreign Nations," *loc. cit.* 273. On the concept of "comity," see *Hilton v. Guyot*, 159 U. S. 113 (1895), and *R.S.F.S.R. v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1928).

¹¹⁹ The Office has not been active in fostering such relationships, although the recently established regular section of the A.J.I.L. dealing with "U. S. Contemporary Practice Relating to International Law," which is presently prepared by a group of Office attorneys, represents a good beginning in this respect. Moreover, with the exception of occasional law review or journal articles, the influence of the professional societies and law schools on the Office has not been substantial. In part, the burden of Office work makes it difficult for its attorneys to keep abreast of outside thinking, even though they are in a sense the "addressees" of many of the reports and articles. In part, such outside thinking is often somewhat unrealistic in terms of the practical problems faced by the Office, and occasionally represents the lobbying of special interests rather than impartial scholarship and thought. An exception, which has had a stimulating influence on the Office, is the work of the American Law Institute in its "Restatement of the Foreign Relations Law of the United States."

the press of daily work leaves the Office little leisure for concentration on many of the deeper issues and long-range problems of international law, or for such necessary tasks as informing and educating the public as to the nature of and need for international law. These are rôles, for example, which the professional societies and law schools might well and usefully perform.

One way of creating such closer contacts might be through the establishment by the Legal Adviser of an Advisory Committee on International Law, which could conceivably provide a convenient mechanism for facilitating the flow of new ideas into the Office, and for obtaining the assistance of the professional societies and law schools in the study in depth of long-term problems. Whether such an Advisory Committee would prove of value would, of course, depend on the quality of its membership and the degree to which it could find areas in which to perform useful functions. The establishment of such an Advisory Committee, or the creation of other means to attain these objectives, might, however, merit study.

CONCLUSION

This article has attempted to suggest the prominent part that the Office of the Legal Adviser plays in the conduct of international relations by the United States, and the desirability of greater public knowledge of the policies and procedures of that Office as an aid in understanding, utilizing, and seeking to develop international law. In particular, it is hoped that what has here been said will serve to focus greater attention on the center of the international law stage—the actual operations of foreign offices and their legal staffs—and to bring the attention of practitioners and scholars to bear on the practical problems and accommodations involved in the process of international adjustment through law.

SOVIET ATTITUDE TOWARD INTERNATIONAL SPACE LAW *

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A. THE IDEOLOGICAL OFFENSIVE

The injection of nuclear armaments and modern delivery systems into Communist world strategy, together with shifts in the balance of world political and economic power, have caused basic revisions in Soviet theories of war, politics, and international law. The Soviets now consider that modern armaments operate independently of the social-political struggle and that modern war can and must be avoided. The Soviets also believe that shifts in the world balance of political and economic power have put the Soviet Union in a good position to wage successful economic, political, and ideological "war." Furthermore, the combination of a nuclear stalemate and the shifting balance of power enables the Soviets to conduct this "war" with a minimum of risk.

These favorable conditions have caused the Soviets to shift increasingly from a defensive to an offensive strategy, and to do so not only in the economic and political fields, but in the field of international law. The Soviets are fundamentally re-evaluating their approach to international law. The problem is no longer, as it was just a few years ago, whether or not one should rely on international law as an instrument of foreign policy. The value of international law is now beyond question. Nor is the problem basically even what elements of traditional international law can serve the political requirements of the moment. The problem now is whether and to what extent one can create and rely on an entirely new "Communist" international law.

The Soviets consider that the balance of world power has shifted far enough to enable them to begin to replace in its entirety traditional international law developed to serve "capitalist" interests, with a new international law designed to serve the interests of international Communism. The problem, for the Communists, in fact, increasingly is not what kind of international law can be created, but how soon they can create it. The creation of this new international law is to be accomplished essentially by an ideological battle.¹ The importance which the Soviets attach to this ideological war of law is evidenced by pronouncements in basic theoretical works on the "inevitability of ideological war over the

* This article is condensed from a background study prepared for the Committee on Aeronautical and Space Sciences, United States Senate.

¹ See Section G below on Peaceful Co-existence and International Space Co-operation.

generally recognized principles of international law."² The Honorable V. M. Koretsky, who now serves as the Soviet judge in the United Nations' principal legal organ, the International Court of Justice, called for increased sophistication of Soviet international legal scholars, because "in the field of international law there is taking place an ideological battle."³

The transformation of the function of international law from static defense to dynamic offense is perhaps best illustrated by the development of Soviet space law. The Soviets consider that the balance of space power is strongly weighted in their favor and that, accordingly, the possibilities here of developing "Communist" law are very great.

The Soviets have increasingly emphasized that the chief problem of space law is the determination of [Communist] principles to govern the legality of specific types of space activities. In order to apply these new principles, commonly known as the "laws of peaceful co-existence," to specific space activities, the Soviets first were faced with the problem of determining the extent and the nature of outer space. Analysis of the development of Soviet law on the extent and nature of outer space indicates that this development itself represents part of the growth of the "laws of peaceful co-existence."⁴

B. DELIMITATION OF OUTER SPACE

The Soviets' emphasis on the ideological and political nature of space law has caused them to oppose any delimitation of the extent of outer space which would separate "outer space" from the context of the global politico-legal arena. The Soviets consider that the legality of aerospace activities depends primarily upon political and ideological evaluation of the nature and function of the specific activity rather than on the activity's

² M. A. Arzhanov, "Gosudarstvo i Pravo v ikh Sootnoshenii" [State and Law in Their Interrelations] 96 (Moscow, 1960). Dr. Arzhanov attacked those who, before the period of peaceful co-existence (specifically 1950-1955), tried to ascribe ideological significance to *traditional* international law by fitting it into a Marxist framework of base and superstructure. An additional reason for the emphasis on this ideological battle is the conclusion of Soviet specialists on "bourgeois" law that the battle between Communism and anti-Communism is "shifting progressively from the field of economics to the field of the political and legal superstructure." V. A. Tumanov, paper delivered at the First Annual Meeting of the Soviet Association of Political Sciences in March, 1961, reviewed in *Sovetskoye Gosudarstvo i Pravo*, July, 1961 (No. 7), p. 133.

³ V. M. Koretsky, paper delivered to the Second Annual Meeting of the Soviet Association of International Law in February, 1959, reviewed in 1959 *Sovetskiy Yezhegodnik Mezhdunarodnogo Prava* (hereafter cited as *Soviet Yearbook of International Law*) 421 (Moscow, 1960).

⁴ By way of caveat, it should be noted that the ideological and politicized nature of Soviet space law, together with the constant state of flux in Soviet space legal development, makes it hazardous to state categorically what the Soviet position is on any specific space legal problem. In order to make any statements at all, it is often necessary to infer the Soviet position from the context of discussions or even to deduce the position from the writings of two or more Soviet authors.

vertical location.⁵ Nevertheless the Soviets emphasize their willingness to delimit outer space, even by drawing a boundary at a low altitude.⁶ This willingness, however, is *contingent* upon substantial concessions on the part of the United States to remove any "advantages" the United States might possibly gain from a delimiting agreement and to improve accordingly the over-all military, political, and economic posture of the U.S.S.R.⁷

The delimitation of the extent of outer space is meaningful only in terms of what is being delimited, *i.e.*, in terms of the nature or status of outer space. Analysis of the Soviet attitude toward international law in outer space is facilitated, however, by examining first the problem of space delimitation, because Soviet space legal ideology developed first in discussions on the delimitation of outer space. Only gradually did the emphasis shift to the nature of what was to be delimited.

As a first approximation, it may be stated that the Soviets have always considered that lack of national sovereignty is the distinguishing feature of the nature of outer space. The problem of delimiting outer space therefore becomes one of determining where national sovereignty stops, *i.e.*, of determining sovereignty's vertical extent or upper limit. The development of the Soviet approach to this problem of the vertical extent of sovereignty has shifted steadily away from defensive reliance on traditional international legal principles and toward reliance on the introduction of new "socialist" international legal principles designed to facilitate the advance of world Communism.

The Soviets first approached the problem of establishing vertical limits of sovereignty in terms of the traditional rules of air law. They considered that the problem was identical with the problem of establishing a boundary between airspace and outer space. Prior to 1957, Soviet legal scholars wrote voluminously on problems of air law, but were concerned primarily with the protection of the "complete and exclusive sovereignty"

⁵ Although the Soviets thus support what is known as the "civil-law *functional* approach" (as distinct from the common-law case-by-case functional approach) to space law, their desire for flexibility has caused them to oppose the extreme concept of an "aerospace continuum," which would eliminate the distinction between airspace and outer space. Of course, they strongly oppose the idea of a "conceptual identity" of outer space, which would divorce outer space entirely from terrestrial political and military realities. They also oppose the static elements of "systems analysis" and "game theory" applications of the functional approach.

⁶ Thus at the October, 1959, Moscow Space Policy Symposium, the Executive Secretary of the Space Law Commission of the U.S.S.R. Academy of Sciences stated: "If security is ensured, I believe that the possibility of establishing a relatively low limit for the applicability of state sovereignty above land space is quite real." G. P. Zhukov, "Conquest of Outer Space and Some Problems of International Relations," *International Affairs*, November, 1959 (No. 11), p. 95; English in "Communist Viewpoints: Guides to the study of Communist views on the legal problems of space exploration, Bibliography, and Communist Articles," prepared by Robert D. Crane as Part IV of *Legal Problems of Space Exploration, A Symposium*, p. 1083 (1400 pp., ed. Eilene Galloway, Committee on Aeronautical and Space Sciences, U. S. Sen. Doc. 26, 87th Cong., 1st Sess., March, 1961, hereinafter referred to as 1961 Senate Symposium).

⁷ See, for example, note 19 below.

of the U.S.S.R. over its airspace against the capitalists who allegedly were attempting to gain power over the airspace of other countries by the use of such principles as "freedom of the air" and "open skies." These Soviet scholars considered that the traditional formula "complete and exclusive sovereignty over the airspace of the U.S.S.R." was sufficient to determine the upper limit of sovereignty, although it is obvious that the vertical extent of sovereignty cannot be defined in terms of an indefinite quantity termed "airspace."

Soviet scholars were careful not to commit the Soviet Union to any position on the vertical limits of airspace in terms of miles; and, to avoid any misunderstandings, they were careful not even to depart from the traditional phraseology of the early 20th century, which recognized only two layers of air, the troposphere and the stratosphere. Accordingly, even Kozhevnikov's textbook of 1957, which, until the 1961 edition, was the principal international law text used in Soviet law schools, states (page 187) that "airspace includes all the air cover (atmosphere); its lower layers (troposphere), and the upper layers (stratosphere)." The only Soviet law text to deviate from this stereotyped formula and mechanically interpret "stratosphere" in terms of miles, thus restricting Soviet flexibility, was condemned for "recommended use" in law schools because of "technical and ideological inadequacy."⁸

The utility of the indefinite concept of "airspace" was proven in 1956, when the Soviets used the "complete and exclusive" formula to counter United States arguments that there were no international legal provisions applicable to its high-altitude balloons which drifted over the Soviet Union. The Soviets pointed out their Air Code provision proclaiming "complete and exclusive sovereignty over the airspace of the U.S.S.R.," and appealed to the writings of leading French and British publicists in support of the position that, in accordance with this formula, Soviet sovereignty extended upwards *usque ad coelum*, i.e., without any limitation within the airspace or atmosphere.⁹ On the basis of existing scientific knowledge about the

⁸ Vadim I. Lisovsky, "Mezhdunarodnoye Pravo" [International Law] 160 (Kiev, 1955, edited by A. M. Ladyzhensky). See George Ginsburgs, "The Teaching and Study of International Law in the USSR," Proceedings, Section of International and Comparative Law, American Bar Association, 1961, p. 313, commenting on the review of Lisovsky's book in Sovetskoye Gosudarstvo i Pravo, June, 1956 (No. 6), pp. 121-124.

⁹ A. Kislov and S. Krylov, "State Sovereignty in Air Space—A Generally Accepted Principle of International Law," International Affairs, March, 1956, p. 43; also in 1961 Senate Symposium, p. 1045. Western comment on the Soviet use of the *usque ad coelum* doctrine illustrates the difficulty frequently encountered in determining the precise Soviet position on specific space/legal questions.

Some leading American commentators on Soviet space law have contended that Drs. Kislov and Krylov interpreted the principle *usque ad coelum* to extend the sovereignty of the U.S.S.R. even beyond the airspace and on into the infinity of outer space. Leon Lipson, "Outer Space and International Law," RAND Paper P-1484 (Santa Monica, California), Feb. 24, 1958, p. 13; Samuel Kucherov, "Legal Problems of Outer Space, USA and Soviet Viewpoints," Proceedings, Second Colloquium on the Law of Outer Space 67 (London, 1959), published as a revision of Dr. Kucherov's report, "The Legal Status of Outer Space and the Soviet Union," AFCIN-1A1 AIR: IR-1879-58, Nov. 10, 1958, p. 3. These original commentaries then served as the

upper atmosphere, this principle of *usque ad coelum* theoretically could have rendered illegal the flight of American balloons or other vehicles at altitudes of several hundred miles.

The "ideological" inadequacy of this *usque ad coelum* formula became apparent in 1957, as soon as the Soviets launched their first artificial satellite, because by the criterion of *usque ad coelum* the Soviet satellite would have violated the sovereignty of countries all over the world. Two weeks after this launching, the Soviets pointed out that, although sovereignty according to international law did extend throughout the airspace, in practice sovereignty did not extend above "the maximum ascent ceiling of present-day aircraft."¹⁰ Although this "ceiling" principle was in accord with Soviet doctrine that the "practice" of international law necessarily did not provide for the extension of sovereignty above the level where airspace could be effectively used,¹¹ nevertheless this principle was not advocated after July, 1958,¹² and in February, 1959, it was declared to be "completely untenable."¹³ The inadequacy of this "ceiling" principle seemed to lie in the facility with which it could legitimize not only the Soviets' "peaceful" uses of outer space, but also what the Soviets designate as "space espionage."

Another principle invoked shortly after the launching of the first Soviet satellite to defend its legality was the somewhat related principle of "effective control."¹⁴ The leading Soviet supporters of this principle

basis for similar interpretations by other authors, e.g., 74 Harvard Law Rev. 1154, 1167 (1961).

Other commentators, however, assumed that the Soviets followed the interpretation that *usque ad coelum* applied only within the airspace. Georg W. Rehm, "Sowjetunion und Weltraum," 5 Osteuropa Recht 100 (1959); Andrew Swatowsky, "The Soviet Attitude on Outer Space," Problems of Communism, May-June, 1960, p. 20.

The present writer's research has disclosed only one Soviet statement which clearly permitted the extension of sovereignty beyond the airspace, and this position was based on grounds of "security" rather than on *usque ad coelum*. Kovalev and Cheprov, "Artificial Satellites and International Law," 1958 Soviet Yearbook of International Law 134 (Moscow, 1959).

¹⁰ G. Y. Zadorozhnyy, "The Artificial Satellite and International Law," Sovetskaya Rossiya, Oct. 17, 1957 (Moscow), p. 3; 1961 Senate Symposium, p. 1048.

¹¹ V. N. Durdenevsky, Mezhdunarodnoye Pravo [International Law] 217 (Moscow, 1947, edited by Durdenevsky and S. B. Krylov). This was repeated verbatim in the section by Durdenevsky in the leading 1951 textbook edited by Ye. Ya. Korovin. The 1951 and 1956 editions of the Soviet Legal Encyclopedia stated simply: "The ceiling of air space has not been established, although in practice it is determined by the technical capabilities of aviation." V. V. Yevgen'yev, and S. B. Krylov, Yuridicheskii Slovar' (1st ed., 1953), p. 82; (2nd ed., 1956), Vol. I, p. 122.

¹² A. Galina [G. A. Osnitskaya], "On the Question of Interplanetary Law," Sovetskoye Gosudarstvo i Pravo, July, 1958 (No. 7), p. 53; English in 1961 Senate Symposium, p. 1052. The "ceiling" principle was supported also by F. N. Kovalev and I. I. Cheprov, "Artificial Satellites and International Law," 1958 Soviet Yearbook of International Law 130 (Moscow, 1959).

¹³ G. A. Osnitskaya, "International Legal Problems of the Conquest of Space," 1959 *ibid.* 58 (Moscow, 1960); English summary in 1961 Senate Symposium, p. 1091. This "ceiling" principle was never again supported by any Soviet writer.

¹⁴ Zadorozhnyy, *loc. cit.* note 10 above; also in 1961 Senate Symposium, p. 1049.

explained its rationale as follows: "A declaration of sovereign rights over altitudes which could not be attained in order to secure in them law and order, would be senseless."¹⁵ Although this "effective control" principle was popular among traditional international legal scholars and was also in accord with the Soviets' positivistic approach to international law and with Lenin's teaching that "law is nothing without a mechanism capable of compelling the observance of legal norms," this principle went into eclipse after February, 1959.¹⁶ The inadequacy of this principle, at the time, seemed to be that it would prove of little value in opposing reconnaissance from satellites and other actions resulting from improved flight technology.

The death-knell of the "effective control" principle may have been rung in an August, 1961, article, which first explained that this criterion was at the foundation of capitalist space law, and then criticized "certain Soviet jurists . . . who showed a tendency to rely on this criterion."¹⁷ This August, 1961, article, which appeared shortly before the capture of the Bulgarian reconnaissance plane in Sicily, stated that the "effective control" theory would restrict the sovereignty of a small country (such as Bulgaria, which has no advanced defense technology) to lower altitudes, and indicated that this would be inconsistent with the following statement on December 21, 1957, by Premier Khrushchev before the U.S.S.R. Supreme Soviet against the U. S. air bases in Italy:

The geographical location of Italy is such that it actually does not have the possibility of using ballistic and other rockets without violating the neutrality of countries separating Italy from the Soviet Union.¹⁸

¹⁵ Kovalev and Cheprov, *loc. cit.* note 12 above, p. 138.

¹⁶ The last approval of this principle was at the February, 1959, Second Annual Meeting of the Soviet Association of International Law, as recorded in 1959 Soviet Yearbook of International Law 411 (Moscow, 1960). References below to this footnote refer to the statements of the individual authors as reported in this Yearbook.

¹⁷ Marko G. Markov, "On the Question of the Boundaries of Air Territory in International Law," *Sovetskoye Gosudarstvo i Pravo*, August, 1961 (No. 8), p. 100. The reputation of Messrs. Kovalev and Cheprov was redeemed, however, because Dr. Markov indicated that they had expressly stated (indeed, just two paragraphs after their widely quoted and misconstrued statement on "effective control") that "the ability to shoot down a space ship cannot serve by itself as a sufficient criterion for determining the vertical boundary of state sovereignty." This August, 1961, article is of particular interest because it was written by a Bulgarian, was the first space law article to appear in more than a year in the Soviets' leading law journal, and was the first space law article by a Bulgarian ever published in a Soviet periodical. Dr. Markov was elected on March 21, 1962, as an officer of the Governing Council of the Bulgarian Astronautical Society to supervise the affairs of its Space Law Committee. For pertinent views, see also the editorial in Bulgaria's leading law journal: "The Aggressive Actions of the Military Aviation of the U.S.A. against the Soviet Union—a Violation of International Law," *Pravna Mis'l*, Summer, 1961 (No. 8), pp. 2-7.

¹⁸ Markov, *ibid.*, p. 101 (note 32), referring to pp. 137-138 of the 1958 Soviet Yearbook of International Law, which discusses Khrushchev's above-quoted statement. The reference to Khrushchev's statement is particularly obvious, because the most

The implication is that the effective control theory might undermine the defensive character of the Bulgarian flight.¹⁹

The third principle invoked by the Soviets to determine the vertical limit of sovereignty and thus the boundary between "outer space" and "sovereign" space was the principle of "security." The "security" criterion was first introduced in the spring of 1958 as a result of several statements in the American press alleging U. S. intentions to launch reconnaissance and bomb satellites. The Soviets stated that, under the changed conditions of the space age, any formulation of state sovereignty in the traditional terms of airspace and air law was obsolete.²⁰ This was emphasized at the Second Annual Conference of the Soviet Association of International Law in February, 1959, in an important address by a senior specialist in the Soviet Foreign Ministry, Dr. G. A. Osnitskaya. Dr. Osnitskaya (formerly known by her pen-name, A. Galina) stated:

With regard to the upper limit of sovereignty, it is primarily necessary to establish a principle which should be the starting point for a discussion of this question, a principle which of course must be based on international law. . . . To take measures to safeguard its security and to protect itself against infringement by other states of its territorial supremacy and independence is a state's sovereign right. Any attempt to draw up a rule which would not ensure the exercising of that right [including an attempt to draw any boundary prior to the demilitarization of outer space] cannot be recognized as being in accordance with the law. . . . The principle of guaranteeing state security is the only, or, in any case, the basic criterion.²¹

The principal advantages of this new criterion were fourfold: (1) it provided great flexibility, because in practice it served to avoid any vertical definition of sovereignty whatsoever; (2) it helped compensate for the decreasing value of "territorial" sovereignty resulting from the fact that a hostile state might conduct reconnaissance or release bombs along diagonal trajectories from points far removed from the target state's cone of territorial sovereignty; (3) it enabled easier proof of a

direct discussion of the inequality of boundaries resulting from the effective control theory appears, not on pp. 137-138, but on p. 139.

¹⁹ This August, 1961, article (on p. 101) nevertheless opposed the establishment of a high boundary for state sovereignty, "on the condition" that the West would agree to the demilitarization of outer space. The significance of this condition, in the circumstances of the Bulgarian case, goes beyond such problems as space reconnaissance, as is indicated by Galina's [G. A. Osnitskaya's] September, 1958, statement (see 1961 Senate Space Symposium, p. 1059) that even "rockets of short and medium range . . . in their flight can leave the limits of the earth's atmosphere and travel through outer space. The liquidation of military bases will create, consequently, an additional guarantee that cosmic space will not be used for military purposes." The converse is, of course, also true, i.e., the demilitarization of outer space, with a low boundary, might contribute to the "liquidation" of military bases.

²⁰ Kovalev and Cheprov, *loc. cit.* note 12 above, citing U. S. press statements during January-March, 1958 (p. 137) and indicating obsolescence of airspace as a delimiting criterion (p. 134).

²¹ Osnitskaya, 1959 Soviet Yearbook of International Law 57-58; the first part of this quote is in the English summary published in 1961 Senate Symposium, p. 1091.

violation of Soviet airspace by introducing the subjective and propagandistic criterion of "hostile" intention, which could operate without proof of an actual entry; (4) and, most important of all, it was a more "principled" criterion, in that it shifted the emphasis away from mechanical rules of traditional international law.

Nevertheless, even this criterion had basic defects and was eventually re-assessed. The first defect from the Soviet viewpoint was that, on the basis of this criterion, other nations might theoretically extend sovereignty so high as to interfere with scientific research in space; employ reconnaissance satellites to defend *their* security; or even add space components to diversify their deterrence forces. Furthermore, this security criterion was basically a defensive doctrine and was not ideally suited for a period of shifting balance of power which called for the development of more dynamic and offensive principles of peaceful co-existence.

Accordingly, at the October 5, 1959, Moscow Space Policy Symposium, G. P. Zhukov, the Executive Secretary of the new Space Law Commission of the U.S.S.R. Academy of Sciences, announced a new policy of emphasis on a more dynamic approach to the delimitation of outer space. Dr. Zhukov indicated the danger of misusing the security criterion to raise constantly the vertical limits of sovereignty, and stated that, instead, one should pursue "the conclusion of an appropriate agreement on the neutralization and demilitarization of outer space."²²

This new policy, however, did not really contribute directly to the delimitation of outer space. Instead, this policy only mirrored a growing Soviet emphasis on the ideological and political nature of space law²³ and emphasized that the delimitation of outer space can be meaningful only in terms of what is being delimited. The Soviets considered that in order to delimit outer space one must first reach agreement on its nature or status.

²² Zhukov, *loc. cit.* note 6 above, p. 94; 1961 Senate Symposium, p. 1082. Zhukov's statement and its context were repeated almost verbatim by E. S. Romashkin, Corresponding Member of the U.S.S.R. Academy of Sciences, in *Sovetskoye Gosudarstvo i Pravo*, January, 1960 (No. 1), p. 22.

In August, 1961, the security criterion was associated with the aggressive "effective control" criterion, allegedly espoused by the United States, which in turn was strongly attacked as being of a "purely empirical nature" and as having been "borrowed directly from the arsenal of the old international law." This August, 1961, article refers to the abuse of the security criterion by attacking "the attempt of the United States to extend the spatial boundary of the criterion of security, by transforming it into a function of the development of rocket technology and telemetry, and by constantly raising the vertical boundary of territorial airspace. . . . [which] conflicts with the Soviet desire to exclude outer space from the strategic plans of the militarists. . . ." Markov, *loc. cit.* note 17 above, p. 101.

²³ On Nov. 9, 1960, the Deputy Chairman of the U.S.S.R. Academy of Science's Space Law Commission, Dr. G. P. Zadorozhnyy, in an address to the Swabian Society, indicated that the advance of the space age had resulted in the transformation of space legal problems into problems primarily political in nature. G. P. Zadorozhnyy, "Basic Questions of Space Law" (mimeo., Nov. 9, 1960), reported in *Stuttgarter Zeitung*, Nov. 11, 1960, p. 4, cols. 2-3; reviewed in *Sovetskoye Gosudarstvo i Pravo*, June, 1961 (No. 6), pp. 117-118.

C. STATUS OF OUTER SPACE

The problem of determining the status of outer space has been discussed in Soviet writings primarily in terms of drawing analogies with special regimes of law governing the high seas and the Antarctic. The problem of establishing a special regime of law for outer space is therefore in essence the problem of determining the applicability to outer space of existing international law, which is the most highly disputed issue in Soviet space law, because one must first determine what constitutes existing international law before one can intelligently even discuss the problem of its applicability. The existing nature of international law, from the Communist viewpoint, depends in turn upon an ideological evaluation of the stage of world revolution which has been reached, and on consideration of the urgency with which world revolution should be pursued during the present period of nuclear stalemate.

As a first approximation, one can state that the "traditional" nature of international law is emphasized by those Communist jurists who view the world revolution pessimistically or who consider that in a world of "nuclear brinkmanship" the principal requirement of the international legal system is normative guidance to strengthen international stability. The "Communist" nature of international law is emphasized by those who want rapidly to replace traditional international law with the laws of peaceful co-existence, regardless of whatever de-stabilizing effects this might have, or who consider that the shift to a new Communist international law will take place within such a short time that one could, or for propaganda reasons should, support the position that international law has already acquired a socialist character of "peaceful co-existence."²⁴

The problem of determining the applicability of international law to outer space therefore consists in determining *what* law of the high seas and what *aspects* of the law of the Antarctic are to be applied by analogy to determine the status of outer space. The trend is to apply only the "new" law of the sea, as it exists within the demilitarized framework of the laws of peaceful co-existence, and the new law of the Antarctic which by analogy would provide, among other things, for freedom of outer space subject to a Soviet veto.

The first Soviet discussions of the status of outer space emphasized that there should be no analogy with the regime of airspace, because this would subject outer space to the sovereignty of national states.²⁵ The first scholarly Soviet article on space law recommended that the status of outer

²⁴ See note 90 below.

²⁵ The clearest discussion of the obvious danger of an air law analogy was in Prof. Yevgeniy Korovin's "International Status of Cosmic Space," *International Affairs*, January, 1959 (No. 1), p. 54; also in 1961 Senate Symposium, p. 1064. The Soviets, however, were careful not to reject entirely the possibility of drawing analogies with traditional air law. Thus G. P. Zhukov, in "Space Espionage Plans and International Law," *International Affairs*, October, 1960 (No. 10), p. 56; also in 1961 Senate Symposium, p. 1100, stated: "It is possible to draw an analogy with the rules of air law which declare aerial espionage unlawful and specifically prohibit the use of photographic equipment for these purposes."

space be the exact reverse of air law, and accordingly designated outer space as a "legal vacuum." In defense of the legality of the first Soviet satellite this article declared that:

The concept of a "legal vacuum" renders senseless the very formulation of the question whether other states must permit the launching of satellites.²⁶

Although this "legal vacuum" theory corresponded with the Soviet emphasis on the consensual nature of international law, it had the obvious defect of legitimizing not only Soviet satellites, but also "dangerous" non-Soviet satellites. This theory was thus attacked by other Soviet writers and in July, 1960, the original authors of this theory explained it away and stated that any discussion of this theory in terms of the problem of the applicability of international law to outer space would be "completely artificial."²⁷

The great dispute on the applicability of international law to outer space came to a head at the Second Annual Meeting of the Soviet Association of International Law in February, 1959. At this meeting half a dozen of the leading Soviet space law jurists exchanged recriminations on their respective support or lack of support of the sea law principle of *res communis* (sometimes equated with "freedom of the seas") as an apt analogy to determine the status of outer space.

The most forceful opponent of the *res communis* analogy was one of the leading Soviet specialists on maritime and admiralty law, Professor S. V. Molodtsov, who recently published a book which was very highly praised because "it integrates the entire subject of the law of the sea . . . with the principles of peaceful co-existence."²⁸ Professor Molodtsov stated:

The mechanical transfer of the regime of the open seas [high seas] to outer space is incorrect. It is possible to borrow some principles, some individual rules of sea law, for example, the rule about the exclusive jurisdiction of the flag state over its ships. . . . But, on the whole, the regime of the open seas must not be carried over to outer space, because in the open seas there exists the practice of using the space of the open seas for military purposes. This practice is not

²⁶ Kovalev and Cheprov, 1958 Soviet Yearbook of International Law 131. The authors explained that they were only applying to outer space an analogy from the principles of air law governing the upper layers of the atmosphere. Dr. V. A. Zarzar, *Voprosy Vozdushnogo Pravo*, Vol. I (1927), p. 96, had first suggested this analogy more than 30 years earlier, but spoke in terms of "free movement" rather than "legal vacuum."

²⁷ Korovin, *loc. cit.* note 25 above, pp. 58-59; 1961 Senate Symposium, p. 1070; Zhukov, *loc. cit.* note 6 above, p. 94; 1961 Senate Symposium, p. 1081; F. N. Kovalev and I. I. Cheprov, "Solving the Legal Problems of Outer Space," *Sovetskoye Gosudarstvo i Pravo*, July, 1960 (No. 7), pp. 186-137.

²⁸ S. V. Molodtsov, *Mezhdunarodno-Pravovoy Rezhim Otkrytogo Morya i Kontinental'nogo Shelfa* [The International Legal Regime of the Open Seas and the Continental Shelf] (Moscow, Soviet Academy of Sciences Publishing House, 1960. 348 pp.); reviewed in *Izvestiya Vysshikh Uchebnykh Zavedeniy, Pravovedeniye*, No. 2 (1961), pp. 185-187.

only incompatible with the principles of the U.N. Charter and with the Kellogg-Briand Pact, which have outlawed war as a means of resolving international disputes, but also contradicts the very nature of the open seas. . . .

One must not forget this aspect of the concepts of *res communis* and *res nullius*, when we speak of the legal nature of outer space and evaluate the statements of bourgeois jurists on the question. The sources of the concepts of *res communis* and *res nullius* are rooted in the teachings of Roman jurists on the law of property. They saw the bases for ownership and for the right of property in the thing [res] itself, and deduced these bases from the character of the thing, and not from the relationships among people in the process of social production. The class nature of the concept is absolutely clear: inasmuch as things exist around people which give a basis for owning them with the rights of private property, then private property would exist as long as these things would exist. [According to Marxist theory, private property will disappear in accordance with changes in the relations of production, i.e., when the working class overthrows the bourgeoisie.] This theory was intended to justify the rule of the exploiting classes. This is the reason why it would be incorrect to carry over these outdated theories and concepts to the problems of outer space.²⁹

Another of the "innovators" at this February, 1959, meeting was Dr. L. M. Maksudov, who delivered a lengthy address on the importance of the five principles of peaceful co-existence as expressed in the April 24, 1955, communiqué from the Conference of Asian and African Countries. Dr. Maksudov pointed out that:

Inasmuch as contemporary international law is basically the old international law developed by the bourgeoisie, but containing a series of characteristics introduced by the practice of the Soviet state which are in principle new, it is now necessary to speak of a new interplanetary or cosmic law, which is arising under new conditions, different from the conditions under which contemporary international law was created. The first artificial satellite of the earth and the first artificial satellite of the sun were launched by the Soviet Union. These historical facts cannot help but exercise influence on the process of creating norms to regulate cosmic flight. All that is new in contemporary international law cannot help but be considered to be of the same decisive importance as are now the countries of socialism themselves. Inasmuch as peaceful co-existence is at the heart of the concept of co-operation among diverse countries, it must find expression also in the development of international space law.³⁰

This dispute over *res communis* and its relationship to the ideological problem of world revolution and the status of outer space is not yet resolved.³¹ It is important to realize, however, that those who support the

²⁹ Molodtsov, *loc. cit.* note 16 above, pp. 432-433.

³⁰ *Ibid.*, p. 433; see also pp. 413-415.

³¹ The leading proponents are Yevgeniy Korovin and G. Y. Zadorozhnyy, respectively Chairman and Deputy Chairman of the Space Law Commission of the U.S.S.R. Academy of Sciences. Dr. Zadorozhnyy, in fact, was the first to advocate the analogy with freedom of the sea in his October, 1957, article; see note 10 above. Prof. Korovin originally opposed this analogy (see Korovin, *loc. cit.* note 25 above, p. 54, 1961 Senate

application of *res communis* to outer space do not necessarily oppose a shift to the new socialist international law. On the contrary, they may consider that to gain a better bargaining position the Soviet Union should support *res communis* as a principle which has already acquired a socialist content.

Thus, Professor V. F. Meshara indicated at the February, 1959, meeting that the *res communis* doctrine can serve to counteract capitalist aggression, and stated that a necessary precondition for agreement on the status of outer space, specifically for its neutralization [here he includes also demilitarization] should be a corresponding agreement on the status of the high seas.³² This, of course, would be designed to prohibit both the defensive reconnaissance of Samos satellites and the deterrence of Polaris submarines. Similarly, Professor Korovin, who originally had opposed the application of *res communis* to outer space, stated at the October 5, 1959, Moscow Space Policy Symposium that the element of "common possession" in *res communis* implies, not common ownership, but a common right of veto power, because "common possession can be established only by the mutual consent of all users." He emphasized that "this path has been steadily followed by the Soviet Government in proposing the international investigation and use of outer space for peaceful purposes only."³³

The other source for an analogy to determine the status of outer space is the status of the Antarctic. As with all analogies from traditional international law, the Soviets in general oppose the attempt to analogize from the Antarctic to outer space.³⁴ The Soviet attitude changed considerably, however, after the conclusion of the Antarctic Treaty in December, 1959. The Soviets do not hesitate to advocate the application of individual provisions of the Antarctic Treaty to negotiations on, and activities in, outer space. The cardinal analogy relied upon by the Soviets is the principle of "agreed solutions" adopted in the International Conference on the Antarctic, which prepared the way for the treaty. "Agreed solutions" of course, is another way of phrasing the right of "veto."³⁵

Symposium, p. 1064), but was criticized for his opposition and changed his position (see Meshara, note 32 below, p. 409). The best-known opponents of *res communis* among Soviet space law jurists are Kovalev and Cheprov, (*loc. cit.* note 12 above, pp. 140-141), who pointed out differing security requirements on the high seas and in outer space; and G. A. Osnitskaya (note 13 above, pp. 60-61, 1961 Senate Symposium, pp. 1092-1093), who introduced the distinction of a "heightened risk" in outer space.

³² V. P. Meshara, *loc. cit.* note 16 above, p. 409.

³³ Korovin, *loc. cit.* note 6 above, p. 90; 1961 Senate Symposium, p. 1075.

³⁴ Thus G. A. Osnitskaya claimed that the attempt of the State Department Legal Adviser to draw an analogy with Antarctica had "the obvious aim of helping the United States at the appropriate time to assert its claims to outer space." G. A. Osnitskaya, *loc. cit.* note 13 above, pp. 60-61 (not included in English summary in 1961 Senate Symposium).

³⁵ The Soviet representative to the United Nations, Ambassador Zorin, stated on Dec. 4, 1961: "If the principle of unanimity could be applied in the Antarctic, there is no reason why it could not in outer space activities." Verbatim Record of U.N. First Committee discussion of the Report of the Committee on the Peaceful Uses of Outer Space, Dec. 4, 1961 (Doc. A/C. 1/SR. 1210), pp. 41-42.

The Soviets also support the analogy of the administrative apparatus of the Antarctic, which consists basically in the supreme power of the Consultative Conference (Article IX), which has no power other than that of recommending means for better co-operative use of the Antarctic. Furthermore, the Soviets support the provision (Article XI) that disputes can be submitted to the International Court of Justice only if both parties agree to submit to its jurisdiction, because this provision "corresponds with the principle of sovereign equality of states."⁸⁶

The Soviets also refer to the analogy of the "neutralization" of the Antarctic (Article I) and of its status as a "non-atomic" (*bezatomnaya*) zone, which they say was achieved by the Soviet Union's successful opposition to the highly suspicious attempt of the United States to allow atomic explosions of a non-military character.⁸⁷ Nevertheless, they state that "the neutralization of Antarctica cannot serve as an exact analogy for outer space,"⁸⁸ probably because Article VII of the Antarctic Treaty provides that any state with participating rights in the Consultative Conference may nominate a representative who has full freedom to go anywhere in Antarctica, and that all parts of the Antarctic and stations and equipment and all ships and planes at points of loading and unloading are subject to inspection. An analogy to outer space, of course, would give complete freedom to inspect all rocket-launching facilities and equipment in the Soviet Union and possibly industrial "points of loading" as well.

The fact that such a comprehensive inspection provision could be agreed upon in the Antarctic context underlines the basic difference which the Soviets have seen between the Antarctic and outer space. This difference has consisted in the vastly greater prestige value and military potential of outer space. A policy of co-operation and inspection in space activities might have undermined the political advantages which the Soviet Union has gained from the propaganda and military use of her great space power.

Analogy is drawn between Antarctica and outer space particularly in terms of their territorial status. This analogy, however, has lost much of its pertinence since the unanimous adoption on December 20, 1961, of the U.N. Resolution on International Co-operation in the Peaceful Uses of Outer Space (Doc. A/RES/1721, reprinted below, p. 946). This resolution provides that: "Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation." This is a stronger source of international law for space than an analogy with the Antarctic, and provides not for a mere 30-year moratorium on further territorial claims, as does the Antarctic Treaty, but for a permanent renunciation of all such claims in space. The Antarctic analogy, however, may be useful in helping to establish the meaning of the terms "free for exploration and use by all States"; "in conformity with international law"; and "not subject to national appropriation."

⁸⁶ S. V. Molodtsov, "The Antarctic Treaty," *Sovetskoye Gosudarstvo i Pravo*, May, 1960 (No. 5), p. 66.

⁸⁷ *Ibid.*, p. 68.

⁸⁸ Zadorozhnyy, *op. cit.* note 23 above.

The problem of determining the status of outer space includes as a sub-problem the status of the celestial bodies in this space. Although the Soviets explicitly state that no distinctions should be made in the legal status of different parts of space (cislunar, intrasolar, extra-galactic, etcetera),³⁹ they do recognize that the status of bodies located within outer space must be considered separately from the status of outer space itself,⁴⁰ just as the status of ships, Texas towers, islands, and continents is considered independently of the status of the surrounding oceans.

The Soviets also distinguish between the types of celestial body concerned, particularly between artificial and natural celestial bodies. The problem in each case, essentially, is the extent to which terrestrial nations may have sovereign rights over these bodies. In the case of artificial bodies (e.g., rockets, satellites, space stations) the Soviets discuss the problem of sovereignty often in terms of the right to "free access to space";⁴¹ in terms of the danger of renunciation of rights and the consequent elimination of responsibility for harm;⁴² in terms of jurisdiction, including problems of conflict of laws;⁴³ and in terms of analogy with maritime law.⁴⁴ Whatever the legal reasoning, however, the conclusion is unanimous that the launching country has sovereignty over the bodies which it launches. The problem of sovereignty over artificial celestial bodies was complicated, however, in November, 1960, by G. A. Zadorozhnyy's statement that

individual states should have sovereign rights over their satellites, space ships, and extraterrestrial installations, unless international agreements on such right are concluded in each individual case.⁴⁵

The question then becomes, what is an extraterrestrial installation, and how does one determine its geographical limits, for example, if it is located on the moon? This is part of the larger problem of the status of natural celestial bodies.

Soviet discussion of the status of natural celestial bodies has largely paralleled the discussion of the status of outer space as such. The Soviets have uniformly denounced any analogy with *res nullius*, have carried on the same dispute over the applicability of the analogy of *res communis*, and have reached the same conclusion, namely, that, regardless of the value of any analogies to traditional international law, the principal requirement of the new international space law is that all celestial bodies must be demilitarized.

A problem of peculiar pertinence to the status of natural celestial bodies,

³⁹ Kovalev and Cheprov, *loc. cit.* note 12 above, pp. 38-39.

⁴⁰ *Ibid.*, p. 46.

⁴¹ Kovalev and Cheprov, *loc. cit.* note 12 above, p. 142.

⁴² Korovin, *loc. cit.* note 6 above, p. 90; 1961 Senate Symposium, pp. 1074-1075.

⁴³ Yevgeniy Korovin, "Space Exploration and International Relations, a Discussion," *International Affairs*, June, 1961 (No. 6), p. 61.

⁴⁴ Molodtsov, *loc. cit.* note 16 above, p. 432; Osnitakaya, *loc. cit.* note 13 above, p. 62; 1961 Senate Symposium, p. 1094.

⁴⁵ G. P. Zadorozhnyy, *op. cit.* note 28 above. See also Yevgeniy A. Korovin, "Peaceful Cooperation in Space," *International Affairs*, March, 1962 (No. 3), p. 63.

as distinct from that of outer space which contains them, is the establishment of territorial claims to these bodies or to parts thereof. The Soviets oppose the establishment of territorial claims to celestial bodies for two reasons: (1) because of the difficulty of applying to these bodies the traditional international law on territorial acquisition;⁴⁶ and (2) because any territorial acquisition at all of celestial bodies would conflict with the new law of peaceful co-existence.⁴⁷ Furthermore, the U.S.S.R. agreed, in the U. N. Resolution of December 20, 1961, that celestial bodies are not subject to national appropriation. This Soviet policy on the status of celestial bodies is subject, however, to two qualifications. The first qualification derives from the Soviet view that it is "impossible to discover in the U.N. Resolution [of December 20, 1961] a rejection of the principle of the extension of sovereignty to outer space."⁴⁸ Such an interpretation of the U. N. resolution would enable the Soviets to renounce sovereignty in outer space, without at the same time renouncing any basis of future claim to such sovereignty.⁴⁹

The second qualification has been aptly summarized by Professor Leon Lipson of Yale Law School as follows:

It seems probable that Soviet diplomatic and legal policy will be governed by two characteristics: 1) they will refrain from claiming sovereignty or jurisdiction over the moon, 2) they will consistently claim the operating rights and benefits that would be expected to result from a successful claim to sovereignty or jurisdiction. Thus they could reap maximum political and practical benefits.⁵⁰

⁴⁶ Korovin, *loc. cit.* note 6 above, p. 89; 1961 Senate Symposium, p. 1073.

⁴⁷ Osnitskaya, *loc. cit.* note 13 above, p. 64; 1961 Senate Symposium, p. 1094. Prof. Korovin quotes Khrushchev's statements on Sept. 15, 1959, at Andrews Air Force Base, and on Sept. 16, 1959, at the National Press Club in Washington, D.C. as formulating "with utmost precision" the entirely "new" Socialist approach to sovereignty over celestial bodies. Premier Khrushchev stated merely that: "We regard the sending of a rocket into outer space and the delivery of our pennant to the Moon as our achievement. And by this word 'our' we mean the countries of the entire world, i.e., we mean that this is also your achievement and the accomplishment of all people living on Earth." Korovin, *loc. cit.* note 6 above, p. 90; 1961 Senate Symposium, p. 1074. See also New York Times, Sept. 17, 1959, p. 18.

⁴⁸ Korovin, *loc. cit.* note 45 above, p. 63. This Soviet attitude may stem from the omission in the resolution of any reference to the limitation of sovereignty and from the decision to delete from the end of Article 1b of Section A the words "by claim of sovereignty or otherwise." Report of the Committee on the Peaceful Uses of Outer Space, Dec. 2, 1961 (Doc. A/C.1/L.301).

⁴⁹ In April, 1960, one of the leading Communist spokesmen on space policy repeated the Communist renunciation of sovereignty both over Antarctica and over celestial bodies, but pointed out that the Soviet Union has not renounced any basis of claim to territorial sovereignty in the Antarctic, and let it be known that if the United States started to apply the principles of territorial acquisition in outer space, then the Communist states will assert the sovereignty over celestial bodies which their activities have created. Criteria for determining when acts may be considered to amount to territorial acquisition were left for further study. Vladimir Kopal, "Penetration into the Universe and International Law," *Mezinárodní Politika*, April, 1960 (No. 4), p. 246.

⁵⁰ Leon Lipson, "International Political Implications of Activities in Outer Space," Report of a Conference, Joseph M. Goldsen, Chairman, Oct. 22-23, 1959, Report R-362-RC, The RAND Corp., Santa Monica, California, May 5, 1960, pp. 79-80.

D. DEMILITARIZATION OF OUTER SPACE

The problems of the delimitation and status of outer space, as well as the more specific legal problems covering reconnaissance, liability for damages, space communications, and administration of international co-operation, are all considered by the Soviets to be mere appendages of the larger subject of demilitarization of outer space.⁵¹ The problem of establishing a demilitarized status for outer space is not considered by the Soviets to be merely a component part of the general problem of the status of outer space, because the demilitarization of outer space is conceived to be an integral element of a different and still larger problem, namely, the over-all problem of bargaining for global military advantage.

In broad ideological outlines, the problem of space demilitarization, according to Soviet thinking, is a subheading of the general problem of universal and complete disarmament, which, in turn, is a cornerstone of the "law of peaceful co-existence." "Peaceful co-existence" is the basis and the pervading essence of all international law in the modern era. In more specific terms, space demilitarization is advocated as a bargaining point in the Soviet attempt to liquidate U. S. overseas bases and, more recently, U. S. continental-based ICBMs.

The basic Soviet bargaining position is expressed in endless repetition throughout every article on, or even remotely related to, international space law.⁵² Ever since the Soviets launched their first artificial satellite, and particularly since they proved their ICBM capability by launching Luniks, they have wanted to trade this Soviet superiority in space for U. S. superiority in more conventional non-space strategic delivery systems, consisting in U. S. bombers and IRBMs stationed overseas within range of the Soviet Union. The Soviets say this may be accomplished by U. S. agreement to the dismantlement of all of its overseas bases, which would eliminate the U. S. strategic delivery systems located on these bases, and by U.S.S.R. agreement to the demilitarization of outer space, which would "eliminate" the Soviet strategic delivery system by rendering illegal the passage of Soviet ICBMs through outer space.

This official Soviet position was first announced on March 15, 1958, in response to U. S. efforts since January, 1957, to reach international agree-

⁵¹ The term "demilitarization" is frequently used by the Soviets interchangeably with the term "neutralization," although the Soviets do point out that, according to "traditional" international law before the Kellogg-Briand Pact and the U.N. Charter outlawing war, demilitarization was designed for peacetime use, and neutralization was reserved for application in time of war. For Soviet definition of the two terms in a space law context, see Yevgeniy Korovin, "On the Neutralization and Demilitarization of Outer Space," *International Affairs*, December, 1959 (No. 12), p. 82; also in 1961 Senate Symposium, p. 1085.

⁵² The best statement of the Soviet bargaining position may be found in the letter by Major General Georgii I. Pokrovsky to the editors of *International Affairs*, July, 1959 (No. 7), p. 106. Raymond Garthoff has described Gen. Pokrovsky as "an authoritative spokesman on future weapons and warfare." This position was expressed also in many of the disarmament negotiations and debates, e.g. Ambassador Zorin's statement in the general debates of the U.N. First Committee on October 25, 1960 (Doc. A/C.1/SR.1090), p. 41.

ment to assure that outer space would be "dedicated to the peaceful uses of mankind and denied to the purposes of war."⁵³ The Soviet space law scholars supported the official position by rendering it in terms of international law. Thus the leading Soviet space jurist, Professor Yevgeniy Korovin, stated in January, 1959:

The meaning of the U. S. proposal to "neutralize" the cosmos comes down in practice to forbidding the Soviet intercontinental ballistic missile and represents an attempt to artificially single out the intercontinental missile from the general context of disarmament. . . . By proposing to outlaw the intercontinental missile alone, the U. S. rulers seek to head off a retaliatory blow via outer space in the event of an atomic war, while simultaneously retaining numerous military bases on foreign territories. . . . It is not to be overlooked that acceptance of the U. S. proposal would represent an infringement of sovereignty (not in space, but on earth) based on the recognition of the equal rights of all sovereign states as solemnly confirmed by the U. N. Charter (Articles 1 and 78).⁵⁴

The following month at the Second Annual Meeting of the Soviet Association of International Law, attended by all Soviet space legal specialists from both in and out of government circles, the politico-legal specialist, Dr. M. Lazarev, explained the new emphasis very clearly:

The integration of the problems of prohibiting the use of outer space for military purposes and the prohibition of overseas bases is completely correct from the military/political point of view as well as from the position of international law. From the military/political point of view such a position is correct because it guarantees the security of all interested states belonging to two diverse social-economic systems. From the international law point of view such a position is in accordance with law and justice for it is based on the principles of peaceful coexistence and corresponds fully with these principles, and in particular it corresponds with the principle of sovereign equality and reciprocal advantages of states, which is a principle of peaceful co-existence.⁵⁵

There is one critical factor in this "equality" which all Soviet writers scrupulously ignore, and this silence underlines the true significance of Communist use of the terms "law and justice," "sovereign equality," and "reciprocal advantages of states," as well as the meaning of "peaceful co-existence" itself. This factor is the powerful land army of the Soviet Union, which could overrun Western Europe if the latter were not protected by the deterrent force of American air and missile bases. This factor incidentally gives added significance to the Soviet demand that the U. S. dismantle not only its missile and air bases, but its naval and logistics bases as well. Instead of advocating equality, which already exists, the

⁵³ These were the words of President Eisenhower in his letter of Jan. 12, 1958, to Soviet Premier Nikolai A. Bulganin. See "International Negotiations Regarding the Use of Outer Space, 1957-1960," with appendix of pertinent documents, prepared by the Historical Office, Bureau of Public Affairs, Department of State, 1961 Senate Symposium, p. 986.

⁵⁴ Korovin, *loc. cit.* note 25 above, p. 57; also in 1961 Senate Symposium, p. 1068.

⁵⁵ Lazarev, *loc. cit.* note 16 above, p. 409.

Soviets are, in fact, advocating the abolition of equality, so that their land armies and still existing strategic delivery systems, or the threat of their use, could influence the relatively defenseless allies of the United States to accept and even support Soviet actions in furthering the interests of world Communism.

More recently, the growth of American ICBM capability has caused the U.S.S.R. to suggest that the "elimination" of the Soviet ICBMs by means of space demilitarization must be met by the removal not only of our overseas bases with their conventional strategic delivery capability, but primarily by removal of our ICBMs and their nuclear warheads as well. This policy is reinforced for bargaining purposes by Soviet refusal to respond to U. S. proposals to ban the stationing in orbit or in space of weapons of mass destruction without at the same time declaring illegal mutual ICBM deterrence power. This Soviet refusal represents merely a "second generation" of the traditional policy of "equality" which demands the coupling of space demilitarization with demilitarization on earth. Now, however, the Soviet bargaining is directed at the use of their superior "bombs-in-orbit" and similar space potential to eliminate both U. S. overseas bases and U. S. ICBMs.⁵⁶

The Soviets use the concept "demilitarization of outer space" not only to gain ground superiority by removing U. S. overseas bases and ICBMs, but also to gain space superiority by removing U. S. defensive systems in outer space. At the same time, by opposing effective inspection, the Soviets assure that their own capabilities both on the ground and in outer space remain undiminished.

The Soviet tactic in attempting to remove U. S. space defensive systems, principally the Samos and Midas satellites, is to appeal to the desires of the world for peace and to the hopes of the world that in outer space there can be created an area devoted exclusively to peaceful purposes, unencumbered by the interests of antagonistic terrestrial politics. The Soviets strengthen their appeal for peace by (1) threatening war against all who would oppose this peace, and (2) interpreting the meaning of peace so that all Soviet actions are peaceful and all actions adverse to their interests are "military" or warlike. This latter tactic is a fundamental principle of Soviet space law and underlies almost every pertinent legal formulation, in particular the legal formulation known as "demilitarization of outer space."

⁵⁶ If the United States gains space superiority, the "law of peaceful coexistence" might cause the Soviets to reverse their position, so that "equality" would require not the coupling of space demilitarization with terrestrial disarmament, but rather their separation. This in turn might cause changes in the Soviets' attitudes on the "legality" of arms control. At present, the Soviets contend that only complete and global disarmament or "demilitarization" is consistent with peaceful co-existence, and that arms control is merely a capitalist concept to legalize armaments and war and to facilitate indirect aggression against the independence of the Soviet Union. See Korovin, "The U.S.S.R. and Disarmament," with appendices, in *International Conciliation*, No. 292 (Sept. 1933), for official statements of Soviet policy with regard to disarmament, calling for the destruction of military, naval and air bases, and the prohibition of military propaganda, *inter alia*.

The effectiveness of this Soviet tactic of interpretation derives basically from the fact that during the age of the atom and space, theories of deterrence have necessarily changed and have blurred the distinctions between offensive and defensive actions, between active and passive weapons, and between aggression and self-defense. Objective standards to determine the difference between these relative concepts have gradually receded and in some cases even disappeared. Such a situation, which is made to order for the propagandist and ideologist, has been exploited by the Communists to the full. The lack of accepted objective standards has enabled the Communists to apply a subjective test, namely, the test of peaceful purposes. This enables the U.S.S.R. to assert *a priori* that all actions by the U.S.S.R. are peaceful and that all actions by the United States contrary to Soviet interests are not peaceful.⁵⁷ This approach is consistent with the whole concept of Communist criminal law, according to which intent is a very important element in the criminality of the act.

The effect is: (1) to create a burden of proof against the United States, so that the United States must "prove" its peaceful intentions;⁵⁸ and (2) to enable the Soviets to adopt a double standard, whereby "demilitarization" equates with "peaceful uses" or "peaceful purposes" and only Soviet actions are entitled to qualify as "peaceful." Accordingly, the Soviets make no distinction between military and non-military uses of space by Soviet vehicles. It makes no difference that all Soviet space vehicles are sponsored by military organizations and are thus "military,"

⁵⁷ Among the best examples of distortions in Soviet space legal literature are the statement by Prof. Yevgeniy Korovin quoting President Eisenhower as having created NASA in order "to secure the use of all advantages hidden in the military possibilities of outer space," Korovin, "Osnovnyye Problemy Sovremennykh Mezhdunarodnykh Otnosheniy 164 (Moscow, 1959); and the statement by G. P. Zhukov at the May, 1961, Moscow Space Policy Symposium that "the Mercury project is regarded in the United States as an integral part of the plans for instituting 'control' and even 'domination' over outer space," Zhukov, *loc. cit.* note 43 above, p. 59.

⁵⁸ Attempts by Western scholars to create objective legal standards for the delineation of "peaceful uses" of outer space have been met by Soviet objections that such standards might legitimize what the Soviets regard as unpeaceful uses. See Korovin, *loc. cit.* note 45 above, p. 61, commenting on the phased space regulation proposed by Prof. F. B. Schick in the article "Space Law and National Security," published without Prof. Schick's prior knowledge in *International Affairs*, March, 1962 (No. 3) immediately following Prof. Korovin's comments. Prof. Schick (on pp. 58-59) divides space activities into three types according to their susceptibility to international regulation. The first category of "sharable" and relatively non-sensitive activities would be incorporated into the "first stage" of legal regulations. The pursuit of the activities regulated in the first-stage treaty would be *prima facie* peaceful, even if such activities could potentially serve non-peaceful purposes [thus reversing the burden of proof which the Soviets seek to impose on the United States]. Conversely, violation of provisions incorporated in the first-stage treaty would serve as *prima facie* evidence of unpeaceful uses. Activities of a less sharable or more sensitive nature would be regulated as soon as agreement can be reached on the requirements for stage two. Although Prof. Korovin did not categorically reject the possibility of seeking agreement, in the beginning, only on stage-one type activities, it was clear that in his opinion the only objective solution to the "peaceful uses" problem would be American acceptance of the methods proposed by the Soviets for demilitarization of outer space within the larger context of general and complete disarmament.

nor that Soviet rockets have served as delivery vehicles for systems testing of nuclear weapons in outer space, because the Soviets contend that all of their space vehicles are "peaceful."⁵⁹ At the same time, the Soviets do make a distinction between "military" and "non-military" when referring to U. S. space activities, and frequently equate the term "military" in a U. S. context with the term "aggression." In Soviet terminology, therefore, demilitarization of outer space means the removal of U. S. defensive systems both on the ground and in outer space, but does not impair the freedom of the U.S.S.R. to maintain identical capabilities.

E. RECONNAISSANCE AND ANTI-SATELLITE WARFARE

The best example of Soviet use of the double standard in international space law to further Soviet interests is the Soviet contention that U. S. reconnaissance satellites are illegal, but that the Soviet use of force as a counter-measure is legal. The first contention is based on the subjective claim that U. S. reconnaissance satellites serve solely aggressive purposes,⁶⁰ and that they can under no circumstances fit into the category of self-defense. The second contention is based on the subjective claim that Soviet use of armed force against these satellites and against those who contribute to their launching would be exclusively in self-defense.

The Soviets' argument against American satellites is based on Article 1 of the U.N. Charter, which declares as inconsistent with the Charter acts of aggression and actions which constitute a breach of the peace; Article 2, paragraph 4, which forbids the threat of force or the use of force against the territorial integrity or the political independence of any other state; and Article 39, which also forbids acts of aggression, breaches of the peace and threats thereof. The Soviet strategy has been to seek acceptance of the "aggressive" nature of the U. S. reconnaissance satellites, because such a designation would assure that the U. S. satellites would then be forbidden by all three of the respective Charter provisions.⁶¹

⁵⁹ The testing of nuclear weapons by the Soviets in the fall of 1961 at altitudes in excess of 100 miles, as well as the general testing of high-megaton range bombs, may have been directed toward possible strategic break-throughs in missile defense and penetration techniques. This testing, perhaps in conjunction with tests of beam-directed energy (LASER and MASER) and other "fantastic" weapons of which Premier Khrushchev boasts, may have been the subject of Soviet Defense Minister Rodion Malinovsky's statement at the XXIII Party Congress on Oct. 23, 1961, and again of the statement in the May 10, 1962, issue of *Krasnaya Zvezda* that: "The problem of destroying enemy rockets in flight has been successfully solved in the Soviet Union."

⁶⁰ G. P. Zhukov, *loc. cit.* note 25 above, p. 55; also in 1961 Senate Symposium, p. 1098. G. A. Osmitskaya, "Legal Problems of Space Exploration," *Review of Contemporary Law* (an organ of the International Association of Democratic Jurists), December, 1960 (published July, 1961), p. 56.

⁶¹ Soviet condemnation of specific types of U. S. satellites as aggressive began shortly after the May, 1960, U-2 case (see R. D. Crane, "Guides to the Study of Communist Views on the Legal Problems of Space Exploration," *loc. cit.* note 6 above, p. 1014), but the Soviets did not label any specific satellite as aggressive until the July 28, 1961, issue of *Krasnaya Zvezda* specifically included Midas III and Tiros III

Although the gravamen of the U-2 case was the violation of Soviet air sovereignty and the complaint that "there are no guarantees that the planes sent into foreign airspace were not carrying weapons of mass destruction,"⁶² U. S. space satellites are condemned because of the "aggressive" nature of reconnaissance itself.⁶³ This nature is such that aggression against the Soviet Union seems to be equivalent to aggression against any and every other country in the Communist bloc,⁶⁴ and collaboration with an aggressive country is equivalent to aggression by the collaborator.⁶⁵ Furthermore, the Soviets consider that the mere preparation of reconnaissance flights in space violates Articles 1 and 2 of the U.N. Charter,⁶⁶ just as they indicated that the United States violated Soviet territorial integrity even before the Powers flight by "organizing the intrusion of Soviet air space."⁶⁷

The Soviets have not discussed the legality of the "deterrence bomb in orbit" in terms of U.N. Charter provisions, but the case they make out against reconnaissance satellites would apply to deterrence bombs *a fortiori*. Furthermore, the law of peaceful co-existence provides that any (U. S.) conduct which may increase world tension is aggressive within the prohibition of the U. N. Charter.⁶⁸

An entirely different picture is presented by the Soviet interpretation of the legality of counter-measures against U. S. reconnaissance. The

in the same legal category as the U-2 planes and designated them as "acts of aggression." Col. B. Aleksandrov, "Spies in Space," *Krasnaya Zvezda*, July 23, 1961, p. 3.

⁶² Editorial, "A Most Serious Violation of International Law," *Sovetskoye Gosudarstvo i Pravo*, July, 1960 (No. 7), pp. 35-44, especially p. 42.

⁶³ G. A. Osnitskaya, *loc. cit.* note 60 above, p. 56. The Soviets seem to agree that Art. 2, par. 4, requires the use of armed force, but contend that "whatever category a plane formally belongs to, its character is determined by the functions it performs." Korovin, note 67 below, p. 50. For a discussion of the use of force and Soviet non-aggression treaties, particularly that of Nov. 16, 1933, with the U. S., see editorial cited note 62 above, particularly p. 40.

⁶⁴ Zhukov, *loc. cit.* note 25 above, p. 55; 1961 Senate Symposium, p. 1098. See also N. V. Zakharova, "Bilateral Treaties of Friendship, Co-operation and Mutual Aid Among Socialist States," *Sovetskoye Gosudarstvo i Pravo*, February, 1962 (No. 2), pp. 80-91, who explains the principle of socialist internationalism, which requires each socialist state to regard aggression against one socialist state as a threat to the others, but qualifies this by stating (p. 90) that Albania (*i.e.*, Communist China) is no longer within the scope of socialist internationalism.

⁶⁵ Editorial, note 62 above, p. 39.

⁶⁶ The first such argument was advanced by Dr. G. P. Zhukov at the October, 1959, Moscow Space Policy Symposium, in which he stated that, because Art. 2, par. 4, of the U.N. Charter prohibits threats against the territorial integrity and political independence of any state, "there are already sufficient grounds for declaring illegal attempts by certain U. S. groups to utilize space for military purposes." Zhukov, *loc. cit.* note 6 above, p. 94; 1961 Senate Symposium, p. 1082.

⁶⁷ Ye. A. Korovin, "Aerial Espionage and International Law," *International Affairs*, June, 1960 (No. 6), p. 50.

⁶⁸ The best instance of this "law" occurred on March 3, 1962, when Premier Khrushchev designated as an "act of aggression" President Kennedy's announcement of the U. S. intention to resume atmospheric testing in response to Premier Khrushchev's resumption of such testing in September, 1961.

pertinent Charter provision here is Article 51, which provides that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense, if an armed attack occurs against a Member of the organization." When the question concerned the right of the United States to self-defense, the Soviets referred to statements of foreign jurists to the effect that the Charter here speaks of "self-defense" rather than "preventive actions," and of an armed attack which "occurs" rather than one which may be "in the making." Now that the question concerns the right of the Soviet Union to act in "self-defense" against U. S. satellites, the Charter is invoked as a complete defense of Soviet actions against these satellites.⁶⁹

The Soviet views on anti-satellite warfare seemed to change after the operational status of reconnaissance satellites became imminent. Thus in January, 1959, Professor Korovin considered reconnaissance to be an "aggressive act," but considered the destruction of another country's satellites, "even if employed for reconnaissance," to be an "act of war."⁷⁰ The shift in attitude toward the legality of anti-satellite warfare occurred gradually from January, 1959, until the fall of 1960. In October of 1960 the completion of this shift was made clear by the Executive Secretary of the Space Law Commission of the U.S.S.R. Academy of Sciences, who stated:

In case of need the Soviet Union will be able to protect its security against any encroachments from outer space just as successfully as it is done with respect to air space. As Nikita S. Krushchev said, "If other espionage methods are used, they will be paralyzed and rebuffed." Such action will be fully justified under the existing rules of international law and the United Nations Charter.⁷¹

F. DAMAGES

The problem of liability for damages in Soviet space law has been discussed largely in terms of liability for damage caused on the ground by space vehicles during the period of ascent or after re-entry, and in terms of the rights of launching nations to vehicles and crew which have entered foreign territory.

⁶⁹ Zhukov, *loc. cit.* note 25 above, p. 57; also 1961 Senate Symposium, p. 1101; see also Korovin, *loc. cit.* note 67 above, p. 50, and Osnitskaya, *loc. cit.* note 13 above, p. 59; 1961 Senate Symposium, p. 1092.

⁷⁰ Korovin, *loc. cit.* note 25 above, p. 56; 1961 Senate Symposium, p. 1066. The distinction was also emphasized by Andrei Gromyko during the Security Council meetings on the U-2; see Nicholas N. Kittrie, Special Counsel, U. S. Senate Committee on the Judiciary, "'Aggressive' Uses of Space Vehicles—the Remedies in International Law" (21 pp. mimeo.), Oct. 3, 1961.

⁷¹ Zhukov, *loc. cit.* note 25 above, p. 57; 1961 Senate Symposium, p. 1101. It is perhaps significant that the Soviet Government has never lodged any official protests against any American space activities. The Space Law Commission of the Soviet Academy of Sciences, however, of which G. P. Zhukov is Executive Secretary, did lodge a semi-official protest against Project Westford. See Commission on Legal Problems of Interplanetary Space, U.S.S.R. Academy of Sciences, "American Diversion in Space," *International Affairs*, December, 1961 (No. 12), p. 118.

Soviet discussions of liability for damages, however, also cover problems of liability for harm caused by contaminating space with nuclear fallout,⁷² "copper whiskers,"⁷³ and spent satellites;⁷⁴ for harm caused by interference with communications and instrumentation (including harm caused by electromagnetic disturbances from nuclear explosions),⁷⁵ by "arbitrary" weather control;⁷⁶ and, particularly within the past year, for any harm caused by violation of the principles of peaceful co-existence governing the demilitarization of outer space.⁷⁷

The Soviets very early emphasized the importance of the problem of damages caused on the ground by space vehicles⁷⁸ and also very early

⁷² The first Soviet condemnation of "contamination of outer space by nuclear fallout" was by Kovalev and Cheprov, *loc. cit.* note 12 above, p. 143.

⁷³ Ambassador Valerian A. Zorin, *loc. cit.* note 35 above, p. 37, condemned Project Westford, not only because of alleged interference with radio-astronomy and other scientific research, but because of "the dangers of such experiments for future trips by astronauts." The next day during the continuance of debates on the Dec. 20, 1961, U.N. Resolution A/RES/1721 (XVI) the Polish delegate, Jacek Machowski, said that Project Westford and "the highly advertised 'spy in the sky' operation . . . belong to the same category." U.N. Doc. A/C. 1/SR. 1211, pp. 66-67.

⁷⁴ N. Varvarov, *Ekonomicheskaya Gazeta*, Nov. 6, 1961, charged the United States with "littering the cosmos with satellites."

⁷⁵ Ositskaya, *loc. cit.* note 60 above, p. 55, indicated that the illegality of nuclear explosions in space was based on "the duty of guaranteeing the security of communications and of acting in a manner harmful to no one."

⁷⁶ Kovalev and Cheprov, *loc. cit.* note 12 above, p. 143.

⁷⁷ Korovin, *loc. cit.* note 45 above, p. 63; *loc. cit.* note 43 above, pp. 61-62. See also G. A. Ositskaya, "Towards a Cosmic Law," *Pravovedeniye, Izvestiya Vysshikh Uchebnykh Zavedeniy*, December, 1961 (No. 4), p. 108, who equates peaceful activities in space with activities which do not cause "damages" (*ushcherb*).

The Soviets also have discussed problems of exobiological damages, which may be defined as harm to or from "non-sentient" life on celestial bodies (part of the problem of sterilization and decontamination), and harm to sentient life in space (part of the problem of "metalaw"). The delay to military programs and the reduction in efficiency of scientific research instruments which would result from a comprehensive program of sterilization prompted the Soviets for many years to regard the problem of sterilization as "at best premature." Korovin, *loc. cit.* note 25 above, p. 1063. Although the Soviets still do not wish to commit themselves on the exact methods used for sterilizing their vehicles and payloads, Soviet scientists (*e.g.*, N. Zhukov *et al.*, *Meditynskiy Rabotnik*, Nov. 9, 1959) and, increasingly, official Soviet policy seem to favor international agreement in this area. Soviet comments on the problem of harm to sentient life in space range from the assertion by Ositskaya in 1959 that the whole subject is "a contrived and fantastic question" (Ositskaya, *loc. cit.* note 13 above, p. 1089) to Sanakoyev's less defensive statement in 1961 that "should this problem be raised by life, we Soviet people will define our attitude toward it" (Sanakoyev, *loc. cit.* note 43 above, p. 68).

⁷⁸ Ari A. Shternfel'd, *Iskustvenniye Sputniki Zemli* [Artificial Satellites of the Earth] 176 (Moscow, 1956), emphasized the danger of nuclear rockets. This section was deleted from the 2nd edition published after the launching of the first Soviet satellite and widely distributed in English translation in the United States. Yevgeniy Korovin, *loc. cit.* note 25 above, p. 54; 1961 Senate Symposium, p. 1064, considered the difference in the degree of damages resulting from accidents in space and on the high seas as the principal factor preventing the drawing of an analogy from the "free" status of the high seas.

conceived an element of reciprocity between the question of liability for damages and the right to the return of vehicles and crew.⁷⁹

Although the element of *quid pro quo* is obvious in almost all Soviet statements on damages, it is not clear whether the Soviets consider that the right of a nation—specifically the U.S.S.R.—to the return or recovery of its spacecraft should be made conditional upon the acceptance by that nation of liability for injury or damage caused by such spacecraft, or whether, to the contrary, the acceptance of liability should be made contingent upon recognition by other countries of a duty to return the vehicle. The latter view, of course, would put the Soviet Union in a stronger bargaining position. The principal indications that the Soviets support the independent recognition of liability for damages without making this recognition contingent upon any right of return are the Soviet discussions of the problem within the framework of the doctrine of state responsibility in international law.⁸⁰ It is possible, however, that this emphasis on liability for violations of international law might itself be designed to help combat such “violations” as “cosmic espionage.” This latter interpretation is strengthened by the statement by Professor Korovin at the October, 1959, Moscow Space Policy Symposium indicating that the very existence of liability for damages results from the ownership of the vehicles.⁸¹ In other writings on jurisdiction and conflict of laws the Soviets had indicated that the continued ownership of space vehicles presupposes a right to the return of the vehicles and their occupants and a corresponding duty to return on the part of the impact state.⁸² Therefore it might follow that the Soviets recognize liability for any damages their space ships might cause, *contingent*, however, upon the recognition by other states of a Soviet right to the return of any and all Soviet space equipment and crew which enter the territory of these states in connection with the incident causing the damage or at any other time.

The extent of the liability of the launching state has never been discussed in Soviet space legal writings, although they do report the writings of others on the subject, particularly the July, 1959, report of the U.N. Ad Hoc Space Committee.⁸³ Analogy with Soviet domestic law, however, may throw some light on Soviet thinking on this problem, particularly concerning the type of conduct which may give rise to liability and concerning the apportionment of financial responsibilities, which are two of the more important subsidiary problems.

The problem of the type of conduct necessary to give rise to liability is usually discussed in terms of the degree of fault required. The Soviets

⁷⁹ Galina [Osnitskaya], *loc. cit.* note 12 above, p. 57; 1961 Senate Symposium, p. 1057; Osnitskaya, *loc. cit.* note 13 above, p. 62; 1961 Senate Symposium, p. 1094.

⁸⁰ Korovin, *loc. cit.* note 6 above, p. 56; 1961 Senate Symposium, p. 1067; Osnitskaya, *loc. cit.* note 60 above, p. 57.

⁸¹ Korovin, *loc. cit.* note 6 above, p. 90; 1961 Senate Symposium, pp. 1074-1075.

⁸² Osnitskaya, *loc. cit.* note 13 above, p. 62; 1961 Senate Symposium, p. 1094; Meshara, *loc. cit.* note 16 above, p. 432.

⁸³ G. P. Zhukov, “The United Nations and Problems of the Peaceful Use of Outer Space,” 1960 Soviet Yearbook of International Law 177-185 (Moscow, 1961).

make a distinction between ordinary tort liability and liability for extra-hazardous activity, and, within the latter category, between the usual extra-hazardous activities and aviation. Thus, Article 90 of the 1962 U.S.S.R. Civil Code provides for liability for injury resulting from extra-hazardous activities unless caused by *force majeure* (similar to the common-law concept of "act of God") or by the intent of the injured party. Article 101 of the 1962 U.S.S.R. Air Code, on the other hand, provides for liability regardless of *force majeure*, although in cases of *force majeure* there is no liability where there is intent or gross negligence on the part of the injured.⁸⁴

Since problems of intent or contributory gross negligence of the injured in the space context would probably play a rôle only, for example, in cases of collisions in space, failure to evacuate impact areas on the moon, and anti-satellite warfare, it may be concluded that for present purposes an analogy with Soviet domestic law would support absolute liability for damage caused by Soviet space vehicles. Furthermore, one might expect that the Soviets' opposition to inspection would influence them to accept absolute liability for any harm caused by their space vehicles, in order to avoid any investigations concerning the existence or absence of due care or negligence on their part.

Another major factor the Soviets may consider in evaluating the effect of the type of conduct on liability would be the civilian or "military" character of the vehicle, specifically, whether it is pursuing "peaceful purposes" or "aggression." During the past year, the Soviets seem to have made just this distinction. Prior to the May, 1961, Moscow Space Policy Symposium all Soviet space legal writing on the subject of damages was exclusively in terms of accidental landings. At this Symposium, Professor Korovin seemed to indicate that the two questions most susceptible to international solution at the present time might be the problem of state responsibility for damages, and the rights and duties of states concerning the return of vehicles and persons which have entered foreign territory. He stated that the discussion of the return of vehicles should cover those which had entered as a result of "forced landing due to an accident or *other causes*." [Emphasis supplied.]

The meaning of both the terms "accident" and "other causes" may be indicated by Professor Korovin's contention in the preceding paragraph that the problem of state responsibility for damages is only part of the question of state responsibility for violating foreign airspace, and by his statement immediately after the discussion of damages that:

Irrespective of separate legal questions, big and small, related to space law, the chief and main question today is the development of

⁸⁴ A detailed analysis of the pre-1962 code provisions may be found in Vladimir Gsovski and Armins Ruis, "Liability Under Soviet Law for Damages or Personal Injury Caused by Space Vehicles," Studies and Reports, European Law Division, Library of Congress, May 8, 1959 (28 pp.). The principal pertinent changes in the 1962 codes are the elimination of gross negligence as a defense in Art. 90 of the U.S.S.R. Civil Code and the addition of gross negligence as a defense for cases of *force majeure* only in Art. 101 of the U.S.S.R. Air Code.

legal rules designed to ensure the utilization of space exclusively for peaceful purposes, which in turn is inseparably bound up with general and complete disarmament.⁸⁵

The problem of liability for damages in Soviet space law discussions has also included problems of international organization, and in particular, the problem of establishing the principles of parity and agreed solutions within the U.N. Space Committee and the problem of relating these principles to the selection of mechanisms for resolving disputes, for example, over the existence and amount of liability.⁸⁶ The Soviets seem increasingly to emphasize that agreement on methods of dispute-settlement, and perhaps on the creation of special dispute-settling machinery, must accompany any effective agreements on international space co-operation.⁸⁷

The significance of this emphasis on dispute-settlement will depend on the extent to which the problem of damages has been integrated into over-all Communist global strategy, just as has every other problem and area of Soviet space law.

G. PEACEFUL CO-EXISTENCE AND INTERNATIONAL SPACE CO-OPERATION

The Soviet approach to the legal problems of international space co-operation may be summarized in the single phrase: "peaceful co-existence." The importance of "peaceful co-existence" for the development of Soviet space law has been pointed out frequently by Soviet jurists,⁸⁸ and most

⁸⁵ Korovin, *loc. cit.* note 43 above, pp. 61-62. Although it is not clear what legal mechanism the Soviets might use to invoke this "peaceful purposes" doctrine, one indication may be found in the Soviet interpretation of Sec. B, Par. 1, of the U.N. Resolution of Dec. 20, 1961. This paragraph "calls upon States launching objects into orbit or beyond to furnish information promptly to the Committee on the Peaceful Uses of Outer Space through the Secretary-General for purposes of registration of launchings." In a somewhat forced interpretation of this paragraph, the Soviets contend that states must also register objects which did not orbit or are no longer in orbit, and contend that information must be furnished prior to the launching rather than "promptly" thereafter. The Soviets also have particular views on the precise type of information which must be submitted. The significance of this or any other Soviet interpretation of Sec. B, Par. 1, is indicated by the statement of the Soviet representative to the meetings of the U.N. Space Committee in March, 1962, that "any spaceships which might be forced to land or might have to effect forced landings" should be returned to the country of launching, "provided suitable information has been submitted to the United Nations concerning the launching." Verbatim Record, U.N. Committee on the Peaceful Uses of Outer Space, March 20, 1962 (U.N. Doc. A/AC.105/P.V.3), pp. 26-27.

⁸⁶ P. S. Romashkin, "Technical Progress and Soviet Law," *Sovetskoye Gosudarstvo i Pravo*, January, 1960 (No. 1), p. 23, discussing the rôle of the U.N. Committee on the Peaceful Uses of Outer Space and the rôle of the International Court of Justice.

⁸⁷ Some general policy guides are given, for example, in G. B. Sharmazanashvili, "Peaceful Resolution of International Disputes—One of the Most Important Principles of International Law," *Sovetskoye Gosudarstvo i Pravo*, January, 1962 (No. 1), pp. 71-79.

⁸⁸ See, for example, the comment by V. M. Koretsky at the meeting of the Air and Space Law Committee of the International Law Association on Aug. 10, 1960, that in outer space, as in other areas, states are bound by contemporary international law

recently by the Soviet representative to the United Nations Committee on the Peaceful Uses of Outer Space. During the meetings of this Committee in March, 1962, Dr. Platon D. Morozov indicated that the U.N. General Assembly's unanimous adoption of the principle that "international law and the Charter are extended to encompass outer space operations . . . signif[ies] in our view, that the activities of the States in outer space research should be conducted in keeping with the recognized principles of peaceful co-existence, sovereignty, equality and non-interference in domestic affairs."⁸⁹

The significance of this statement derives from the fact that during the past five years the concept of "peaceful co-existence" has evolved into the most radical innovation in Soviet international legal theory since the Russian Revolution in 1917.

Dr. Morozov and his colleagues from Eastern Europe presented the concept of "peaceful co-existence" to the non-Communist representatives in the primitive form developed during the period of Lenin and Stalin and later embodied in the *Pancha Shila* or "five principles" in 1954. During this period "peaceful co-existence" was primarily a defensive doctrine which prescribed the co-existence of hostile Powers in an unstable period of peace.⁹⁰

and thus are bound by the principles of peaceful co-existence, in particular by the requirement of equality [*i.e.* unanimity]. International Law Association, Report of the 49th Conference, Hamburg, 1960, p. 256.

⁸⁹ Verbatim Record of the Third Meeting of the Committee on the Peaceful Uses of Outer Space, March 20, 1962 (U.N. Doc. A/AC.105/P.V.3), pp. 23-25. Dr. Morozov added that: "These important principles and provisions should be studied and should become a basis for the work of the juridical sub-committee."

⁹⁰ This primitive phase of peaceful co-existence is often traced from Lenin's statement on Nov. 21, 1920: "We found ourselves in such a position that, not securing international victory, a single and final victory for us, we secured for ourselves conditions in which we could exist together with capitalist powers." Sochineniye, Vol. 31, p. 385, cited in Trukhanovsky, *Istoriya Mezhdunarodnykh Otnosheniy* [History of International Relations], Vol. I, p. 217 (Moscow, 1961).

Western scholars who have written in detail on the meaning of this primitive type of "peaceful co-existence," which existed from 1920 to about 1958, include: Wladyslaw W. Kulski, *Peaceful Coexistence: An Analysis of Soviet Foreign Policy* (Regnery, 1959, 662 pp.), with bibliography; Elliot R. Goodman, *The Soviet Design for a World State* (Columbia University Press, 1960), with a chapter on "The Meaning of Peaceful Coexistence," pp. 164-189; Milton Kovner, *The Challenge of Coexistence, A Study of Soviet Economic Diplomacy* (Public Affairs Press, 1961), with a chapter on "The Meaning of Coexistence," pp. 4-20; and R. N. Carew Hunt, *A Guide to Communist Jargon* 26-33 (Macmillan, 1957). One of the most useful articles is John N. Hazard's "Legal Research on 'Peaceful Co-existence,'" 51 *A.J.I.L.* 63-71 (1957), which develops the early ideological conflict between the terms "peaceful co-existence" and "peaceful co-operation." Of the many separate bibliographies on "peaceful co-existence," perhaps the two most useful are Durdenevsky's standard bibliography on Soviet international law, *Sovetskaya Literatura po Mezhdunarodnomu Pravu, Bibliografiya, 1917-1957*, under the headings "Battle for Peace," for pre-1950 citations, and "Peaceful Co-existence," for more recent materials; and the selective bibliography compiled by the Committee on Juridical Aspects of Peaceful Coexistence for the International Law Association, Report of the 49th Conference, Hamburg, 1960, pp. 368-370.

During the period of ideological ferment in 1956-1957, which resulted in the ideological fragmentation of the Communist bloc especially in the field of law,⁹¹ and in the announcement of the end of the defensive period of the "capitalist encirclement,"⁹² the concept of "peaceful co-existence" began to acquire a much broader and more dynamic meaning. The ideology of "peaceful co-existence" increased in complexity and preciseness particularly after 1959, until in the Communist and Workers Parties' Manifesto in 1960 and in The New Program of the Communist Party in 1961 it became the new ideology of world revolution.⁹³

One of the requirements of the new rôle of "peaceful co-existence" was its elevation to an all-encompassing doctrine which contained not only the "five principles" but all of the other principles of international law as component and reconstituted parts. Last year, in an address to the advisory council of the Moscow University Law School, one of the world's leading Communist jurists, Professor Yevgeniy Korovin, who is also

⁹¹ See Robert D. Crane, "Sino-Soviet Law—A Conceptual Analysis" (Booklet Series, World Rule of Law Center, Duke University, 1962), an address to a joint meeting of the East Asian Institute and the Parker School of Foreign and Comparative Law at Columbia University on Jan. 10, 1962.

⁹² The final reversal of Soviet policy on neutralism and the rejection of the "inevitable clash" at the XXth Party Congress in 1956 prepared the way for the final abolition of the period of "capitalist encirclement" in Premier Khrushchev's speech at the XXIst Party Congress on Jan. 27, 1959. *Vneocherednoy XXI S'yezd Kommunisticheskoy Partii Sovetskogo Soyuza, Stenograficheskiy Otchet*, Vol. I, p. 107 (Moscow, 1959); translated in Leo Gruliov, *Current Soviet Policies*, III, *The Documentary Record of the Extraordinary 21st Communist Party Congress*, p. 68 (Columbia University Press, 1960).

⁹³ The most authoritative definition of this new dogma of "peaceful co-existence" was given in October, 1961, at the XXIIst Party Congress, which also proclaimed the related principle that the class nature of law in the Soviet Union no longer exists. This definition consists of only two paragraphs, the first defining the form of "peaceful co-existence" and the second defining its content:

"Peaceful co-existence of the Socialist and capitalist countries is an objective necessity for the development of human society. . . . Peaceful co-existence implies renunciation of war as a means of settling international disputes, and their solution by negotiation; equality, mutual understanding and trust between countries; consideration of mutual interests; non-interference in internal affairs; recognition of the right of every people to solve all the problems of their country by themselves; strict respect for the sovereignty and territorial integrity of all countries; promotion of economic and cultural co-operation on the basis of complete equality and mutual benefit.

"Peaceful co-existence serves as a basis for the peaceful competition between socialism and capitalism on an international scale and constitutes a specific form of class struggle [the highest form] between them. As they consistently pursue the policy of peaceful co-existence, the Socialist countries are steadily strengthening the position of the world Socialist system in its competition with capitalism. Peaceful co-existence affords more favorable opportunities for the struggle of the working class in the capitalist countries and facilitates the struggle of the peoples of the colonial and dependent countries for their liberation." *The New Program of the Communist Party* (first published in Russian in July, 1961), in Arthur P. Mendel, *Essential Works of Marxism* 418 (Bantam Books, 1961). For general comment on the revolutionary nature of the new Soviet doctrines, see Rodolfo Mosca, "The New Ways of Communism," 6 *Orbis* 65-75 (1962).

Chairman of the Scientific Research Commission on Space Law and Corresponding Member of the Soviet Academy of Sciences, proposed that the entire program and method of teaching and studying international law in the Soviet Union be reconstituted and integrated into the ideological system of "peaceful co-existence." Professor Korovin announced that:

Proceeding on the basis of the indisputable fact that the Soviet Union and the other socialist countries hold the initiative in the international arena during the present stage of history, we see what extremely important concrete principles the socialist countries, relying on the aid of the friendly and neutral countries, have introduced into operative international law. In this regard, I have in mind, of course, not merely some hopes for the future (*de lege ferenda*), but the principles and norms which have already received official international recognition (*de lege lata*). First of all is the principle of peaceful co-existence of states with diverse social-economic systems, insofar as this is defined to consist in the battle and competition of the two systems—socialism and capitalism. . . .

Without exaggeration one can designate all contemporary generally recognized international law, as it exists today, as a Code of Peaceful Co-existence. From this it follows that everything which is incompatible with the principle of peaceful co-existence does not exist juridically in international relations. Conversely, all the old and new principles which contribute to the development and consolidation of peaceful co-existence can with complete justification lay claim to legal validity.⁹⁴

An even more important requirement of the new rôle of "peaceful co-existence" was that it function solely to serve the higher principle of proletarian internationalism, *i.e.*, co-ordinated world revolution. The relationship between these two principles was summarized in a recent book⁹⁵ by Professor Korovin:

⁹⁴ The theoretical justification for this dynamic approach was given by Prof. Korovin as follows: "Premier Khrushchev, in his address at the Conference of Communist and Workers Parties [in November, 1960], stated that as representatives of the most advanced ideology we should not occupy a defensive position. Premier Khrushchev emphasized that the Soviet Union and the socialist countries now hold the initiative in the international arena, whereas the imperialist states and their governments are on the "blind defensive." One asks, however, to what extent our scholarly work shows this initiative and evidences an offensive attack. . . . We usually merely explain the position of our enemy, and then begin to correct and criticize it. Would it not be more correct to proceed from our own concepts, from the democratic principles of international law, and then, having proclaimed their binding character and universality, to show that any theories hostile to them constitute a violation of the generally recognized and therefore generally binding principles of law, a violation of the peaceful co-operation [properly interpreted] of peoples and states." Yevgeniy Korovin, "The Declaration of the Conference of Representatives of Communist and Workers Parties and the Tasks of the Science of International Law," *Vestnik Moskovskogo Universiteta*, August, 1961 (No. 3), text quoted from p. 66, footnote quoted from pp. 64 and 71-72.

For a rephrasing of Korovin's ideas in terms somewhat more palatable to Western statesmen, see the statement of the Director of the Legal Office of the Soviet Foreign Ministry, G. I. Tunkin, in *Verbatim Record of the 717th Meeting of the Sixth Committee, United Nations*, Nov. 21, 1961 (Provisional A/C.6/SR.717, p. 13, Official, p. 139).

⁹⁵ Yevgeniy Korovin, "Proletarian Internationalism in International Relations,"

The principles of proletarian internationalism . . . determine the relations of socialist states among themselves,⁹⁶ the relations of these states with states which have been or are being liberated from colonialism, and also their policies toward capitalist countries.⁹⁷

Ch. II, in *Osnovnyye Problemy Sovremennykh Mezhdunarodnykh Otnosheniy* [Basic Problems of Contemporary International Relations] 60 (Moscow, 1959). In a review article, Dr. M. I. Lazarev, in *Pravovedeniye*, No. 1, 1961, p. 174, welcomes Prof. Korovin's book as the "first scientific periodization of the development of the basic principles of proletarian internationalism." One might add that this recognition of the evolution of Soviet international legal theory has been lacking not only in Soviet literature but even more so in analyses by Western scholars.

The most recent authoritative announcement on the subsidiary function of "peaceful co-existence" stated: "Contrary to the assertions of the dogmatists, the principle of peaceful co-existence presents the most subtle and most effective expression of the party principle of proletarian internationalism. . . . Peaceful co-existence of states with different regimes is not the abandonment of the class struggle in the world arena, but the selection of such deployment areas for this struggle as are best suited for the interests of all mankind." I. Inozemtsev, "Peaceful Coexistence—The Most Important Present-Day Problem," *Pravda*, Moscow, Jan. 17, 1962, p. 5.

The fundamental subsidiarity of "peaceful co-existence" was indicated by the recent statement of Sh. Sanakoyev that, although the new concept of peaceful co-existence derives from the "permanent" shift of the correlation of forces in favor of Communism, nevertheless the policy of peaceful co-existence can continue only "to the extent that the forces of Socialism grow stronger." Sh. Sanakoyev, "The Socialist Community and Mankind's Progress," *International Affairs*, March, 1962 (No. 3), p. 12.

⁹⁶ Proletarian internationalism as it operates among Communist countries was elevated during the period of ideological ferment in 1956–1957 to the level of a formal legal doctrine, known as "socialist internationalism." Western legal scholars conclude from analysis of pertinent documents that the Soviets sponsored the doctrine of socialist internationalism to give formal equality to the other Communist states in order to avoid the appearance of Russian hegemony, and yet at the same time to secure for the U.S.S.R. the legal basis for controlling and, if necessary, intervening in other Communist countries to support their proletariats in accordance with the principles of proletarian internationalism. The Yugoslav, and, for a while, the Chinese and Polish Communists, in order to prevent what the Communist Chinese termed the exercise of "great Power chauvinism," insisted that the principles of "peaceful co-existence," in particular, such principles as non-intervention and non-aggression, apply within the Communist bloc as well as between it and the "capitalist" camp. See John N. Hazard, "Soviet Socialism as a Public Order System," 1959 *Proceedings*, American Society of Int. Law 30–41; Dietrich Loeber, "Die Rechtsstruktur des Ostblocks," 6 *Osteuropa Recht* 196–211 (1960), also 27 *Social Research* 188–202 (1960); Curt Gasteyger, "Neue Entwicklungen im sowjetischen Völkerrecht," *Jahrbuch für Ostrecht*, May, 1961 (No. 1), pp. 39–50; also "Theorie und Praxis im sowjetischen Völkerrecht," 16 *Europa Archiv* 427–430 (1961); Zakharova, *loc. cit.* note 64 above.

⁹⁷ The functions of proletarian internationalism in determining the legal relations between "socialist" and "capitalist" states are:

(1) Maintenance and accentuation of bipolarity in the world, which is the most crucial of all elements in the dynamic policy of revolution by "peaceful co-existence." This is facilitated by maintaining a dichotomy—both in theory and as much as possible in practice—between the legal principles of socialist internationalism designed to govern the Communist bloc and those of "peaceful co-existence" designed to govern relations of the bloc with its class enemies. The overriding importance of this function of proletarian internationalism may be illustrated by considering the profound implications of the following heretical statement in The Programme of the League of Yugoslav Communists, Beograd, "Yugoslavia," 1958, p. 83: "Active co-existence can be implemented only in relations between states and peoples, not in re-

The subjection of "peaceful co-existence" to proletarian internationalism is accomplished by means of the interpretation of the component elements of "peaceful co-existence" by the Communist Party of the Soviet Union. This is evident from the doctrine that:

The socialist countries are states which are led and directed by the Communist and workers' parties. It naturally and necessarily follows

relationships between blocs. There can be no co-existence between blocs, for that would not be co-existence at all, but merely a temporary truce concealing the danger of new conflicts."

(2) Consolidation of the Communist bloc in order to present the united front against capitalism necessary to achieve "both the internal and external tasks of Communism." Aleksandrov, "State and Communism," *Vestnik Moskovskogo Universiteta*, November, 1961 (No. 4), p. 10. The unity of the Communist bloc is to be achieved primarily through the formal, legal manifestation of proletarian internationalism in the following doctrines of socialist internationalism: "negotiated agreement," which consists essentially in "periodic consultation and the exchange of opinions among the leaders of the parties and states on the most important political and economic questions," Zakharova, *loc. cit.* note 64 above, p. 88; and the legal principles of reciprocal aid, fraternal co-operation, and mutual benefit, which have established positive duties on the part of [otherwise] sovereign states within the Communist bloc to support one another in the interests of the entire bloc, as these interests are determined by the party leaders in the most advanced socialist state. Zakharova writes: "co-operation of socialist states . . . has as one of its principal purposes . . . the securing of peaceful co-existence. To achieve this worthy goal it is necessary to continue the battle to strengthen fraternal co-operation of the socialist countries against any attempts whatever to weaken their monolithic unity [*monolitnoye yedinstvo*]." Zakharova, *ibid.* 90.

(3) Guidance of revolutionary workers' parties in non-Communist countries in their efforts to support the right of the "people"—in both colonial and non-colonial areas—to national sovereignty and self-determination. The Soviet delegate to a recent conference on "peaceful co-existence" explains this right as follows: "National sovereignty is a condition or state immanent in any nation. . . . It may be secured only if national sovereignty is added and guarded by state sovereignty. That is to say, state sovereignty of a national state is to secure the national sovereignty of its people. Thus the right to self-determination stresses the sovereign right of each nation to secure its national sovereignty. The recognition of the sovereignty of a nation implies the recognition of its sovereign right to be an independent state." R. Touzmoukhamedov, Statement to the Committee on Juridical Aspects of Peaceful Coexistence of the International Law Association, Report of the 49th Conference, Hamburg, 1960, pp. 335-386. The relationship of this distinction to proletarian internationalism within the Communist bloc is, of course, a matter of dispute.

(4) Development of socialist internationalism as a new socialist international law to serve as a stage in the progressive growth of general international law conducive to the victory of world Communism. See Korovin, "International Law Today," *International Affairs*, July, 1961 (No. 7), p. 20. The first discussion of "socialist international law" in this intra-bloc sense, rather than in the traditional sense of a socialist or "progressive-democratic" element in a pluralistic international law, was in M. Rapaport's article, "The Essence of Present International Law," *Sovetskoye Gosudarstvo i Pravo*, November/December, 1940 (Nos. 5/6), p. 145, at a time when the only two "socialist" countries were the U.S.S.R. and the Mongolian Peoples' Republic. Although this view was supported in several articles—apparently not consulted by Western scholars—during the Stalinist era, it was not officially accepted until the 1957 Declaration of Representatives of the Communist and Workers' Parties of Socialist Countries (the 1957 Moscow summit conference) and, to the present writer's knowledge, was not designated as a "stage" in the development of general international law until after the next Communist summit conference in November, 1960.

therefore that the inspirers and organizers of the new stage in the progressive movement of mankind, and particularly in international relations and in international law, are the Communist parties—the advance guard of the working class. These Communist and workers' parties in the person of their representatives (81 parties were represented at the Moscow Conference in November, 1960) unanimously declared that the vanguard of the world Communist movement was and remains the Communist Party of the Soviet Union. Furthermore, they noted the principle of the great significance . . . of the Communist Party of the Soviet Union in the progressive development of democratic principles of international law.⁹⁸

and from the statement that:

Peaceful co-existence is inconceivable without international legality [as the Communists conceive it], for peaceful co-existence is international law in action. . . . An essential task of the science of international law is the struggle against any deviations whatsoever from the Leninist doctrine of peaceful co-existence, the struggle against manifestations of bourgeois ideology [including traditional international law], revisionism [*i.e.*, Titoism], dogmatism and sectarianism [*i.e.*, Chinese Communism], as well as against the harmful consequences of the cult of the individual [*i.e.*, Stalinism].⁹⁹

The third basic requirement of the legal doctrine of peaceful co-existence, in addition to the requirements that it be all-encompassing in nature and that it be subject to the Communist Party of the Soviet Union, is the requirement that it be charismatic, that it operate not only in the political order but in what the Communists term the "spiritual" order of mankind. To regard "peaceful co-existence" or any other product of Communist ideology as a political or as a purely strategic position would be to misunderstand it completely.

According to the doctrine of historical materialism, law is part of the ideological superstructure, the passive reflection of reality in the minds of men. At the same time, Communist doctrine recognizes the positive function of the superstructure to control the development of reality. In the field of international law this control is exercised by developing Communist law as an integral part of the social and political consciousness

⁹⁸ Korovin, *loc. cit.* note 94 above, pp. 70-71. See also the very frank article by Gerhard Herder, *et al.*, "The Moscow Declaration of Communist and Workers Parties of November 1960 and Some Questions of International Law," Part I, *Staat und Recht*, May, 1961 (No. 5), p. 845.

⁹⁹ Yevgeniy Korovin, F. I. Kozhevnikov, and G. P. Zadorozhnyy, "Peaceful Co-existence and International Law," *Izvestiya*, April 18, 1962, p. 5. The "cult of the individual" represents at least two basic errors in international law: (1) it denies the sovereignty of the people as distinct from the sovereignty of the state, and thus undermines the legality of revolution in non-Communist countries, and the legality of Soviet aid to the suppression of revolution in accordance with the doctrine of proletarian internationalism in Communist countries; and (2) it denies the rôle of the people in forming international law, thus undermining the effectivity of domestic legislation, particularly within Communist countries, as a source of international law during the present period of rapid and radical change, when treaties and custom no longer suffice to effectuate international law's progressive transformation.

of mankind and by creating thereby a new reality in the minds of men.¹⁰⁰ The Communists are trying to create this new reality not only to "legalize" and effectuate their policies of world revolution with a minimum amount of coercion, and to avoid a military response to their political and economic strategies, but to reform the basic nature of man in pursuit of the Communist Utopia.

The highly ideologically charged nature of "peaceful co-existence" has a pervading influence throughout all aspects of international space co-operation. Perhaps the most basic influence is on the very concept of co-operation as such. The Soviets emphatically emphasize their desire to co-operate and there is no reason to doubt the existence of this desire.¹⁰¹ The only question is "how" and "how much." Although the proposals of Premier Khrushchev and President Kennedy early in 1962 both called for co-operation in essentially the same fields of activity, the Soviets necessarily conceive of this co-operation in terms different from those of President Kennedy. The Soviet desire to co-operate in space activities is no greater than the Soviet desire to "prolong the existing state of opposing social and economic systems," and stems therefore not from any consideration of the moral value or intrinsic worth of such co-operation, but

¹⁰⁰ Premier Khrushchev, in opening the All-Union Conference on Questions of Ideological Work, called by the Central Committee to discuss the results of the XXIIInd Party Congress, stated: "The Soviet Union has now entered a new phase of development, and this puts an imprint of profound change on all spheres of our life, including the ideological sphere. . . . Ideological activity deals with the consciousness of man and with his psychology; it acts upon his thoughts and emotions. . . . It is necessary, Comrades, to emphasize particularly that the peaceful co-existence of states with different social systems has never signified and will never signify the peaceful co-existence of the different ideologies, socialist and capitalist. In the field of ideology, a class struggle, a struggle for people's minds and hearts has been and will be waged." *Pravda*, Moscow, Dec. 26, 1961.

Premier Khrushchev was even more explicit in his Jan. 6, 1961, report on the November, 1960, Communist summit conference by stating: "The time is not far away when Marxism-Leninism will *possess the minds* of a majority of the world's population" [Emphasis added]. N. K. Khrushchev, "For New Victories of the World Communist Movement," *Kommunist*, January, 1961 (No. 1); also in *Annual Report of the American Bar Association*, Vol. 86 (1961), Supplemental Report of the Special Committee on Communist Tactics, Strategy and Objectives, p. 621. See also notes 2 and 3 above. One might consider this ideological offensive and its embodiment in the campaign of "peaceful co-existence" as a type of global brain-washing.

¹⁰¹ The Soviet delegate to the United Nations stated more than two years ago that: "In the century of space and nuclear energy, the need for international cooperation is clear for all to see, and requires no proof. Indeed, it is impossible to conceive of any study of outer space in the absence of an exchange of the data collected by the scientific institutions of the whole world." 823rd Plenary Meeting of the U.N. General Assembly, Oct. 6, 1959 (U.N. Doc. A/P.V. 823, p. 404). The Soviets support their statements on space co-operation with enthusiastic statements, such as the following by General Georgii I. Pokrovsky in June, 1961: "If the benefit mankind could gain from improved weather forecasts were to be measured in terms of money, it would run to an annual saving of thousands of millions of rubles. This sum is so large that it could more than compensate for all the money spent on space research." Pokrovsky, *loc. cit.* note 48 above, p. 62.

rather from "considerations of objective reality." The objective reality of international space co-operation, whether in the field of disarmament, the renunciation of war propaganda, international administration, technical assistance to developing countries, or any other space-related activity, goes beyond crude factors of military and economic necessity and includes sometimes equally important ideological problems, such as the current machinations in interpreting proletarian internationalism. The reasoning behind the Soviet approach to co-operation may be summed up in the following statement in February, 1962, in the leading Soviet law journal:

Contemporary international law, which regulates the relations both of socialist and capitalist states, does not require the establishment among such states of relations of broad and full co-operation and fraternal mutual assistance, because by virtue of the very nature of capitalist states such relations are impossible.¹⁰²

The influence of the principle of "peaceful co-existence" is equally pervasive on the methodology of reaching agreements between "socialist" and "capitalist" states, and determines, for example, the Soviet principles of "equality" in the U.N. Space Committee,¹⁰³ of "international regional agreement" in space telecommunications,¹⁰⁴ and of Soviet "leadership" in

¹⁰² Zakharova, *loc. cit.* note 64 above, p. 83. See also the statement that in the capitalist countries "the creativity of the leading scholars and scientists are cynically appropriated by capitalist monopolies. In these conditions one cannot speak of giving disinterestedly to another state the results of this or that scientific research." A. I. Poltorak, "Legal Forms of Cultural and Scientific Co-operation of Socialist Countries," *Sovetskoye Gosudarstvo i Pravo*, October, 1961 (No. 10), p. 162.

The Executive Editor of *Časopis pro Mezinárodní Právo* states that real progress in astronautics can be achieved only after the elimination of capitalism and the establishment of world Communism. Vladimír Kopal, "Penetration into the Universe and International Law," *Mezinárodní Politika*, April, 1960 (No. 4), pp. 242-243.

¹⁰³ In December, 1961, the Soviets gave up their demand for veto power in the U.N. Space Committee in return for U. S. withdrawal of a proposal that certain jurisdiction of the Committee be transferred to the U.N. Secretariat. The representatives unanimously agreed that "it will be the aim of all members of the Committee and its sub-Committees to conduct the Committee's work in such a way that the Committee will be able to reach agreement in its work *without need for voting* (U.N. Doc. A/AC.105/OR.2, p. 5 [emphasis supplied]), but did not exclude the operation of Rule 126 which provides for majority vote in all U.N. committees. The representatives from Communist countries, however, subsequently have stated that the principle allowing a right of veto has been accepted, usually expressed by the diplomatic terms "unanimity," "agreed decisions," "consensus of opinion," "without voting," or "on the basis of equality." (The Soviet delegate also indicated opposition to the December agreement that the specialized agencies dealing with space matters report directly, not to the U.N. Space Committee, but to the Economic and Social Council and to the General Assembly; see comment in *New York Times*, March 21, 1962, p. 8, col. 5).

¹⁰⁴ The Soviet representative indicated that the principles governing the utilization of ground and space telecommunications systems, and seemingly also principles governing interconnection, standardization, spectrum and systems management, and program monitoring, should be determined "on the basis of international regional agreements." Verbatim Record of the Third Meeting of the Committee on the Peaceful Uses of Outer Space, March 20, 1962 (U.N. Doc. A/AC.105/P.V.3), pp. 18-20. Some introductory background information may be found in Andrew G. Haley, "Space Com-

determining general policies of space co-operation.¹⁰⁵ In view of the Soviet emphasis on the economic impact of space research on the underdeveloped countries, both directly and by means of by-products or "spin-off" from this research, the legal problems of space activities have expanded to include the whole area of international investment and trade, but with the additional complication that international space co-operation would necessarily involve East-West agreement on "investment policy." In view of such statements as the one in the Moscow *Pravda* in April, 1962, that American technical aid and "fraternity with Africa is unparalleled in scope and hypocrisy,"¹⁰⁶ one might expect that the application of the policy of "peaceful co-existence" to the space legal problems of technical assistance and investment might cause the Soviets to be even less co-operative than they are in joint intra-bloc overseas investment, which ostensibly is conducted in accordance with the higher principle of "proletarian internationalism."

Perhaps the most subtle influence of "peaceful co-existence" will occur only after agreements are already reached. The first problem, of course, will be the interpretation of the agreements. The Soviets will not understand the formulas in the agreements in an abstract and conventional meaning, but rather within the context of the political nature of the law which the Communists are trying to develop. Complications arise, for example, from the basic Soviet international legal doctrine that the law binding the treaty partners must be a product of their wills and therefore cannot derive from an independent international law of treaty interpretation; from the Soviet doctrine that the laws of treaty interpretation are customary international law and therefore must represent the wills of the socialist countries in order to be binding (the Soviets have never consented to these laws); and from the Soviet doctrine that an absolute agreement of wills between socialism and capitalism is impossible anyway.¹⁰⁷ These

munications and Cooperation with Iron Curtain Countries," *Signal*, November, 1961 (No. 11) and December, 1961 (No. 12).

¹⁰⁵ At the Moscow Space Policy Symposium in May, 1961, the future weapons specialist, General Georgii I. Pokrovsky, stated: "Soviet scientists, engineers and workers who have created the most advanced rocketry in the world have secured for their country the leading place in space studies. Hence it is natural and inevitable that the Soviet Union should rightly play the leading part in the international efforts in space research. This rôle in no way infringes the interests or prestige of other states. On the contrary, this should be one of the forms of disinterested scientific and technical mutual assistance in consolidating peace and international co-operation." Pokrovsky, *loc. cit.* note 43 above, p. 62. This policy of "leadership" will undoubtedly vary according to the domestic and intra-bloc needs of the Soviet Union, and will probably not be advanced in direct dealings with non-Communist scientists. Particularly enlightening, however, in this regard would be a comparison of Soviet space-administrative proposals with the administrative structure, operation, and policy guidance of the Joint Nuclear Research Institute at Dubna, near Moscow.

¹⁰⁶ K. Brutents, "The Shadow of the Dollar over Africa," *Pravda*, Moscow, April 6, 1962, p. 5.

¹⁰⁷ The best recent discussion by the Soviets on the sources of international law is the book by Dr. N. M. Minasyan, *Istochniki Sovremennykh Mezhdunarodnogo Prava* [Sources of Contemporary International Law] (151 pp., Rostov-na-Donu, 1960). Soviet

and other doctrines, in turn, provide the theoretical basis for the doctrine of the "new" international law that the validity and interpretation of every treaty depends on whether or not it strengthens "peaceful co-existence."¹⁰⁸

Of even greater importance for the interpretation and application of the agreement is the influence of "peaceful co-existence" on the sources of international law which bind in addition to the particular treaty provisions. Most significant in this regard is the recent Soviet emphasis on the creation of "auxiliary" sources of international law. This revolution in Soviet international legal theory—which at times in the past has rejected the significance of auxiliary sources of international law altogether

doctrine provides furthermore that the drafters of a treaty do not have independent wills, but represent states, and that their discussions and expression of will do not determine the wills of the states; nor does the ratifying organ (*e.g.*, Congress) express this will. The will of the state is always the will of the ruling class (or, in the case of the Soviet Union since October, 1961, the "will of all the people"). For an analysis of traditional Soviet treaty interpretation, see Hans Werner Bracht, "Die Auslegung internationaler Verträge in der sowjetischen Völkerrechtslehre," 7 *Osteuropa Recht* 66-81 (1961). A stimulating discussion of the general problem of agreement of wills in the field of law between Communist and non-Communist states is Dietrich Loeber's "Rechtsvergleichung zwischen Ländern mit verschiedener Wirtschaftsordnung," 26 *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht* 201-229 (1961).

¹⁰⁸ Professor Korovin states that, in accordance with the ideology of the November, 1960, Communist summit conference, "When treaties are considered as instruments of peaceful co-existence, primary attention must be given to the question whether the given treaty serves to strengthen peaceful co-existence or, on the contrary, whether it leads to its violation. A finding of the latter would be tantamount to a recognition of the legal nullity of the entire treaty." Korovin, *loc. cit.* note 94 above, p. 68.

This "objective" interpretation of treaties is not a new phenomenon and prompted Professor Oliver J. Lissitzyn to conclude as early as 1959, in a review of Shurshalov's first book on treaty law, that the emphasis on "objective factors" rather than on subjective wishes as the basis of the validity and effectiveness of treaties "comes close to what might be called a Marxist 'natural law' doctrine." Lissitzyn, "Recent Soviet Monographic Literature on International Law," 5 *Osteuropa Recht* 26 (1959). In 1956, at an international conference of Communist jurists, the First Vice Minister of Justice of the U.S.S.R. anticipated later developments in his attempt to support the Soviet position on peaceful co-existence by his doctrinally off-beat statement that the principles of peaceful co-existence "have become part of the conception of law held by civilized humanity and have become their natural law, because by their nature these principles are the fundamental rules of natural international law." P. J. Kudryatsev, "The Legal Principles of Peaceful Co-existence," VIth Congress of the International Association of Democratic Lawyers, Brussels, May 22-25, 1956, *Proceedings of the Commission on Legal Principles of Peaceful Co-existence*, pp. 18-22.

This appeal to "objective" standards is reconciled with the traditional emphasis on the "will" of the parties by means of another innovation in Soviet international law, namely, by the development of a new science of the "forms" of international law. One of the principal elements of this new science is the use of the preamble as a separate procedural treaty determining the substantive meaning of the main treaty. The Soviets consider that no preamble is complete without some exhortatory reference to "peaceful co-existence." Soviet jurists state that the first Communist treatment of this subject and one of the first works to recognize the importance of "forms" in international law is the article by I. I. Lukashuk, "The Preamble to International Treaties," *Pravovedeniye*, 1959, No. 3, pp. 134-136.

—may be of particular importance to international space co-operation, because it has led to the development of an entirely new source of international law, particularly in the scientific field. This new source is the international scientific conference, which by well-graduated steps may lead to the establishment of international law. The first step consists in the recommendations of the scientists at international conferences, which “are not legally binding and have a consultative character . . . but nevertheless acquire enormous authority . . . and are an important step in the process of law formation, frequently leading to the creation of international law.” A later step consists in the incorporation of these recommendations in detailed plans of co-operation “agreed upon internationally either at the departmental or even at the enterprise level.” These recommendations then “already acquire the character of international legal sources of law.”¹⁰⁹

A much more basic “auxiliary” source of international law, and one which the Soviets are increasingly emphasizing, is municipal or domestic law, in particular domestic legislation. The Institute of State and Law of the Soviet Academy of Sciences has prepared the first of four volumes of Soviet domestic legislation to serve as a source of international law during the present period of rapid and radical change, when treaties and custom no longer suffice to effectuate international law’s progressive transformation. The Soviets consider that to oppose the influence of domestic law on international law would be equivalent to a denial of the increasingly democratic nature of international law and to a denial of “peaceful co-

¹⁰⁹ Poltorak, *loc. cit.* note 102 above, p. 167. The principal steps in this type of law formation are: (1) agreement by scientists on recommendations for specific forms or means of co-operation and development in detail of the operative and regulatory procedure; (2) incorporation of a statement in the preamble or appendix to the recommendations that the observance of the recommendations should establish a new order; (3) request in the preamble or appendix that the recommendations be effectuated by bilateral or multilateral agreements; (4) request that the recommendations, as representative statements of the consenting will of the respective countries from which the scientists come, should be given legal significance; (5) international agreement at the departmental or lower level on annual plans of co-operation; (6) formal inter-governmental treaty ratifying the recommendations either directly or as part of annual plans of co-operation.

For obvious reasons, this particular type of source for international law is operative at present only within the Communist bloc. Nevertheless, the marked Soviet tendency to carry over domestic legal concepts and customs of the U.S.S.R. into Soviet legal arrangements with underdeveloped countries in the field of economic co-operation would indicate that the Soviets would attach to agreements of scientists at joint East-West conferences more legal significance than might initially be apparent.

See also the article “On the Interrelationship of Technical and Legal Norms,” *Vestnik Leningradskogo Universiteta, Seriya Ekonomiki, Filosofi i Prava*, August, 1961 (No. 3), and related Soviet sources on the relationship of science and politics in the Soviet Union. This interrelationship is also of great importance in determining Soviet attitudes toward international organizational problems in the space field, for example, toward the division of functions between COSPAR and the International Astronautical Federation.

existence."¹¹⁰ Soviet theorists consider that this shift in Soviet international legal theory

underlies the close connection of international law with national law and of external politics with internal politics, and re-emphasizes Lenin's theory that external politics is only a continuation of internal politics and is determined by it.¹¹¹

From the above analysis of the general relationship between peaceful co-existence and international space co-operation, one might conclude that it is meaningless to speak either of international law or of space co-operation when one is dealing with the Soviet Union. Professor Leon Lipson comments that "it would be unwise for the United States to suppose that Soviet leaders attach importance to legal doctrine when thinking of space,"¹¹² and that in the world of Soviet international legal scholarship "law seems to be reduced to rhetoric."¹¹³ Others conclude that "space communications seem to offer the only area where some international agreement on space problems might possibly be reached."¹¹⁴

¹¹⁰ I. P. Blishchenko, *Mezhdunarodnoye i Vnutrigosudarstvennoye Pravo* [International and Municipal Law] 190-205 (Moscow, 1960). See also note 99 above on the relationship between the rôle of domestic legislation in international law and the heresy of the "cult of the individual."

¹¹¹ Minasyan, *op. cit.* note 107 above, p. 146. In a very favorable review of this book published in *Sovetskoye Gosudarstvo i Pravo*, January, 1962 (No. 1), pp. 125-127, the leading Soviet jurists, V. N. Durdenevsky and M. Lazarev, stated that this book is the first systematic Soviet work on the subject of the sources of international law. Dr. Minasyan emphasizes (on pp. 135-136) the enormous importance of the domestic law of the Soviet Union in international law, and points out that domestic law can serve as a source of international law only if (1) it is "democratic and peace-loving in its essence . . . that is, corresponding to the basic generally recognized principles of peaceful co-existence of states, such as sovereign equality and territorial integrity, non-interference and non-aggression [to prohibit counter-revolutionary forces], equality and reciprocal advantage." One of the examples given by the Communists of the rôle of Soviet domestic legislation is Lenin's Decree on Peace, issued on Nov. 8, 1917, which allegedly was the first step in establishing the "principal of peaceful settlement of disputes" as part of international law (Sharmazanashvili, *loc. cit.* note 87 above, p. 72; *International Conciliation*, No. 292 (Sept. 1933), p. 310); (2) it relates to the field of international relations. Soviet law, according to Minasyan (p. 134), has always been directed toward the international welfare of the peoples of the world; (3) it is officially or tacitly recognized by other states or at least is not protested by them. One might note here the provision in the projected new Soviet Constitution, announced in April, 1962, on "peaceful co-existence."

A more conservative book by P. I. Lukin emphasizes that domestic law can serve as a source of international legal rules and principles, but can serve only as an influence on, not as a source of, international law as such. P. I. Lukin, *Istochniki Mezhdunarodnogo Prava* [Sources of International Law] 129-130 (Moscow, 1960). This book was not mentioned in the review of the Minasyan book in January, 1962.

¹¹² Lipson, *loc. cit.* note 9 above, p. 17.

¹¹³ Lipson, 1959 Proceedings, American Society of Int. Law 45.

¹¹⁴ Joseph Whelan, "Implications of the Soviet Space Program for International Cooperation and International Law," in *Soviet Space Programs: Organization, Plans, Goals, and International Implications*, p. 216, Committee on Aeronautical and Space Sciences, U. S. Senate, 87th Cong., 2nd Sess., May 31, 1962.

The rhetorical quality of Soviet international law, however, does not detract from its significance any more than the rhetorical quality of Lenin's statements a half-century ago detracted from the significance of his "scientific theories" of history. Nor does the obviously strategic orientation of everything the Soviets propose and do in space eliminate the need for the United States to take the initiative in developing international space co-operation. A negative approach to space problems tends only to eliminate the need for dynamic policies and planning. A more flexible, dynamic, and morally responsible approach on the part of the free democratic countries would be to pursue their own global strategies to develop the world not within the bipolar framework of "peaceful co-existence," but in accordance with "peaceful co-operation under law."¹¹⁵

¹¹⁵ A preliminary discussion of some elements of such a free democratic strategy may be found in Robert D. Crane, "Developing Space Legal Strategy," *Orbis*, July, 1962. The best discussion of the moral/military problems involved is in the book, *Morality and Modern Warfare* (168 pp., Baltimore, Helicon Press, 1960, edited by William J. Nagle), in particular Ch. III, "Technology, Strategy and National Military Policy," by Col. John K. Moriarty, and Ch. V, "Theology and Modern War," by the Rev. John Courtney Murray, S.J.

NOTES AND COMMENTS

THE DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

This note is meant to take the place of a review of the first six volumes of the *Reports of the Decisions of the Court of Justice of the European Communities* which are published in the four official languages of the European economic communities and contain the decisions rendered during the years 1954-1960.*

The Court was originally instituted by the Treaty Establishing the European Coal and Steel Community of April 18, 1951 which went into force on July 25, 1952. The Treaties of Rome of March 25, 1957, establishing the European Economic Community and the European Atomic Energy Community, respectively, which went into force on January 1, 1958, likewise each provided for a Court of Justice. Therefore, by a Convention Relating to Certain Institutions Common to the European Communities, concluded on the same date as the Treaties of Rome, the creation of a single Court of Justice for all three of the European Communities was agreed upon.¹ The Court of Justice of the European Coal and Steel Community had been formally constituted on December 10, 1952, and opened its door to litigants upon publication of its rules of procedure on March 7, 1953.² It was replaced by the Court of Justice of the European Communities upon its formal constitution on October 7, 1958.³ From the inception of its work until the end of 1960 the Court has produced six volumes of printed opinions, the last one consisting of two separately bound parts. A seventh volume covering the year 1961 is in the process of publication. A special Index Volume, covering volumes 1 through 5, was issued in 1961.

This note is not designed to give a detailed case-by-case analysis of the 62 opinions contained in the six volumes, and it must confine itself to observations of a more general character. Looking in the first place at the more statistical and formal side of the work of the Court, it may be noted that the 62 opinions correspond to 59 separate proceedings conducted

* Vols. 1-6 (1954-1960). Paris: Recueil Sirey; Luxembourg: Services des Publications des Communautés Européennes. Vol. I: 1954-1955. B. Fr. 120, N. Fr. 11.80; Vol. II: 1955-1956. B. Fr. 200, N. Fr. 19.60; Vol. III: 1956-1957. B. Fr. 120, N. Fr. 11.80; Vol. IV: 1958. B. Fr. 200, N. Fr. 19.60; Vol. V: 1959. B. Fr. 250, N. Fr. 25; Vol. VI: 1960. B. Fr. 300, N. Fr. 30.60. Indexes.

¹ For texts of the various European conventions, see this JOURNAL, Supp., Vol. 46 (1952), p. 107 (European Coal and Steel Community); Vol. 51 (1957), p. 865 (European Economic Community), p. 955 (European Atomic Energy Community), p. 1000 (Institutions Common to the European Communities).

² Journal Officiel de la C.E.C.A. 33 (1953).

³ Journal Officiel des Communautés Européennes 453 (1958).

in the Court, one judgment being of an interlocutory character,⁴ one being rendered upon petition for interpretation of a previous opinion⁵ and one being a rejection of a petition for revision of a prior decision.⁶ All of the opinions, except two, concern matters growing out of the Treaty Establishing the European and Steel Community, the remaining two terminating the first litigations involving the Treaty Establishing the European Economic Community.⁷ Nine of the 62 opinions deal with complaints launched by employees of the governmental agencies of the European Communities, the remaining ones concern the validity of measures taken or proposed by the governmental agencies of the E.C.S.C. in the performance of their regulatory functions. Two opinions are of an advisory character and involve the legality of certain proposed amendments of the E.C.S.C. Treaty under Article 95 of that treaty,⁸ the others were rendered in the exercise of the Court's contentious jurisdiction. In all contentious cases except one, the complainant was a member government, an enterprise or association of enterprises, or an individual, while the defendant party was a governmental organ of one of the European communities. One case, however, was that of an individual against the government of a member state, concerning the scope of immunity from local taxation enjoyed by the employees of the European communities.⁹ The preponderant majority of the proceedings were proceedings for the annulment of purported actual or implied decisions of the High Authority by virtue of either Article 33, or Article 35 in conjunction with Article 33, of the E.C.S.C. Treaty. Thirty-six complaints were based on Article 33 alone, two complaints invoked Article 35 in conjunction with Article 33, and two proceedings combined attacks based on Article 33, with relief sought under Article 35 in conjunction with Article 33. In addition, three proceedings seeking annulment of certain decisions of the High Authority were instituted by complaining member governments on the basis of the special "full" jurisdiction granted by Article 88, paragraph 2, of the E.C.S.C. Treaty,¹⁰ and one further complaint of a member government praying for the annulment of a decision of the High Authority invoked simultaneously three different jurisdictional bases, *viz.*, Articles 33, 88 and 37.¹¹ Two proceedings sought the cancellation or reduction of fines

⁴ *Fédération Charbonnière de Belgique c. Haute Autorité*, 2 *Recueil de la Jurisprudence de la Cour de Justice des Communautés Européennes* (C.J.C.E.) 201 (1956).

⁵ *Associazione Industrie Siderurgiche Italiane (ASSIDER) c. Haute Autorité*, 1 *ibid.* 265 (1955).

⁶ *Acciaieria Ferriera di Roma (FERAM) c. Haute Autorité*, 6 *ibid.* 353 (1960), rejecting petition for revision of judgment, reported 5 *ibid.* 503 (1959).

⁷ *Von Lachmüller, Peuvrier et Ehrhardt c. Commission de la C.E.E.*, 6 *ibid.* 933 (1960); *Fidelaar c. Commission de la C.E.E.*, *ibid.* 1079.

⁸ Opinions requested by the High Authority and the Special Council of Ministers of the E.C.S.C., 5 C.J.C.E. 551 (1959); 6 *ibid.* 107 (1960).

⁹ *Humblet c. État Belgique*, *ibid.* 1127; reported in 56 A.J.I.L. 540 (1962).

¹⁰ *Gouvernement de la République Fédérale d'Allemagne c. Haute Autorité*, 6 C.J.C.E. 119 (1960); *Gouvernement de la République Italienne c. Haute Autorité*, *ibid.* 665; *Gouvernement du Royaume des Pays-Bas c. Haute Autorité*, *ibid.* 725.

¹¹ *Gouvernement de la République Fédérale d'Allemagne c. Haute Autorité*, *ibid.* 471.

imposed by the High Authority pursuant to Article 36 of the treaty,¹² and one complaint was a suit for damages on the ground of an alleged governmental tort committed by the High Authority pursuant to Article 40 of the E.C.S.C. Treaty.¹³

Turning now to the substance of these opinions, it is easily seen that they mirror the various problems and difficulties which the High Authority and the Council of Ministers had to face in translating the common market of coal and steel of the six countries from a blueprint into a reality, and in taking the necessary measures for the assurance of its proper functioning.

Space forbids recounting the chronic ailments or passing afflictions which plagued the coal and steel sectors during the six-year period spanned by these proceedings or to rehearse the variety of measures taken by the High Authority and the Council of Ministers to alleviate these ills. To be sure, the European coal industry, as a result of the technological obsolescence of the mines in numerous Belgian regions and of the progressive attrition in the industrial utilization of solid fuels, faces long-range difficulties that are of a dimension quite different from that of the troubles which beset the steel industry in consequence of its unprecedented postwar recovery and expansion. Yet a prolonged interval of an intense shortage of domestic scrap menaced seriously the harmonious growth of the steel production and called for the institution of complex schemes aiming at an equalization of the costs of community scrap and imported scrap and at the introduction of financial incentives for the curtailment of the utilization of scrap in the manufacture of steel. Actually, various facets of the operation of these mechanisms precipitated the lion's share of the legal controversies included in the six volumes of the Court's decisions.¹⁴ Another recurring source of litigation before the Court grew out of the long battle of the High Authority to curb the excessive economic power of the Ruhr coal sales cartels and reduce it to a level needed for an orderly and rational supply of the market.¹⁵ Lately the efforts of the community agencies toward the elimination of special and protectionist rail freight rates and the prevention of discriminations in the motor transport industry have been reflected in numerous resorts to the Court.¹⁶

¹² *Acciaierie Laminatoi Magliano Alpi (ALMA) c. Haute Autorité*, 3 C.J.C.E. 181 (1957); *Macchiorlatti Dalmas e Figli c. Haute Autorité*, 5 *ibid.* 415 (1959).

¹³ *Acciaieria Ferriera di Roma (FERAM) c. Haute Autorité*, *ibid.* 503.

¹⁴ The legality, interpretation and enforcement of the various schemes introduced by the High Authority and the Council of Ministers to secure an adequate supply of scrap and an equitable distribution of its cost formed the object of 21 proceedings reported in Vols. 4, 5, and 6(I).

¹⁵ *Sociétés Minières du Bassin de la Ruhr c. Haute Autorité*, 3 C.J.C.E. 9 (1957); *Nold c. Haute Autorité*, *ibid.* 223, 5 *ibid.* 89 (1959); *Stork et Cie c. Haute Autorité*, *ibid.* 43; *Comptoirs de Vente du Charbon de la Ruhr c. Haute Autorité*, 6 *ibid.* 45 (1960); *Comptoirs de Vente du Charbon de la Ruhr et Entreprise L. Nold K.G. c. Haute Autorité*, *ibid.* 859.

¹⁶ Seven of the opinions contained in Vol. 6 deal with measures taken for the elimination of discriminatory rail freight rates and the supervision of motor carrier freight rates in the common market for coal and steel.

Several, including the earliest, cases decided by the Court involved the legality and enforcement of the regulations governing pricing practices, issued under Article 60 of the E.C.S.C. Treaty.¹⁷

Since the Court is a court of limited jurisdiction whose adjudicatory powers are circumscribed and particularized with great caution by an array of different provisions in the governing treaties, a considerable portion of the case law developed by the Court deals with procedural matters familiar to American lawyers (lumped together under the rubric of "entertainability"), such as jurisdiction over the subject matter, standing, ripeness for judicial review and the proper scope of such review. In proceedings for the annulment of decisions of the High Authority instituted under Articles 33 and 35 of the E.C.S.C. Treaty (barring the special case of Article 88, paragraph 2), the Court may not review the economic or political judgment upon which the High Authority has based its action and must confine itself to strictly legal issues except where "abuse of power" or a "patent misconception of the treaty provisions" is alleged. The Court decided at an early stage that it would not use this jurisdictional clause as a gate to an enlarged scope of review, and since then has carefully avoided concerning itself directly with the wisdom of the action of the High Authority. This, however, does not mean that the Court has shown a pronounced tendency toward putting its stamp of approval on all important regulations or individual decisions issued by the High Authority. On the contrary, the Court has not hesitated to annul some of them either on the ground of a rather strict interpretation of the E.C.S.C. Treaty with reference to permissible discretion,¹⁸ allowable delegation,¹⁹ or recital of sufficient reasons,²⁰ or because of a disapproval of the legal basis of their issue²¹ or a failure to find proper authorization in the treaty.²²

Generally speaking, the Court has not endeavored to shape the economic policies to be pursued by the community organs, but rather insisted on a

¹⁷ *Gouvernement de la République Française c. Haute Autorité*, 1 C.J.C.E. 9 (1954); *Gouvernement de la République Italienne c. Haute Autorité*, *ibid.* 75; *ASSIDER c. Haute Autorité*, *ibid.* 125 (1955); *I.S.A. c. Haute Autorité*, *ibid.* 179; *A.L.M.A. c. Haute Autorité*, 3 *ibid.* 181 (1957); *Macchiorlatti Dalmas e Figli c. Haute Autorité*, 5 *ibid.* 415 (1959); see also *Acciaieria e Tubificio di Brescia c. Haute Autorité*, 6 *ibid.* 153 (1960).

¹⁸ *Gouvernement de la République Française c. Haute Autorité*, 1 C.J.C.E. 9 (1954); *Gouvernement de la République Italienne c. Haute Autorité*, *ibid.* 75; *Chambre syndicale de la Sidérurgie de l'Est de la France et autres c. Haute Autorité*, 6 *ibid.* 573 (1960).

¹⁹ *Meroni & Co. c. Haute Autorité*, 4 *ibid.* 11 (1958); *Meroni & Co. c. Haute Autorité* (2nd case), *ibid.* 53.

²⁰ *Comptoirs de vente du Charbon de la Ruhr et Entreprise I. Nold c. Haute Autorité*, 6 *ibid.* 859 (1960).

²¹ *Mannesmann A. G. et autres c. Haute Autorité*, *ibid.* 243 (denying High Authority's right to restitution of scrap equalization payments disbursed in consequence of fraud committed by third party).

²² *Gouvernement de la République Italienne c. Haute Autorité*, *ibid.* 665; *Gouvernement du Royaume des Pays-Bas c. Haute Autorité*, *ibid.* 725.

high degree of strict adherence to the treaties (*Vertragstreue*). In its work it has had the assistance of the two Advocates General who play a substantial rôle in the administration of justice in the European communities and whose final conclusions as to the proper disposition of the proceedings are included in the reports. Nevertheless, the Bench has not always followed the recommendations of its Advocates General, but upon some occasions reached substantially different results.²³

Although the decisions of the Court are of great interest to students of international law, particularly because of light which they shed upon the processes involved in the interpretation of multipartite treaties, it must be noted that so far the Court has not seen any necessity for a direct reliance on international law. Only twice (and that in parallel opinions)²⁴ has the Court referred to "recognized principles of classical international law" and then solely for the purpose of accentuating that the procedures provided for in Article 88 for the enforcement of treaty obligations go beyond what is traditionally available to international organizations and that therefore the governing article calls for a narrow interpretation.

Undoubtedly the increased burden on the Court which must result inevitably from the great strides that have been made in transforming the general European Common Market from a political instrument into an operative organism will reflect itself in new lines of judicial activity which should invite closest attention from students of international law.

STEFAN A. RIESENFELD

THE FOREIGN CLAIMS SETTLEMENT COMMISSION AND THE
ADJUDICATION OF INTERNATIONAL CLAIMS*

In the ever expanding panorama of international law, few areas have been more intriguing to the scholar or of greater concern to the international lawyer than the international responsibility of states for injuries to aliens. Even a cursory examination of the literature dealing with the responsibility of states will reveal that much attention has been devoted to the subject. Furthermore, until recently, the principles of substantive law seemed quite clear and well established. Apart from isolated and unique cases, the most usual questions involved the status or protection enjoyed by foreign-owned property.

²³ See, e.g., *Gouvernement de la République Française c. Haute Autorité*, 1 C.J.O.E. 7 (1954); *Gouvernement de la République Italienne c. Haute Autorité*, *ibid.* 73; *Fédération Charbonnière de Belgique c. Haute Autorité*, *ibid.* 201 (1956) (interlocutory decree); *Chambre Syndicale de Siderurgie de l'Est c. Haute Autorité*, 6 *ibid.* 573 (1960).

²⁴ *Gouvernement de la République Italienne c. Haute Autorité*, *ibid.* 665 at 692; *Gouvernement du Royaume des Pays-Bas c. Haute Autorité*, *ibid.* 725 at 761.

* In substance, this note is a review of *International Claims: Their Adjudication by National Commissions*, by Richard B. Lillich (Syracuse, Syracuse University Press, 1962. pp. xvi, 140. Index. \$5.00). Since the work of the Foreign Claims Settlement Commission occupies a major portion of the book, Chairman Re has contributed additional materials concerning the Commission and its activities.—ED.

It is invariably emphasized that the existing international law precedents clearly establish the inviolability of private property.¹ This principle of international law which protects property in time of peace has been justified not only because "it represents a universally recognized standard of justice, but also because it is absolutely essential for the welfare of every nation, for without its protection no commercial or financial international intercourse could safely be carried on."² The position of the United States on this question has been expressed in unmistakable terms:

When a nation has invited intercourse with other nations, has established laws under which investments have been lawfully made, contracts entered into and property rights acquired by citizens of other jurisdictions, it is an essential condition of international intercourse that international obligations shall be met and that there shall be no resort to confiscation and repudiation.³

It follows from the foregoing that a confiscation of foreign-owned property is an act of state that constitutes a *denial of justice* for which the state becomes internationally responsible. Regardless of the particular philosophical basis upon which the right is founded, both the writings of publicists and international practice firmly establish the right of the owner to compensation for the deprivation of his property.

Much also has been written on the requirement and measure of compensation. The "just compensation" to which the owner is entitled has been also described as "adequate, effective and prompt payment."⁴ It cannot be said, however, that adequate treatment has been accorded the procedural aspects of the international claims that result from the nationalization of foreign-owned property. What procedural devices have been utilized and what procedural problems have been encountered in the adjudication of these claims?

Although serious attempts are being made to codify and synthesize what may be called the substantive law of international claims, the attention devoted to matters of procedure has been incredibly meager. This is particularly surprising when one considers the tremendous growth of international trade and investment, and the social revolutions involving vast programs of nationalization of property. The traditional methods of individual espousal of claims, or their adjudication by mixed claims commissions, could not cope with the thousands of claims that followed these nationalizations. Experience has demonstrated that the most prac-

¹ See authorities cited in Re, "The Nationalization of Foreign-Owned Property," 36 Minn. Law Rev. 323, 327 (1952), and "Nationalization and the Investment of Capital Abroad," 42 Georgetown Law J. 44 (1953).

² Anderson, "Basis of the Law Against Confiscating Foreign-Owned Property," 21 A.J.I.L. 525, 526 (1927).

³ Secretary of State Hughes, Report, Mexican Claims Convention, quoted in Buell, International Relations 389 (1925).

⁴ Dept. of State Press Release, Aug. 25, 1938; 32 A.J.I.L. Supp. at 191, 193 (1938). See Rubin, "Nationalization and Compensation: A Comparative Approach," 17 U. Chicago Law Rev. 458, 460 (1950).

tical solution was to submit these claims for adjudication by national claims commissions. These unique tribunals constitute the subject matter of Professor Richard B. Lillich's attractive monograph.

International Claims: Their Adjudication by National Commissions, is a welcome and useful addition to the available literature on international claims and state responsibility. Written in a clear and concise manner, it presents to the student of international law an excellent introduction to a tribunal whose functions and procedures ought to be as well known as those of other courts devoted to the solution of international legal problems.

The book is of particular value because of its discussion of the jurisdiction and practice of the Foreign Claims Settlement Commission of the United States. In this respect, it possesses the distinction of being perhaps the first to accord independent treatment to the work of the Commission. Since, unfortunately, the decisions of most national claims commissions, like those of the Foreign Claims Settlement Commission, have not been systematically reported, and, therefore, have not been readily available to those interested in the work of these tribunals, the book may be said to be in the public interest.

Furthermore, *International Claims: Their Adjudication by National Commissions* not only ransoms from relative obscurity materials found in Congressional reports and other official publications, but also calls attention to the various reports of the Foreign Claims Settlement Commission. These reports contain a veritable treasury of information and experience, and, notwithstanding their availability to the researcher, have not thus far received the dissemination, evaluation and analysis they deserve.

In highlighting the invaluable materials contained in the various reports of the Foreign Claims Settlement Commission, the book performs a long overdue public service. Although these reports do not contain all of the decisions of the Commission, some of them have proven to be most helpful. One such report, entitled *Settlement of Claims*, was published by the Commission on June 15, 1955. This report of 690 pages covered the activities of the Foreign Claims Settlement Commission and its predecessor Commissions from September, 1949, to March, 1955. It presents the problems involved in the processing of claims pursuant to the Yugoslav Claims Agreement of 1948, the Panamanian Claims Convention of 1950, the International Claims Settlement Act of 1949, as amended, and the War Claims Act of 1948, as amended. Although written primarily for the benefit of the Commission's staff, it was thought to be of

special interest and a guide to attorneys and claimants interested in future claims programs especially in view of the fact that the procedures adopted for the settlement of the above international claims represented a marked departure from that which had characterized earlier undertakings by the United States Government in the espousal of claims against foreign governments.⁵

⁵ *Settlement of Claims by the Foreign Claims Settlement Commission of the United States and Its Predecessors* iii (1955).

A similarly helpful report is the Foreign Claims Settlement Commission's *Tenth Semiannual Report* to the Congress, which contains many of the Commission's leading decisions in the claims programs against Bulgaria, Hungary, Rumania, Italy and the Soviet Union. Each decision, preceded by headnotes, sets forth the governing principles or precedents, together with footnotes which provide further explanation and documentation. In an effort to bring the work and decisions of the Commission to the attention not only of Members of Congress but also to all interested lawyers, the *Fourteenth Semiannual Report* has been widely distributed. It summarizes the functions of the Commission and reprints its leading decisions in the Czechoslovakian and Polish Claims programs.

In his introduction, Professor Lillich declares that his "short study purports to be a modest contribution toward a needed evaluation of national claims commissions,"⁶ and adds that its scope is limited to the 20 national claims commissions that have been established by the United States, the 20th such commission being the Foreign Claims Settlement Commission of the United States. The book, divided into four chapters, succeeds in introducing the reader to the history and organization of national claims commissions, the law that they apply, their contributions, and the "precedent value" of their decisions.

Chapter 1, entitled "History of National Claims Commissions," indicates that these "special domestic tribunals,"⁷ as they have been called by Professor Hudson, "have been utilized frequently by the United States during the past 150 years."⁸ While these national claims commissions are usually characterized simply as "special national courts"⁹ or "domestic tribunals,"¹⁰ Professor Lillich stresses their "dual nature."¹¹ He emphasizes this "dual" classification by quoting the words of William E. Fuller, Attorney for the Spanish Treaty Claims Commission.¹² Fuller observed: "In a strictly technical sense the Commission is a national court, but in a broader sense [it] is also international . . ."¹³ and, therefore, although "in every essential a municipal judicial body," in the adjudication of claims it sits "*in the character of an international tribunal.*"¹⁴

⁶ Lillich, *International Claims: Their Adjudication by National Commissions* 3 (1962) (hereinafter cited as Lillich).

⁷ Lillich 20; Hudson, *International Tribunals* 192 (1944).

⁸ Lillich 8.

⁹ Jessup in *Proceedings, Second Summer Conference on International Law*, Cornell Law School 37 (1958).

¹⁰ See references to writings of Domke, Briggs and Ralston at Lillich 21.

¹¹ *Ibid.* 23.

¹² Special Report of William E. Fuller 114-115 (1907).

¹³ *Ibid.* at 112.

¹⁴ *Ibid.* at 114-115 (emphasis in original by Fuller). Professor Jessup, writing about the future of international law-making, after commenting on the rôle of the Prize Court, notes that the Court of Claims at times "sat in a rôle which it considered to be indistinguishable from that of an international arbitral tribunal." Jessup, "The Future of International Law Making," in *Legal Institutions Today and Tomorrow* 211 (Paulsen ed., 1959), citing *Royal Holland Lloyd v. U. S.*, 73 Ct. Cl. 722 (1931).

Chapter 1 also contains a discussion of the juridical status of the "funds of national claims Commissions." Although scholars have written about the "lump sum" or "*en bloc*" settlement,¹⁵ the nature of the fund has not received legal analysis. In that connection, Professor Lillich states that the function of these commissions

is to distribute to certain eligible claimants funds made available—either from a lump sum (sometimes called *en bloc* or global) settlement with a foreign country, or from an appropriation made by the United States in return for certain consideration from a foreign country, or from vested assets of a foreign country held by the United States—to satisfy a large group of international claims against a foreign country.¹⁶

Since the true function of the Commission is to *adjudicate* the claims presented, and since the total awards will determine the amount actually paid to the successful claimants, particular attention ought to be given to the treatment afforded the "defender of the fund" technique that has been utilized in the past,¹⁷ and is currently in use by British national commissions.¹⁸ Discussing the procedure of the Foreign Claims Settlement Commission, Professor Lillich feels that the Commission ought to adopt "some formal defense procedure,"¹⁹ and suggests that "vesting several staff members with the power to oppose claims would give the Commission a better basis for a decision and serve to protect the interests of the other claimants."²⁰ Without attempting to evaluate the merits of the defender of the fund technique, it is believed that Professor Lillich has unduly relied upon a remark of a former Chairman of the Commission, and has perhaps been misled as to the actual Commission procedure and the function of the staff attorney. Although it is true that the staff attorney does not perform his duties in a manner that is "adversary," in the sense of hostility, staff attorneys must and do present all of the facts, *i.e.*, both favorable and unfavorable aspects of all claims, prior to their determination by the Commission.

Furthermore, one cannot ignore the clear language of the Commission's regulations, which declare that "the claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim."²¹ The claimant who cannot sustain this burden as to all elements of the claim is denied relief. In summarizing the law that the Commission has applied on this point, the most recent semiannual report of the Commission states:

This conclusion has been applied to each item of property involved in a claim. Thus, in many cases, claimants who were able to establish

¹⁵ See references to the statements of Nielsen, Drucker, Domke and others at Lillich 117-118.

¹⁶ *Ibid.* at 2.

¹⁷ *Ibid.* at 114.

¹⁸ *Ibid.* at 52.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 115.

²¹ Foreign Claims Settlement Commission Reg., 45 C.F.R. § 531.6(d) (1959) (Hearings; issues and burden of proof).

their claims as to some items of property were granted awards therefor, but were denied recovery as to other items for lack of proof.²²

A staff attorney of the Commission, writing on the work of the Commission, has come closer to a portrayal of the actual practice when he states that staff attorneys serve "as adversaries to the claimants in all hearings before the Commission."²³

Chapter II, "Organization of National Claims Commissions," treats a variety of interesting areas dealing with the structure, procedures, and finality of the decisions of national claims commissions. Discussing the crucial problems of appointment and qualifications of the Commissioners, Professor Lillich decries the "political appointment" of Commissioners, and points out that, "despite warnings that the International Claims Commission would have to decide numerous questions of citizenship and international law, no provision requiring bar membership was included in its enabling act, and hence non-lawyers may serve today on the Foreign Claims Settlement Commission."²⁴ Professor Lillich also compares the salary of the Commissioner with that of the Federal District Judge for "four representative years" as "a factor which may have some effect on the quality of commission personnel."²⁵ He observes that "commissioners who once received twice the compensation of judges currently lag far behind their inadequately paid judicial brethren," and concludes that "the trend cannot help but affect the quality of commissioners if it is allowed to continue."²⁶

The brief but excellent discussion of the leading court cases²⁷ that have

²² 14 Foreign Claims Settlement Commission Semiannual Rep. 14 (Jan.-June, 1961).

²³ Rode, "The International Claims Commission of the United States," 47 A.J.I.L. 615, 621 (1953).

²⁴ Lillich 42-43. Although legally possible, it is unlikely that non-lawyers will be appointed to the Foreign Claims Settlement Commission. Of the 18 Commissioners appointed to the Commission and its predecessors, the International Claims Commission and the War Claims Commission, all but three have been lawyers. Not only are the present members of the Foreign Claims Settlement Commission all lawyers, but as a matter of Commission policy only lawyers are permitted to serve as staff attorneys.

²⁵ Lillich at 43.

²⁶ *Ibid.* The "lag" is not quite as conspicuous as would appear from Professor Lillich's chart, wherein the salary for Commissioners for the year 1960 is shown to be \$15,000. The salary of the members of the Foreign Claims Settlement Commission is \$20,000 and that of its Chairman \$20,500. 70 Stat. 737-38 (1956), 5 U.S.C. § 2204 (10), § 2205 (45) (1959) (Federal Executives Pay Provisions).

²⁷ The most important cases mentioned are *de Vegvar v. Gilliland*, 228 F. 2d 640 (D.C. Cir., 1955), cert. denied, 350 U.S. 994 (1956); *Dayton v. Gilliland*, 242 F. 2d 227 (D.C. Cir., 1956), cert. denied, 355 U.S. 813 (1957); *American and European Agencies, Inc. v. Gilliland*, 247 F. 2d 95 (D.C. Cir., 1956), cert. denied, 355 U.S. 884 (1957); *Haas v. Humphrey*, 246 F. 2d 682 (D.C. Cir., 1957), cert. denied, 355 U.S. 854 (1957); *Zutich v. Gilliland*, 254 F. 2d 464 (6th Cir., 1958); *First Nat'l City Bank v. Gilliland*, 257 F. 2d 223 (D.C. Cir., 1958), cert. denied, 358 U.S. 837 (1958). An excellent discussion of the non-reviewability of the decisions of the Commission may be found in Coerper, "The Foreign Claims Settlement Commission and Judicial Review," 50 A.J.I.L. 868 (1956). Note the consistent denial of certiorari in the cases cited above.

passed upon those provisions of the enabling acts which exempt the decisions of the Commission from judicial review concludes as follows: "Being 'courts of last resort' for international claims, their opinions take on added importance as valuable evidences of international claims law."²⁸

In Chapter III, entitled "Jurisprudence of National Claims Commissions," the reader will find a brief summary of the decisions of some of the United States claims commissions and of the Foreign Claims Settlement Commission in particular, on the status of claimants before such commissions. Specifically, the discussion deals with the eligibility requirements of individual claimants, partnerships, corporations, assignees, subrogees, heirs, executors and administrators. Clearly, this presents only a very small facet of the jurisprudence of these commissions. Nevertheless, even from this limited survey, Professor Lillich is able to conclude that "the law that they apply is generally international;"²⁹ that "the decisions of national commissions have mirrored the progress in the law of state responsibility"; and that "the variable standards which the Foreign Claims Settlement Commission has applied are indicative only of the current state of flux in this area of international law."³⁰

In the final chapter, "Evaluation of National Claims Commissions," Professor Lillich sets forth the "favorable" and "unfavorable" aspects of national claims commissions. The book closes with a brief discussion of the "precedent value"³¹ of their decisions.

Dr. Martin Domke, International Vice President and Director of Legal Research for the American Arbitration Association, has contributed an enlightening foreword to the book. Commenting on the concluding chapter, he states that it "contains helpful suggestions for further refining this method of international adjudication."³² With typical candor, Dr. Domke writes that "many aspects of substantive international law are not touched upon by the author, however, since they are beyond the scope of his work."³³ Every reader of the book, whether jurist, lawyer or student, will also agree with Dr. Domke that "it does not detract from the merit of this valuable book to say that much remains to be done."³⁴ Indeed, that which remains to be done has been greatly facilitated by the present study. Its appearance serves to remind the reader not only of the contribution that the national claims commission has already made to international law, but also of the expanding rôle that it is capable of performing in the future.

EDWARD D. RE

*Chairman, Foreign Claims Settlement
Commission of the United States*

²⁸ Lillich 70.

²⁹ *Ibid.* at 100-101.

³² *Ibid.* at ix.

³⁴ *Ibid.* at ix.

²⁹ *Ibid.* at 71.

³¹ *Ibid.* at 118.

³³ *Ibid.* at x.

THE SALZBURG SESSION OF THE INSTITUT DE DROIT INTERNATIONAL

The Fiftieth Session of the *Institut de Droit International* was held in Salzburg, Austria, from September 4 to 13, 1961, under the presidency of Professor Alfred von Verdross. The session was attended by seventy-four Members and Associates, including Hans Kelsen, Philip C. Jessup, Josef L. Kunz, Quincy Wright and the undersigned, from the United States. Professor William W. Bishop was elected an Associate at Salzburg, and the United States group now comprises eight: Honorary Member (Hans Kelsen); Members (Philip Marshall Brown, Green H. Hackworth, Philip C. Jessup); Associates (William W. Bishop, Herbert W. Briggs, Josef L. Kunz, Quincy Wright).

Judge Algot Bagge (Sweden) and Lord McNair (U.K.) were elected Honorary Members at Salzburg and eight Associates were elected titular Members: Roberto Ago (Italy), Ricardo J. Alfaro (Panama), Juraĵ Andrassy (Yugoslavia), Emile Giraud (France), Edvard Hambro (Norway), A. E. F. Sandström (Sweden), Sir Humphrey Waldoek (U.K.) and Wilhelm Wengler (Germany). Of eighteen candidates for Associate, twelve were elected: Rudolf L. Bindschedler (Switzerland), William W. Bishop (U. S.), Charles Chaumont (France), J. E. S. Fawcett (U.K.), Charalambos N. Fragistas (Greece), Georges A. van Hecke (Belgium), Eduardo Jiménez de Aréchaga (Uruguay), Riccardo Monaco (Italy), Nagendra Singh (India), Stephan Verosta (Austria), Mustafa Kamil Yasseen (Iraq) and Jaroslav Zourek (Czechoslovakia).

Prior to the Salzburg session, only thirty of the more than one hundred states of the world had nationals in the *Institut*, whose statutory purpose is to serve as "an exclusively scientific association and without official character . . . to promote the progress of international law," and to assist in formulating its principles in a manner responding to the juridical conscience of the world. Two steps were taken at Salzburg to broaden membership in the *Institut*. The Bureau nominated five candidates (Jiménez de Aréchaga, Singh, Verosta, Yasseen, and Zourek) from countries from which no nominations were otherwise possible, and all were elected Associates. The second step was the adoption of a proposal to increase the statutory number of Associates from sixty to seventy-two, with opportunity for the Bureau to reserve not more than one third of the vacancies in the rank of Associate at any particular election for candidates from regions of the world insufficiently represented in the *Institut*. This proposal was adopted, despite the vigorous opposition of a number of members who feared that its effect would be to weaken the high standard of scientific achievement in the field of international law as the *sine qua non* of membership. The debates reveal that, in adopting the proposal, the *Institut* had no intention of abandoning its rigorous criteria for membership and that it did not intend to fill all the new vacancies at the next election. Considerable credit is due Lord McNair and Judge

Philip C. Jessup for this step towards increasing the responsibilities and opportunities of the *Institut*.

In a dozen plenary meetings at Salzburg, the *Institut* considered four reports, but succeeded in adopting resolutions on only two. On September 11, 1961, the *Institut* adopted, by a vote of 50-0-1, a resolution on *Utilization of Non-Maritime International Waters (except for Navigation)* for which Professor Juraj Andrassy was *Rapporteur*; and, by a vote of 54-0-7, a resolution on *International Conciliation* for which Senator Henri Rolin was *Rapporteur*. English translations of these resolutions are appended and it can be seen that both resolutions have potential significance and utility.

After a bitter debate on *Renvoi*, in which the utility of the principle was lauded or castigated,¹ the *Institut* referred the question back to the 23rd Commission for further study. Prolonged debates on the three questions mentioned above necessitated the adjournment to the next session of the debate on *Conflict of Laws in Matters of Aerial Law*.

By decisions taken at Salzburg, Commissions were authorized to prepare studies on the following topics:

- 1st Commission: *The Diplomatic Protection of Individuals in International Law*. Herbert W. Briggs, *Rapporteur*.
- 8th Commission: *The Diplomatic Protection of Business Enterprises in International Law*. Roberto Ago, *Rapporteur*.
- 9th Commission: *Juridical Conditions of Capital Investment in Developing Countries and Agreements Relating Thereto*. Ben A. Wortley, *Rapporteur*.
- 10th Commission: *Testamentary Succession in Private International Law*. Riccardo Monaco, *Rapporteur*.
- 14th Commission: *The International Effects of Constitutional Limitations on the Power to Conclude Treaties*. Paul De Visscher, *Rapporteur*.
- 15th Commission: *The Effect on Treaties of the Creation of a New State out of a Pre-Existing State*. Charles Rousseau, *Rapporteur*.
- 19th Commission: *Le Contrat de Commission de Transport en Droit International Privé*. Léon Babinski, *Rapporteur*.

The next session of the *Institut* will be held in Brussels in 1963 under the presidency of Senator Henri Rolin.

HERBERT W. BRIGGS

¹ One member was heard to observe: "We used to play ping-pong in our country, but we gave it up."

ANNEX

RESOLUTIONS ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW AT ITS
SESSION AT SALZBURG (3-12 SEPTEMBER 1961)

I. Utilization of Non-Maritime International Waters
(Except for Navigation)¹

(Ninth Commission)

The Institute of International Law,

Considering that the economic importance of the use of waters is transformed by modern technology and that the application of modern technology to the waters of a hydrographic basin which includes the territory of several States affects in general all these States, and renders necessary its restatement in juridical terms,

Considering that the maximum utilization of available natural resources is a matter of common interest,

Considering that the obligation not to cause unlawful harm to others is one of the basic general principles governing neighborly relations,

Considering that this principle is also applicable to relations arising from different utilizations of waters,

Considering that in the utilization of waters of interest to several States, each of them can obtain, by consultation, by plans established in common and by reciprocal concessions, the advantages of a more rational exploitation of a natural resource,

Recognizes the existence in international law of the following rules, and formulates the following recommendations:

Article 1

The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States.

Article 2

Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin.

Article 3

If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances.

¹ English translation by Herbert W. Briggs.

Article 4

No State can undertake works or utilizations of the waters of a water-course or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under Article 3, as well as adequate compensation for any loss or damage.

Article 5

Works or utilizations referred to in the preceding article may not be undertaken except after previous notice to interested States.

Article 6

In case objection is made, the States will enter into negotiations with a view to reaching an agreement within a reasonable time.

For this purpose, it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned.

Article 7

During the negotiations, every State must, in conformity with the principle of good faith, refrain from undertaking the works or utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult.

Article 8

If the interested States fail to reach agreement within a reasonable time, it is recommended that they submit to judicial settlement or arbitration the question whether the project is contrary to the above rules.

If the State objecting to the works or utilizations projected refuses to submit to judicial settlement or arbitration, the other State is free, subject to its responsibility, to go ahead while remaining bound by its obligations arising from the provisions of Articles 2 to 4.

Article 9

It is recommended that States interested in particular hydrographic basins investigate the desirability of creating common organs for establishing plans of utilization designed to facilitate their economic development as well as to prevent and settle disputes which might arise.

Text adopted by a vote of 50 to 0, with one abstention.

(11 September 1961.)

II. International Conciliation ¹

(Thirtieth Commission)

The Institute of International Law,

Considering that by the provisions of the Charter of the United Nations, States have the duty to seek by peaceful means the settlement of international disputes,

Acknowledging that nevertheless a certain number of disputes have remained unsettled in the course of recent years, the Parties having neglected or refused recourse to judicial settlement or arbitration,

Considering that such a state of affairs is prejudicial to international understandings,

Observing, on the other hand, that the procedure of international conciliation has been employed with success in a number of cases during recent years,

Draws the attention of States to the advantage, for a sound appreciation by them of questions arising from a dispute and for its peaceful solution, of the assistance of a small number of competent and impartial men of good will,

For this reason again *recommends* States to conclude, if they have not already done so, conventions establishing permanent bilateral commissions of conciliation as provided by different treaties and, in particular, by the General Act of 1928/1949, even if they are not disposed to undertake any engagement to submit to these commissions all disputes or certain categories of disputes,

Emphasizes that Parties willing to have recourse to the procedure of conciliation are free to determine the methods according to their particular preferences, either when establishing a permanent or *ad hoc* Commission or at a later date,

Declares that no admission or proposal formulated during the course of the conciliation procedure, either by one of the Parties or by the Commission, can be considered as prejudicing or affecting in any manner the rights or the contentions of either Party in the event of the failure of the procedure; and, similarly, the acceptance by one Party of a proposal of settlement in no way implies any admission by it of the considerations of law or of fact which may have inspired the proposal of settlement, and

Recommends that States wishing either to conclude a bilateral conciliation convention or to submit a dispute which has already arisen to conciliation procedures before an *ad hoc* Commission, should adopt the rules contained in the annexed Regulations which the Institute substitutes for those adopted 2 September 1927, at the Session of Lausanne; and that, in the absence of such adoption, the members of Commissions of Conciliation should be guided by these rules for the solution of questions entrusted to them by the Parties.

¹ English translation by Herbert W. Briggs.

Regulations on the Procedure of International Conciliation

Sec. 1. DEFINITION OF CONCILIATION

Article 1

For the purpose of the present provisions, "conciliation" means a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or on an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.

Sec. 2. PROCEDURE FOR CONCILIATION

Article 2

The Conciliation Commission is seized of the dispute in the manner agreed upon by the Parties. In the absence of such agreement, the Commission can be seized not only by a joint application of the Parties, but by an application by one of them, addressed to the President and indicating in summary form the object of the dispute. On receiving a unilateral application, the President is responsible for seeing that it has been communicated to the other Party and that the latter accepts recourse to conciliation.

Article 3

It is desirable that any application by which the Commission is seized of a dispute should contain the designation of the agent or agents who will represent the Party or Parties making the application.

Should occasion arise, the President of the Commission may request any Party to make such a designation.

He then designates the place and date of the first meeting to which the members of the Commission and the agents are summoned.¹

Article 4

At its first meeting, the Commission will name its secretary and, taking account of such circumstances, among others, as the time which may have been granted to it for the completion of its task, will determine the method for proceeding to the examination of the affair, whether, in particular, the Parties should be invited to present written pleadings, and in what order and with what time-limits, as well as the time and the place where the agents and counsel will, should occasion arise, be heard.

¹ Attention is drawn to the fact that the Administrative Council of the Permanent Court of Arbitration places its premises and staff at the disposition of States Parties to its Statute who resort to conciliation.

Article 5

If the Commission establishes that the Parties are in disagreement on a question of fact, it may proceed, either at their request or *ex officio*, to the consultation of experts, to investigations on the spot, or to the interrogation of witnesses. In such case, the provisions of Part III of The Hague Convention of 18 October 1907 on the Pacific Settlement of International Disputes are applicable except for Article 35 which requires the Commission to set forth in a report the facts resulting from the investigation.

Article 6

If the Commission fails to achieve general agreement, it can decide by majority vote, without being obliged to indicate the number of votes.

Sec. 3. CONCLUSION OF THE COMMISSION'S WORK

Article 7

At the conclusion of its examination, the Commission will attempt to define the terms of a settlement susceptible of being accepted by the Parties. In this connection, it may proceed to an exchange of views with the agents of the Parties, who may be heard either together or separately.

Once decided upon, the terms of the proposed settlement will be communicated to the agents of the Parties with a request to inform the Commission within a stated period whether the governments accept or not the proposed settlement. The President of the Commission may accompany his communication with a statement, either orally, or in writing, of the principal reasons which, in the opinion of the Commission, appear likely to persuade the Parties to accept the settlement. He will refrain in this statement from setting forth definitive conclusions with reference to disputed facts or from formally deciding questions of law involved, unless the Commission has been requested to do so by the Parties.

Article 8

If the Parties accept the proposed settlement, a *procès-verbal* will be drawn up setting forth its terms and will be signed by the President and by the secretary. A copy signed by the President and the secretary will be handed to each Party.

Article 9

If any of the Parties do not accept the settlement and the Commission decides that no purpose will be served by attempting to reach an agreement between the Parties on the terms of a different settlement, a *procès-verbal* will be drawn up as provided above, stating, without setting forth the terms of the proposed settlement, that the Parties were unable to accept the conciliation proposal.

Sec. 4. SECRECY OF THE PROCEEDINGS

Article 10

The meetings of the Commission will be secret; the members of the Commission and the agents will refrain from divulging any documents or oral statements, as well as any communiqué relating to the progress of the proceedings which has not received the approval of both agents.

Should any indiscretion occur while the proceedings are pending, the Commission shall have power to determine its possible effect on the continuation of the proceedings.

Article 11

No declaration or communication of the agents or members of the Commission made with regard to the merits of the affair will be entered in the *procès-verbal* of the meetings except with the permission of the agent or member of the Commission making it. On the other hand, written or oral reports of experts, the results of investigations on the spot and depositions of witnesses will be attached to the *procès-verbaux*, unless, in a particular case, the Commission decides otherwise.

Article 12

Certified copies of the *procès-verbaux* of the meetings and copies of the annexes will be delivered to the agents through the secretary of the Commission unless, in a particular case, the Commission decides otherwise.

Article 13

Except for evidential material which may be derived from reports of experts, investigations on the spot or interrogations of witnesses, of which the agents will have received the *procès-verbaux*, the obligation to respect the secrecy of the proceedings and deliberations continues for the Parties as well as for the members of the Commission after the closure of the proceedings and even includes the terms of settlement in case the Commission has succeeded in its task of conciliation, unless, by common agreement, the Parties authorize a total or partial publication of the documents. When the Commission has completed its task, the Parties will consider whether or not to authorize the total or partial publication of the documents. The Commission may address recommendations to them on the subject.

Article 14

At the termination of the proceedings, the President of the Commission will deposit the documents in the archives of a government or of an international organization chosen by the Parties; the secretariat of the Permanent Court of Arbitration appears to be particularly well qualified for this purpose. The depositary authority will preserve the secrecy of the archives within the limits indicated above.

Sec. 5. EXPENSES

Article 15

Expenses connected with the conciliation procedure, including expenses occasioned by investigations which the Commission shall have judged it useful to institute, will be borne in equal shares by the Parties.

Text adopted by a vote of 54 to 0, with 7 abstentions.

(11 September 1961.)

[The French text is authentic.]

BUENOS AIRES "JORNADAS DE DERECHO INTERNACIONAL"

At the invitation of the Argentine Institute of International Law, representatives of the several professional associations of international law in the American Republics met in Buenos Aires September 12 to 15, 1960. This note appears at this late date because of the delay in the final preparation and receipt of the *Actuaciones*, or proceedings of the symposium or conference.¹

I. ORGANIZATION AND AGENDA

The delegates from the United States, named by the then President of the Society, Charles E. Martin, were Professors Josef L. Kunz of the University of Toledo Law School, and Vice President of the Society, and Robert D. Hayton, of the City University of New York (Hunter College) and visiting professor at the University of San Carlos Law School (Guatemala). The expenses of both delegates were defrayed most generously by the Argentine Government, which sponsored the sessions as one of the many cultural acts in observance of the nation's sesquicentennial. Other countries represented were Brazil, Chile, Ecuador, Guatemala, Panama, Peru and Uruguay.²

¹ Instituto Argentino de Derecho Internacional, comp., *Jornadas de Derecho Internacional* (Buenos Aires, 1961, 180 pp.) (hereinafter cited simply as *Jornadas*), a copy of which is now in the library of the American Society of International Law. For press commentary, see especially *La Prensa* and *La Nación* (Buenos Aires), Sept. 13, 14, 15, 16, 1960; editorial in *La Prensa*, Sept. 20, 1960.

² The other delegates were (asterisk indicates member of the American Society of International Law): Lineu de Albuquerque Melo and Braz de Souza Arruda, of the Sociedad Brasileira de Derecho Internacional; Julio Escudero Guzmán and Abel Váldéz of the Instituto Chileno de Estudios Internacionales; Angel Modesto Paredes and Jorge Villagómez Yepes * of the Instituto Ecuatoriano de Derecho Internacional; Antonio de León of the Asociación Panameña de Derecho Internacional; Enrique García Sayán and Raúl Ferrero of the Sociedad Peruana de Derecho Internacional; Dardo Regules, Eduardo Rodríguez Larreta, Justino Jiménez de Aréchaga, Eduardo Jiménez de Aréchaga,* Carlos Carbajal, Eduardo Lerena Acevedo, Jorge Peirano Facio, Bernardo Supervielle, Quintín Alfonsín and Manuel Vieira of the Instituto Uruguayo de Derecho Internacional; Carlos García Bauer * of the Asociación Guatemalteca de Derecho Internacional; Isidoro Ruiz Moreno,* Margarita Argúas, Adolfo Bioy, Higinio

Dr. Isidoro Ruiz Moreno of Argentina was elected president of the sessions; Dr. Kunz was elected a vice president, and presided over the fifth plenary session.³ The proceedings were conducted entirely in Spanish and Portuguese. The United States delegation waived interpretation and translation, an accord and capability unique in the memory of the participants, but one which markedly aided the efficiency of the meetings as well as the quality of the discussion, by permitting direct exchange and engagement of ideas. It was the clear hope of the host country that the meeting would only be the first in a long series of truly Pan American professional gatherings dedicated to the study and promotion of international law. That hope was shared by all present.

On the agenda were Revision and Limitation of Diplomatic Privileges and Immunities, International Protection of Human Rights in the Americas (subsuming for special purposes Rights and Responsibilities of States in Relation to Nationalization and Expropriation, and Exhaustion of Judicial Remedies as an Indispensable Requisite to Diplomatic Protest), the Teaching of International Law, the Juridical Status of International Rivers, and the Reorganization of the American Institute of International Law. All delegations signed the extensive Final Act.⁴

II. SUBSTANTIVE DISCUSSIONS

The subject of human rights occupied a major portion of the delegates' time. A number of important and far-reaching proposals were submitted, particularly by the Uruguayan and Argentine associations, both of which had made human rights a special theme. Dr. García Bauer, the Guatemalan delegate, and also a specialist in the human rights field, contributed along with many others to raising the inquiry to a high plane. Related questions—"intervention" in particular—were examined at some length. As with most of the other topics, it was not intended that this group draft definitive texts or reach firm conclusions. But bases for even general agreement proved too complex for the time available and, in the end, the conferees resolved merely to recommend to their respective parent organizations that each should promote the protection of human rights and the application of the principles of the existing international declarations on human rights;⁵ and further, to recommend approval, with "opportune"

Arbo, Eduardo Labougle, Atilio Dell'Oro Maini, Eduardo Augusto García, José María Ruda,* Manuel Ordóñez,* Ernesto C. Hermida,* Hugo Caminos,* Santiago Sabaté Lichtschein,* Calixto Armas Barea,* Emilio Vaquero Lascano, César Díaz Cisneros, Alberto Pichot and Luis Tulasne* of the Instituto Argentino de Derecho Internacional. An observer was present from the International Labor Organization.

³ Dr. Kunz also delivered a major address on behalf of the American Society of International Law at the opening ceremonies in response to the official welcome.

⁴ *Jornadas* 168-173. A not altogether satisfactory English version follows the Spanish at 174-179. Article references below are to the Final Act.

⁵ Art. X-A; for a summary of discussion, see *Jornadas* 75-130. The memoranda which served as a basis for the discussion are reproduced in *ibid.* 17-23 (Uruguayan), 23-26 (Argentine), 27 (Ecuadorian).

modifications, of the draft Human Rights Convention prepared by the Inter-American Council of Jurists at its Santiago, Chile, meeting in 1959.⁶ The conference also accepted a resolution by Dr. Ruiz Moreno to the effect that there ought to be a rule of positive law excepting an action for recognition of human rights from the necessity of previous exhaustion of domestic remedies, when petitioner's proceedings are arbitrarily blocked by the very authorities through which he must seek redress, or are precluded by prevailing internal conditions.⁷

With respect to diplomatic privileges and immunities it was resolved, after an informative scrutiny of the problems, to await the results of the Vienna Conference on this topic and to recommend attention to the matter by the individual societies in the light of the views registered in Buenos Aires.⁸ For lack of time, similar determinations were made after fruitful preliminary exchanges on the topics of expropriation,⁹ and of international rivers.¹⁰

The "urgent necessity" of arranging for rapid, certain and systematic distribution of inter-American system documents to the specialists and professional organizations needing them was ordered communicated to the Secretary General of the Organization of American States.¹¹ As for the teaching of international law, a comparison of objectives, requirements and syllabi in various countries—even on a superficial and mostly spontaneous basis—proved of great interest to the delegates. Modernization of the courses from the point of view of methodology and of orientation of subject matter was urged; the importance of impressing the student with the need for a rigorous approach to the study of international law *as law* was agreed to. These and other points made were cited as departures for "unification" of the discipline. At the next such inter-American reunion it was agreed this topic should be explored on the basis of exhibits of course materials and methods from each country.¹²

III. AN INTER-AMERICAN INSTITUTE

One of the principal purposes in assembling representatives of the various national societies was to consider the desirability of revival and reorganization of the American Institute of International Law. Thus, reproduction of the agreed resolution at this juncture may have merit:

⁶ Art. X-B. The Inter-American Council of Jurists' draft convention is to be submitted to the next Inter-American Conference, scheduled to take place in Quito.

⁷ Art. IX; the Argentine memorandum is in *Jornadas* 28-29.

⁸ Art. IV; discussion in *Jornadas* 51-64. The basis was a memorandum forwarded to the delegates by Dr. Alberto Ulloa of Peru, which urged a halt to extension of diplomatic privileges and immunities to new classes of persons; text *ibid.* 15-16.

⁹ Art. V; see *Jornadas* 43-44, 99-104, for discussion based on an Uruguayan statement.

¹⁰ Art. XI; discussion, *Jornadas* 156-161. The basis was a memorandum by Dr. Angel Paredes; text *ibid.* 27-28.

¹¹ Art. VII (proponent, Robert Hayton; see *Jornadas* 143).

¹² Art. VIII; discussion, *Jornadas* 133-155, based on a Chilean memorandum and a memorandum by Dr. Hermida.

Reorganization of the American Institute of International Law

The Buenos Aires Meeting on International Law,

CONSIDERING:

The urgent need of uniting and associating the entities devoted to international law studies in order to stimulate progress in International Law [and] its codification; of harmonizing, when possible, criteria on disputed matters; and of considering scientifically the delicate problems the present international situation poses for the law,

RESOLVES:

(1) To consider an [Inter-]American Association of International Law as established.

(2) To establish an Organizing Commission composed of Drs.:

Carlos García Bauer
Eduardo Jiménez de Aréchaga
Julio Escudero Guzmán
Robert D. Hayton
Lineu de Albuquerque Melo
Isidoro Ruiz Moreno.

This Commission will undertake to arrange the holding of the prospective preparatory meeting at the location decided upon by the said Commission, within a period of no more than six months, after consulting with the respective American Institutes, Associations and Societies.

(3) That that same Organizing Commission is charged with preparation of a draft of the statutes of the Association and will ponder the problems of its financing, in order that these matters may be considered at the Preparatory Meeting.

(4) That the ordinary meetings of the Association should take place not more often than every two years and not less often than every four years.

(5) That the Secretariat of the Association remain in the charge of the Argentine Institute of International Law, sponsor of this Conference, until the Institution in the country appointed as the seat of the next meeting is ready and able to assume charge of the Secretariat, which assumption will be notified to all entities that form a part of this International Association.¹³

The Organizing Commission created by the resolution is made up of individuals;¹⁴ however, it was understood that Mr. Hayton would consult with the American Society of International Law as plans for an Inter-American Association or Academy and plans for a preparatory meeting developed, and use his best efforts to work out plans that might engage the interest and participation of the Society in accordance with the

¹³ Art. VI; discussion, *Jornadas* 35, 66-73; report of the special committee to study the subject, *ibid.* 132-133. The Society's delegate, Robert Hayton, served as a member of that committee.

¹⁴ A number of factors, including unsettled conditions in Argentina, have postponed initiation of the Organizing Commission's labors. However, preliminary conversations were held prior to departure of the members from Buenos Aires, between two members of the Commission in New York and in Guatemala City, and by means of sporadic correspondence. No technical or liaison reports have as yet been made to, nor instructions sought from, the Executive Council of the Society by Professor Hayton.

resolution adopted by the Society in 1957 endorsing the plan to revive the American Institute of International Law, "recognizing the important work it has performed in the past and suggesting that an important function it might undertake would be to coordinate the work of the national societies of international law in accordance with the original objective of the Institute . . ." ¹⁵

It scarcely need be added that extension of collaboration among those jurists specialists in international law in the Hemisphere carries considerable potential as a supplement to the efforts of the *Alianza para Progreso*. To the extent that that policy in the long run relies on viable and reliable international understandings among the American Republics, and in particular between the Latin American countries and the United States, co-operation (or the lack of it) on the basis of law and mutual respect may very well prove decisive.

It remains for the Organizing Commission to begin its serious work and to bring forth recommendations, both for the actual form and by-laws of such an institute, and for the date and place of the next inter-American meeting. At the next such meeting the various national societies should be prepared to seek acceptable compromises on points of difference and then to take decisions in this matter—to accept or reject some concrete form of hemisphere-wide association either of individuals in the "Academy" tradition, or of national societies, or both. ¹⁶

The invited delegations to the Buenos Aires Conference owe an enormous debt of hospitality and intellectual camaraderie to their Argentine hosts—one which the writers are most anxious to acknowledge. ¹⁷ The American Society of International Law, and its JOURNAL, are highly respected among the international lawyers of Latin America. A number of them belong to the Society. It would be an error of omission not to state here that there is some expectation that their colleagues in the United States will do their share not to allow the estimable example set and substantial momentum begun by Argentina in 1960 to be dissipated or forfeited.

JOSEF L. KUNZ

ROBERT D. HAYTON

¹⁵ "Revival of American Institute of International Law," 1957 Proceedings, American Society of International Law 181. The Executive Council of the Society had given prior approval to the resolution with the understanding that the Society was not committing itself financially in any way. *Ibid.* 182. The American Institute, with headquarters in Washington, was created on October 12, 1912. See Alberto Ulloa, "The American Institute of International Law," 51 A.J.I.L. 98-100 (1957). For more background, see 6 A.J.I.L. 949 (1912) and 7 *ibid.* 163 (1913).

¹⁶ Several alternative forms and sets of operating principles have been put forward. It is precisely the task of the Organizing Commission to consider carefully these and any other suggestions. It would be improper in this report to prejudge the deliberations or to take a position prematurely.

¹⁷ By way of further honor and hospitality, Josef Kunz, Carlos García B., and Robert Hayton were invited, at the close of the sessions, to Montevideo to give a special set of lectures at the University as guests of the Uruguayan Government. See *El Día*, *El Diario* and *Acción* (Montevideo), Sept. 19, 1960.

DE JURE NATURAE ET GENTIUM

We have read with great interest the remarks "*De Jure Naturae et Gentium*"¹ by Mr. Alfred P. Rubin of the U. S. Department of Defense. But as these remarks were obviously written with reference to this writer's editorial, "Natural-Law Thinking in the Modern Science of International Law,"² it should be pointed out that they do not deal with the problem of the writer's editorial, which relates to the 2,500-year-old conflict between "positivism" and genuine "natural law." This is a conflict as to what law is, as to the general definition of law; it is a fundamental problem of jurisprudence or philosophy of law. It is with this problem of jurisprudence, made actual by the revival of genuine natural-law thinking, that the editorial deals. Since this is a fundamental problem of jurisprudence, it arises in all special fields of law, *e.g.*, in criminal or constitutional, and thus also in international law; but it is not a specific problem of international law. The solution of the problem is, therefore, a task of the philosophy of law.

Mr. Rubin does not deal with this problem. He refers only to the "*droit de la raison*"—not a theory of an objective natural law, but of subjective natural rights. It was exactly the long predominance and the extravagances of this "*droit de la raison*" which stimulated the triumph of positivism at the beginning of the nineteenth century; the adherents of traditional natural law today reject the "*droit de la raison*" as much as the strictest positivists.³

Mr. Rubin does not write on the fundamental differences between positivism and natural law, as his phrases of an "adamant naturalist" and of mere "parochial differences of definition" show. He does not write on this problem but as a positivist who does away with the problem by simply twice quoting Article 38(1) of the Statute of the International Court of Justice. This quotation does not seem particularly apt for this purpose; it refers, in this old conflict, to a very new norm of international law; some might say that this norm is only binding on the International Court; point (a) of this rule is very badly drafted from a legal point of view; some, as Mr. Rubin mentions, have interpreted the "general principles" as rules of natural law. First of all, however, as Mr. Rubin states, this article puts the accent on "consent," *i.e.*, on enactment. He who

¹ In 56 A. J. I. L. 514-517 (1962).

² In 55 *ibid.* 951-958 (1961).

³ It was therefore necessary to mention that the science of international law started under the influence of traditional natural law and that Grotius, although still near to that natural law, by his secularization, made a fundamental change. This writer is by no means rigid; fifty years of study have shown him abundantly that men, grouped for convenience into a "school," *e.g.*, of "American legal realists," may differ among themselves and have different ideas. Thus it is here; the natural law of Hobbes is, of course, very different from that of Locke. This writer agrees that the majority of international lawyers of the seventeenth and eighteenth centuries were "Grotians"; he only remarks, what is undeniable, that there were tendencies to develop theories in the two opposite directions of pure natural law or of positivism, as in Moser, who wants to teach the "real" international law, based exclusively on the practice of states, on "what the princes do."

is absolutely governed by Article 38(1) is a positivist, and our problem whether law is law "by enactment" or "by nature" does not even arise.⁴ Mr. Rubin sees only minor differences, "parochial differences of definition"; hence he says that "all legists may be considered by others so inclined to show significant traces of 'naturalist' thought in their work."⁵ Mr. Rubin is entirely right in indicating the abyss which divides the statement of the law actually in force and politics of law, *i.e.*, mere proposals *de lege ferenda*, and this difference is a main point of this writer's editorial. But while everybody, positivist or naturalist, may make such proposals *de lege ferenda*, not all these proposals are founded in natural law. We agree with Mr. Rubin that international law in practice is still "positivistic"; but his statement that "there is no revival of 'naturalist' jurisprudence" is not correct.

In dealing with the fundamental problem, as this writer does, it is good to select examples where the contrast between "positivism" and "natural law" is perfectly clear and where it is seen that, contrary to Mr. Rubin's opinion, starting from the two opposite conceptions leads to very different results also in practice; still, in the eighteenth century English courts decided that an Act of Parliament which is "against reason" is void and binding on no one—that is natural law; but since the nineteenth century British courts have recognized the legislative omnipotence of Parliament—that is positivism.

In order to state the contrast, we must start with the opposition, as formulated in Greece: Is law law "by enactment" or "by nature"? In the long development of traditional natural law from the times of Socrates to the present day it was laid down that law is a reasonable order, in accordance with natural law, which has been written by God into the heart of all men and can be recognized by man's reason, a reasonable order for the common good. It is not the enactment, but the justice of the contents which makes law law: justice, not mere will.⁶ The legislator has no unlimited competence to legislate; he is bound by supra-positive, eternal rules, the rules of natural law. For the "nature" of traditional natural law is, of course, not the nature of natural sciences, but a normative order which has its fountain in the *lex aeterna*, just as "reason" is the

⁴ A peace treaty, if "agreed upon" and ratified, is, from a positivistic point of view, a valid treaty regardless of its content. But the natural law doctrine of *bellum justum* made the *justa pax* an equally important precondition of a just war. Such ideas can also be found today. The Munich Treaty of 1938 was, regardless of its content, a valid treaty in 1938. But the Declaration of the French National Committee of 1942 held that the Munich Treaty was void *ab initio*: "*nul et non avenue*."

⁵ Mr. Rubin's quotation, as an illustration, of the above sentence, of Professor Verdross, is not a happy one, for Professor Verdross is a full adherent of traditional natural law opposed to strict positivism in his philosophy of law, and builds his Treatise on International Law on the philosophy of Francisco Suárez.

⁶ The conflict between mere enactment and "reason," between will and justice is already found in the medieval Catholic Church. The Franciscan monk, William of Occam, taught in the fourteenth century that the moral order of the world is exclusively based on the will of God, who may abolish the Decalogue; no natural law, but only positive orders of God. Verdross, *Abendländische Rechtsphilosophie* 80 (1958).

"*ratio recta*," the "*lógos oethos*" of the Stoics. The genuine natural law must, therefore, be distinguished from sociological and political considerations, from reasons of expediency or opportunism, from the many forms of pseudo-natural law. From this basis it follows that a law, however well enacted, but in violation of natural law, is, in the phrase of St. Thomas of Aquinas, "*non lex, sed legis corruptio*."¹ Traditional natural law fully insists on the absolute necessity of "man-made" positive law; it has always considered itself to consist only of a few general highest principles, which may and must be applied differently according to different times and nations, thus fully recognizing the dynamics of the law. Natural law is not a second, rival legal order opposed to positive law. There were forms of strictly revolutionary natural law, like that of Rousseau; but the bulk of natural law, from Socrates through its long history, was of a conservative character, aimed at giving positive law more authority; hence, obedience to positive law, generally speaking, is itself a principle of natural law.

It stands, therefore, to reason that real clashes between positive and natural law have always occurred only in extreme cases, where the strongly anti-ethical content of an enacted law forced the conclusion that it was not law. Such a resurgence of natural law arises also in extraordinary times. We are living in such extraordinary times. It is therefore understandable that before and during 1945 and in the following years, a true revival of genuine natural law has taken place. The battle was naturally fought in the realm where it primarily belongs: in the realm of jurisprudence or philosophy of law. In the nineteenth century the advantages were on the side of positivism exactly because of the relatively quiet times, when there was less occasion for open clashes between the two theories. This time the advantages were on the side of the adherents of genuine natural law, and the positivists were rather in a position of defense. One needs only look through the literature of legal philosophy of the last decades in all the languages in order to see how strong the battle is, how strong the attack against positivism which, contrary to what the nineteenth century said of natural law, is often considered in decline, if not dead. We hear all the arguments of traditional natural law: the outcry for justice and natural law against mere will, the accent on the necessity of eternal, supra-positive principles; the idea that a law against justice is not a law; the attack against Kelsen's positivistic dictum that "every content can be law"—content, not enactment. Adherents of natural law, who designate a legal scholar of former or present times as a "positivist," or even as a "strict positivist," certainly have no intention of paying a compliment; they mean to say that he is not only a mediocre scholar, a "mere formalist," but almost to indict him as immoral. They charge positivism with "separating ethics from law"; they even suggest that positivism is responsible even for the application of the most abominable decrees of Hitler through the German judges. As we see, these are not questions of "parochial differences." It is

¹ Summa Theologica.

this true revival of genuine natural-law thinking which also appears in the different branches of law, including international law.⁸ It is highly interesting to see this full revival of genuine natural law in West German constitutional practice and in the practice of the highest West German courts.⁹ Here we read in perfect terms traditional natural-law sentences like: "Hitler's regime has taught *ad hominem* the necessity of universal higher standards of valid supra-positive principles"; or "the property of Jews was forfeited to the government in violation of natural law, and, therefore, void *ab initio*; it is no rule of law; obedience to it is against the law"; or "the confiscation law cannot be considered as a rule of law as to *content*, though clothed in the formal robes of the legality of law."

It is with this real problem that this writer, a moderate positivist, deals in his editorial. He indicates his lines of solution of this problem of jurisprudence and sees in Dabin's and others' insight that so-called "natural law" is a normative order, but ethics, not law, the basis for such a solution.

JOSEF L. KUNZ

56TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law held its 56th annual meeting from April 26 to April 28, 1962, at the Statler Hilton Hotel in Washington, D. C. The meeting opened on Thursday afternoon, April 26, at 2:15 p.m., with two simultaneous panel discussions on the subjects of "Disarmament" and "The Anti-Trust Laws of the European Economic Community," respectively. Mr. Charles Spofford, of the New York Bar, was Chairman of the Disarmament panel, on which the principal speaker was Professor

⁸ Natural-law terminology is again applied in treaties, as, *e.g.* the "inherent" right of self-defense in Art. 51 of the U.N. Charter, certainly not a correct formula from a legal-technical point of view. True attitudes of traditional natural law are taken by international lawyers, who *are* adherents of natural law. Thus, to give an example, J. A. Pastor Ridruejo (*La Protección a la Población Civil en Tiempo de Guerra* 311 (1959)), in discussing the 1956 Draft Rules of the International Red Cross at the New Delhi Conference, asks whether the states will transform these draft rules into an obligatory convention, but holds that these draft rules are imposed by the minimum exigencies of natural law and are, therefore, already "*obligatory legal norms*, whether or not the states accept them." The positive science of international law is accused of having corrupted international law by following merely state practice and ignoring justice. See, for example, the Mexican, Luis Padilla Nervo, in the International Law Commission: ". . . in international law an unbridled positivism had reigned supreme, whose sole criterion was the practice of states. . . . Once international lawyers had abandoned the criterion of justice . . ." Quoted in Mr. R. P. Anand's article in 56 A. J. I. L. 386 (1962). Such natural-law attitudes we find in international lawyers of non-Occidental cultures. The Indian Judge Guha Roy holds that the rules concerning responsibility of states are merely "enacted" customary rules of international law and not norms of "universal" international law, because they are not based on justice, and, referring to a very ancient Occidental source, he adds that he means that justice with which we were made familiar by Plato's Dialogues. 55 A. J. I. L. 865 (1961).

⁹ Cf. Heinrich Rommen, "Natural Law in Decisions of the Federal Supreme Court and the Constitutional Courts of West Germany," *Natural Law Forum*, 1959, pp. 1-25.

Roger D. Fisher of Harvard Law School. His topic was "Enforcement of Disarmament: The Problem of the Response." The speaker stated that the problem is not simply one of planning a response but of creating rules about what governments should and should not do if one government fails to respect the rules regarding disarmament. Disarmament can be regarded as a precautionary rule, and responses to its violations should be made within a framework of continuing rules. A breach of a disarmament treaty must not be thought of as terminating the legal relationship, but rather as an act which produces certain legal consequences. The functions of a response should be to serve as a warning or threat designed to discourage subsequent violations of a rule, to nip a violation in the bud, and to deal with the situation created by the actual or possible violation before any real harm is done. If too late to do this, a response should serve to redress any imbalance or instability created by the violation and may also serve the cause of international order by giving the aggrieved party a chance to "let off steam." In fulfilling these purposes, the response should not at the same time create an undue risk that the original violator will engage in a counter-response which would increase the size of the problem and be disruptive of the international situation.

Professor Fisher declared that, lacking an agreed set of rules on the subject, the current situation may be said to be governed by the common law of appropriate responses, which encompasses reciprocal non-compliance, responses directed at the non-complying object, and responses agreed to in advance. The most frequently considered sanction for a country's failure to comply with an arms limitation is reciprocal non-compliance by the other parties. This may not serve as a deterrent to future violations, and may create another dangerous situation to meet the first. If the situation is truly reciprocal, and recognized as such by all concerned, there will be little risk of escalating responses. In the real world, however, the response cannot be identical in all respects to the violation and there will be a risk of escalation. He stated that the fact that a violation of one part of an agreement may be deemed by the community to justify a country's repudiating the entire agreement argues for bringing about disarmament through a number of separate agreements rather than through one comprehensive treaty.

The more directly that a response deals with the symptom of non-compliance, the more acceptable it will be and the less danger it will create of escalating responses. By dealing directly with the visible and tangible consequences of non-compliance it may be possible both to discourage future violations and to arrest this violation before real injury takes place. The speaker suggested that in articulating the rules about appropriate responses to violations of an arms limitation agreement, we would do well to explore what might be done by dealing directly with the objects involved in the particular violation.

Professor Fisher stated that, by providing agreed rules, the essential talent of the law to deal with disorder in an orderly fashion is brought to bear. In the disarmament field it should be possible to devise "liqui-

dated damages" provisions which would make the response more certain and lessen the risk of escalation. Among possible agreements it has been suggested that the U.S.S.R. and the U. S. each deposit nuclear material in a neutral country, specified amounts of which would be forfeited to the other in the event of a violation; means could be devised by which military secrets could similarly be placed in escrow; U. S. foreign bases might be pledged as security for its undertakings, it being explicitly agreed that in event of a violation, the United States would have to withdraw the base or it could be destroyed legitimately. It might further be agreed that any satellite launched without prior inspection would be subject to legitimate destruction by the other side.

In developing ideas as to what would be wise responses to governmental violations of disarmament rules, Professor Fisher said, it is useful to examine the responses now made to governmental violations of law within existing orderly societies. Such examination suggests three propositions which might be taken into account in trying to improve upon the Clark and Sohn proposals: (1) governments should not be treated as criminals; (2) violations should be considered as disputes; (3) judicial orders should seek to restrain individuals. Mr. Fisher stated that we should not conceive of the problem of enforcing rules against governments as one of imposing punishment after the fact. He declared that to the extent that punishment is designed to act as a deterrent to future violations, it should be directed at the individual who will in fact be deciding upon the government's conduct. In view of the fact that governments feel compelled to justify what they do in terms of principle, and will not admit they are breaking a rule without justification, violations of disarmament rules should be dealt with as disputes. In this borderline area where a rule of international law is unclear and can reasonably be interpreted in different ways, the very concept of compliance depends upon there being a court or some other authoritative way of determining what the rule is. Under any comprehensive disarmament scheme there must be, as Clark and Sohn emphasize, judicial machinery competent to decide all questions of interpretation and obligation. Such a court should have broad jurisdiction not only to determine the obligations of states, but to hear, consider and in its judgment reject, the reasons advanced for not doing what the court has indicated should be done. Such a court should direct its order at the individual government official found to have acted contrary to a disarmament agreement, for such action passes the problem of the response back to the government of which the individual is an officer, and that government will be faced with the difficult question of what to do. Where there is no international judicial machinery, a law-abiding government will have to decide whether a small violation by another government justifies the disruptive response of throwing away the entire disarmament agreement. Where there is international judicial machinery, the violating government must either go along with the court's decision ordering an officer to refrain from specified improper conduct or take upon itself the responsibility for the disruptive response of throwing away the entire agreement.

Professor Richard Falk, of Princeton University Center of International Studies, in commenting on Mr. Fisher's paper, stated that in formulating a response to a violation of a rule, weight would have to be given to a description and interpretation of the particular event, an assessment of the motivation and intention of the violating country, and a political judgment about the nature of the other participating governments. He questioned whether we in fact want rules at the response stage, and stated that it might or might not be appropriate to direct the response at an individual or government, depending on whether the violation stemmed from a basic government policy that challenged the premise of disarmament or was merely a trivial departure from established legal rules.

Mr. John T. McNaughton, Deputy Assistant Secretary of Defense, International Security Affairs, referred to the United States treaty for comprehensive disarmament presented at Geneva, and stated that the only response embodied in that treaty is what Professor Fisher labeled reciprocal non-compliance. He agreed that the word "inspection" was both too narrow and too broad. The primary objective is to insure compliance, and for this purpose "verification" is a better term. He declared that the area within which Professor Fisher's efforts might be successful is a very narrow one. His points would be most clearly valid once a disarmament treaty was successfully working.

Mr. Richard J. Barnet, of the United States Arms Control and Disarmament Agency, agreed with Mr. Falk's position regarding the nature of response to violations, and disagreed with Professor Fisher's assertion that reciprocal non-compliance was an undesirable form of response because of the danger of escalation. It was also true that reciprocal non-compliance was for that very reason a potentially stabilizing factor in the maintenance of agreements. He stated that there is a relationship between control, in the sense of observation or inspection, and deterrence. An increase of inspection may be an appropriate response to discourage further violations, but raises a problem in that it implies that inspection is not in the interests of the inspected country. This is not always true, for the greater the amount of inspection, the greater the assurance to the other side that the inspected country is not violating the treaty, and hence the greater the stability of the disarmament arrangement.

The second panel on the "Antitrust Laws of the European Economic Community" had as its chairman Mr. Carlyle E. Maw, of the New York Bar. The participants were Mr. George Nebolsine, of the New York Bar, who spoke on "The Substantive Effect of the Anti-Trust Provisions of the Common Market Treaty"; Professor Stefan A. Riesenfeld, of the University of California Law School, who discussed "The National Anti-Trust Laws of the Community Countries"; and Professor Louis B. Schwartz, of the University of Pennsylvania Law School, who spoke on "Implementing the Anti-Trust Sections of the Rome Treaty."

On Thursday evening at 8:30 p.m. the Society heard the presidential address of Mr. Arthur H. Dean, who, because of his absence in Geneva as head of the United States Delegation to the United Nations Disarmament Conference, was unable to deliver his address in person.

Mr. Dean devoted the first part of his address to the progress made by the Society in carrying out the program of expanded activities made possible by the acquisition of a headquarters building, increased staff, and generous gifts and grants from individuals and organizations. He stated that the Society's expanded program "has reinvigorated its venerable character," and that "the Society still has a major financing and reorganization job to complete." Mr. Dean stressed that it is particularly important that through its study groups, forums and publications the Society should combat the pernicious view that there is no international law:

If the reality of the ever growing scope of international law can be brought home to an expanded audience and membership, including an ever greater participation by practicing lawyers from coast to coast, the scholarly articles and topical discussions which are published in the *Journal* and *Proceedings* supplemented by the monthly newsletters and regional forums and meetings may greatly contribute to the climate of informed public opinion which is needed today to support a United States foreign policy which can increasingly foster and accept the rule of international law.

One of the subjects for future study by the Society, Mr. Dean suggested, could be the problem of establishing an effective international civil service and judiciary. He stated that "the controversy over the acceptance of the power of international civil servants involves the same ultimate problem faced by a free society based on a government of laws, not of men." A basic tenet of the Western democratic system of justice and government is that a man can be trusted to act in his official duty according to law with integrity and impartiality, deciding each case or making each decision on its merits under general principles upon which all parties can agree. This is not recognized by Communist dogma, where all men are conceived to be either capitalists or proletarians, exploiters or exploited, and thus not capable of impartiality or integrity. Mr. Dean declared that for the establishment of a rule of law, generally accepted or agreed moral principles are the "necessary basis of any system . . . which aspires to achieve justice and the common good"; and "without impartial judges and executives to make just decisions and justly to execute them, no system of accepted legal principles would offer much hope of justice or the common good." He stated that many principles of international law are coming to be recognized more widely, even among the new nations, and that international agreement on international law principles has shown significant advances during the past year.

Referring to the Disarmament Conference in progress in Geneva, Mr. Dean stated that an attempt was being made to do two things at once: to agree upon principles of law and upon a system of enforcing and administering the laws by men whose decisions can be trusted to protect against violations. However, "the concept of an international judiciary and of an international civil service for use as an effective and trustworthy instrument to apply mutually agreed principles or to enforce collective decisions is not yet accepted by the Communist nations," and is not yet fully

accepted in the United States. This is demonstrated by the Communist reservations to conventions denying jurisdiction to the World Court with respect to those conventions, and by the Connally Reservation to United States acceptance of the compulsory jurisdiction of the World Court.

Mr. Dean asserted that "the United States, while publicly supporting the concept of an impartial international United Nations Secretariat, in fact has failed to accord the officials of that Secretariat the privileges and immunities necessary for them to maintain that status and character," by not ratifying the Convention on the Privileges and Immunities of the United Nations. He added that "if we aspire to 'save successive generations from the scourge of war,' the international civil service and judiciary will become increasingly important and their impartial international character and status must be defended and strengthened." Referring to the defense of the integrity of the United Nations Secretariat by the late Dag Hammarskjöld, Mr. Dean declared that

It may prove to be that this greatest crisis in the history of the United Nations was the most momentous turning point in the heroic undertaking in which we are engaged to persuade all nations to accept and promote the growth of a rule of law. . . . It must be our continuing endeavor to persuade the Soviet Union to accept the concept of an impartial and permanent international civil service as part of the price of peaceful co-existence.

With regard to the disarmament negotiations, Mr. Dean stated:

Now we are attempting to negotiate the most comprehensive general disarmament treaty ever proposed, complete with detailed practical steps and methods to enforce such disarmament in several stages. Among the key concepts of this new treaty are that in the first stage of disarmament there be established an International Disarmament Organization with its own executive officers and staff within the framework of the United Nations, and that in the second stage, the compulsory jurisdiction of the World Court shall be accepted without any reservations. Thus the United States is proposing to commit itself to do away with the Connally Amendment, subject to Congressional approval of such a treaty if it can be successfully negotiated. The United States is presently devoting all of its resources of persuasion, patience and good will to achieve this purpose.

He asserted that "the key to eventual success in the international inspection or verification of disarmament and nuclear tests will depend upon whether or not the Soviet Union comes to realize that it has an interest not so different from that of the West in establishing an effective multinational or international control system." In the meantime, agreements have already been reached on basic disarmament principles in accordance with a joint statement negotiated last summer, which served as the basis for the U.N. resolution which now provides the framework for the disarmament negotiations. These agreed principles are far from complete, especially where they concern international inspection techniques, and there are still outstanding some important differences. He added that "The problems of establishing and administering disarmament and verifying a nuclear

test ban by effective international machinery are not dissimilar from the problems of solving many other international problems."

Among the problems confronting the world, in addition to those concerned with outer space and nuclear weapons, are those of the newly independent states. The resolution of the struggles of the African states for stable government and economic order may affect to an extraordinary degree the conflict between East and West and the health of great alliances far from Africa. In the African situation there is a "desperate need for international law and for a skilled international secretariat which can operate in the dangerous power vacuums which have been created by the unexpectedly rapid departure of the colonial and trust territory administrators." The difficulties of the new nations place immense demands upon the United Nations and its Secretariat as well as upon other international institutions such as the World Bank. Mr. Dean continued: "The United Nations and other international organizations are being called upon to supply an astonishing variety of services," and

we have seen only the beginning of a change that has already revolutionized traditional approaches to foreign policy. It is here that we face the greatest tasks statesmen have yet undertaken as part of a continuing and realistic program to shift from the unfettered sovereignty of diplomatic relations to reliance upon international institutions. It is here that lawyers may have their greatest opportunity to contribute to the future well-being of mankind. . . . We must devote our efforts to work with Soviet statesmen and scholars. We must encourage co-operation with them in all fields of law to increase their understanding and willingness to respect agreed principles of law and institutions to enforce them.

Many of the officials of the United Nations and its specialized agencies and other international organizations are able and dedicated men, who "are being increasingly asked to assume responsibilities which transcend the national interests of their homelands, and to remain free from influence by such countries in keeping with the principles of the United Nations Charter. . . . The ability of most United Nations officials to fulfill their international responsibilities with highest honor . . . has been demonstrated." Whether we can create a lasting and honorable peace which will endure beyond our time will largely depend on whether we can build and staff reliable and impartial international institutions to enforce international law, and whether such institutions will be able to function effectively when harassed and obstructed by the forces of anarchy and violence.

Following the presidential address, Dr. Francis Deak of the Carnegie Endowment for International Peace delivered a paper on "Observations on International Law in Underdeveloped Areas." These observations were gathered in the course of a trip through four continents during the past year to survey for the Carnegie Endowment for International Peace the status of teaching and research in international law. He stated that, "with few exceptions, international studies in general and international law in particular, have, at best, a very low priority as an academic discipline" in most African, Asian and Western Hemisphere countries which he visited.

The teaching of international law is "superficial, of mediocre quality and of narrow scope," and opportunities for advanced study and research are rare and often totally absent. Dr. Deak stated that the principal reasons for this situation are: (1) a shortage of competent full-time teachers; and (2) the lack or total inadequacy of tools for teaching and research. Among other reasons, he pointed out the lack of opportunities for international law specialists and lack of interest in the subject, as well as an attitude among a number of the new African and Asian countries challenging the validity of international law on the ground that it has been formulated by colonial and imperialist Powers for their own benefit. On the other hand, Dr. Deak stated that in many of these countries international law is a required undergraduate subject, and that there is a growing realization in many countries of the need for international studies, with resulting efforts to improve training in these fields.

In Western Europe, Dr. Deak pointed out, international law is a required subject in many European universities, while this is not the case in the United States. He also pointed out that in Yugoslavia and Poland there was much useful research going on in the field. In Africa, British-educated Nigerian lawyers have great influence and prestige, and their program for legal education, if carried out, may well create the pattern for legal education in much of Africa. A law school has recently been opened at Dar-es-Salaam in Tanganyika, which is designed to train lawyers not only for Tanganyika, but also for Kenya, Uganda and Zanzibar.

The Indian School of International Studies in New Delhi is a promising institution with the most complete and best organized library for international studies which Dr. Deak had seen in Asia. Its department of international law was weak because it had not yet succeeded in adding a permanent full-time professor to its faculty. The University of Singapore Law School, in his opinion, comes closest to our concept of legal education, having a largely full-time faculty of outstanding lawyers, good teachers and a very good library.

In the Philippines there is much activity in the field of international law, and the younger generation, many of them trained in the United States, is injecting new methods and approaches in teaching international law. Similarly, the Chinese in Taiwan are very active in international law and diplomacy. In Japan international law is being taught at most of the major universities, generally along traditional lines. Dr. Deak stated that one of the significant developments in Japan is the growing attention in teaching and research to primary sources of international law instead of textbooks. The Japan Institute of International Studies, founded in 1959, receives generous support from the government and from business in its activities, which include the publication of a number of books and monographs on Japanese foreign policy and relations. A major research project in international law is being carried out in Tokoku University in Sendai and at Kyoto University Law School.

In Latin America serious work is in progress or planned at the University of Montevideo, at the recently established School of Public Adminis-

tration in Bogotá, at the Colegio de Mexico, and at the Institute of Comparative Law of the National University of Mexico. Efforts are being made at the University of Chile and the Catholic University in Santiago to improve legal education and to intensify international studies. Latin American interest in various official and unofficial bodies engaged in promoting the development of international law is varied. There is some interest in the activities of the United Nations International Law Commission, but it "is not generally looked upon as a very active or effective body for the codification and progressive development of international law." The Inter-American Committee of Jurists is considered to be composed of government representatives rather than of independent scholars. There is a difference of opinion regarding the Afro-Asian Legal Consultative Committee.

Dr. Deak asserted that more attention seems to be paid to unofficial organizations, such as the Hague Academy of International Law, the Institute of International Law, and the International Commission of Jurists. Although the International Law Association has national branches in some Asian and Latin American countries, these generally appear to be inactive paper organizations. There is limited interest in the "World Peace through the Rule of Law" project sponsored by the American Bar Association, but the Tokyo and Costa Rica Conferences seem to have had little impact on the legal profession of the countries which sent representatives to these conferences.

Dr. Deak stated that, among international lawyers of the countries he visited, American contributions to the development of international law are very much appreciated, and the prestige of prominent scholars such as Elihu Root, John Bassett Moore, Charles Cheney Hyde, Manley Hudson and Philip Jessup is very high everywhere. The Society has been taken as a model by the Indian Society of International Law and the Philippine Society of International Law, both of which publish a quarterly journal closely patterned on THE AMERICAN JOURNAL OF INTERNATIONAL LAW, which "is generally considered as one of the indispensable tools for the international lawyer." The Society and the JOURNAL are closely associated in people's minds with the Carnegie Endowment for International Peace, which, along with the great amount of source material published or sponsored in the past by the Endowment's Division of International Law, is held in high esteem. Dr. Deak stated that few people's names are as much revered among international lawyers as that of Dr. James Brown Scott; and the Classics of International Law, Judge Moore's *International Arbitration* Series, Hudson's *International Legislation*, and the Harvard Research Draft Conventions are particularly valued and sought after.

Dr. Deak concluded by stating that international law is a neglected and sadly underdeveloped discipline in many parts of our globe, and that "the American community of international lawyers—as represented in our Society—has a great opportunity to help in the progressive development of international law throughout the world." Such help in the form of visiting professors to assist in planning courses and developing syllabi to

train native talent would be welcome in many places. There is also a pressing need for books and periodicals in the English language, and for advice as to the essential literature, textbooks, and documents which would constitute a basic library of international law. Dr. Deak stated that no organization is better equipped than this Society to take the lead in a constructive effort to assist institutions and individuals in the underdeveloped countries to contribute to the development of international law.

On Friday afternoon, April 27, at 2:15 p.m. two simultaneous panel discussions were held. The first panel, under the chairmanship of George W. Haight, of the New York Bar, dealt with "New Developments in Investment Guaranties." Mr. Seymour J. Rubin, General Counsel of the Agency for International Development, gave a description of the investment guaranty program of the United States which has been in effect since the Economic Co-operation Act of 1948. He discussed the history of the program from 1948, when the Economic Co-operation Act authorized the protection of new investors in Europe against the inability to convert the proceeds of their investments into dollars. This protection was broadened in 1950 to include the risks of expropriation or confiscation. In 1951 guaranties were made available in all countries which were aid recipients. In 1956 the risk protection was expanded to include loss resulting from war, and, finally, in 1959, the program was restricted geographically so as to apply only to underdeveloped countries. Under these programs some six hundred million dollars of guaranties had been issued, of which, as of June 30, 1961, about 500 million dollars remain in force. The Development Loan Fund, established in 1957, was authorized to insure loans against all risks of whatever nature and to insure equity investments against all political risks. The 1961 Act combines the specific risk guaranty authority of the International Co-operation Administration and the so-called all-risk guaranty authority of the Development Loan Fund. The specific risk authority has been expanded to include the risks of revolution or insurrection, and the all-risk authority to include business risks on behalf of equity investments.

Among the principal problems which the Agency for International Development faces in connection with the administration of the program, Mr. Rubin stated that "It has in the past been difficult or impossible to negotiate agreements with the host governments on the basis of which the United States was willing to initiate a guaranty program. . . . The guaranty program has been considered to be a method of expanding participation of private capital in the economic development program of the United States"; and the United States Government has been asked to guaranty private investments in activities which are normally considered to be within the public domain, or to attach a guaranty to what is essentially a security issued by a foreign government. Finally, the authority granted under the Act to issue guaranties to wholly-owned foreign subsidiaries raises the entire problem of "tax haven" corporations.

Mr. Rubin stated that a number of foreign governments were unable to agree to the conditions which the United States Government wished

to lay down in agreements initiating a guaranty program. These conditions include provisions that guaranties would not be issued with respect to projects disapproved by the host government; provisions recognizing the title of the United States to currency transferred to it when it has made payment under a convertibility guaranty, and providing for recognition by the host government of the United States title to property covered by an expropriation guaranty which has been brought into effect, together with agreement by the host government that in such situations the United States will have the right to institute inter-governmental discussions and to refer problems not settled in those discussions to international arbitration. In conclusion he said that "the rôle of the administrator of the guaranty program . . . is by no means a simple or an easy one," and "the guaranty technique seems to have been sufficiently proved so that little doubt remains . . . of its usefulness."

Mr. Rubin was followed by Dr. Aron Broches, General Counsel for the International Bank for Reconstruction and Development, who discussed recent proposals by a number of private individuals and organizations that investment insurance be placed on a multilateral rather than on a national or bilateral basis. These problems have been studied by the International Bank and the International Chamber of Commerce, which jointly addressed questionnaires to the business and financial communities in a number of countries with respect to the possibility of a multilateral insurance program. On the basis of its study the World Bank published a staff report on multilateral investment insurance, prepared at the request of the Development Assistance Committee of the Organization for Economic Co-operation and Development. The report of the International Chamber of Commerce on the subject had not yet been issued.

Dr. Broches pointed out that the principal proposals for multilateral investment insurance have certain features in common, such as an international organization with membership drawn from both capital-importing and capital-exporting countries, which would insure private foreign investments in the less developed countries against certain risks, such as expropriation or nationalization, inability to transfer profits or to repatriate capital, and international war. Protection would not be available against normal business risks or any risk for which insurance coverage could be purchased from private sources. Under most proposals only a percentage of the loss would be insured, only new investments would be covered, and insurance would be for a term of years, upon payment of an annual premium.

Under some of the proposals a condition of participation would be that certain minimum rules of good conduct with regard to foreign investment be accepted by governments. Most proposals provided that the investor would be insured against loss arising from the occurrence of a specified event which deprived him of effective control of his property or the receipt of earnings. Under an alternative proposal the investor would be insured against the refusal of the country of investment to arbitrate an investment dispute or to abide by an arbitral award in his favor, in violation of a

previous undertaking to do so. Most of the proposals contemplated that such a multilateral investment insurance program would be administered by the World Bank or by a separate agency affiliated with the World Bank.

Dr. Broches discussed some of the possible advantages and disadvantages of a multilateral program as compared to the national approach. Among the questions which arise is whether both capital-exporting and capital-importing countries should share in the financial liabilities entailed in a multilateral program, and, if so, in what proportion should these liabilities be undertaken; the degree of solidarity that can be expected from the participating countries; and the danger in both national and multilateral programs of increasing rather than decreasing the risk of politically motivated interference with property rights by some of the capital-importing countries. With respect to this last problem, Dr. Broches stated, there is a large body of opinion which feels that a multilateral guaranty program could only have the desired beneficial effects if it were coupled with an undertaking by the capital-importing countries to abide by the rules of good conduct. Attempts to find a formulation of such rules in an international agreement are now being made within the framework of the Organization for Economic Co-operation and Development, but no decisive progress has been made.

Dr. Broches stated that "proposals for establishment of a multilateral program proceed from the premise that insurance against the non-commercial risks of private overseas investment is an effective technique for stimulating that investment," and that governments, before establishing such a program and undertaking the financial and other obligations attached thereto, "would wish to be satisfied as to the validity of that premise." The World Bank has made a study of this question and has not found a satisfactory answer, principally because of the variety of considerations which influence investment decisions. A study of the national investment guaranty program of the United States, which has been in operation for more than ten years, "fails to give any indication of the extent to which the program has induced investments which would not have been made had the program not been in operation." Consequently, the World Bank "has not found it possible to establish a position for or against the creation of an international investment insurance program."

The second panel on Friday afternoon was devoted to "A Critical Appraisal of the United Nations Program for the Codification and Progressive Development of International Law." Mr. James Nevins Hyde, of the New York Bar, presided over the discussion. Dr. Eugeniusz Wyzner, First Secretary of the Permanent Mission of Poland to the United Nations, delivered a paper on "Selected Problems of the United Nations Program for the Codification and Progressive Development of International Law." Referring to the definition in the Statute of the International Law Commission of the term "codification and progressive development of international law," Dr. Wyzner stated that "codification of international law should also insure unification of existing practices on the basis of com-

monly accepted principles, to make them more precise and clear and finally to eliminate outmoded rules." He stated that "the idea of a universal code, which would embrace all the principal problems of international law and which would be acceptable for all States—seems to be rather impractical." Efforts prior to the creation of the United Nations to codify international law resulted mainly in the codification of the laws and customs of war. The League of Nations Conference held at The Hague in 1930 was unsuccessful. Substantial progress in the field of codification and development of international law has been achieved mainly by the United Nations through its International Law Commission and other United Nations organs. As practical results of the activities of various U.N. organs, Dr. Wyzner pointed out numerous multilateral agreements and conventions adopted by the General Assembly, such as the Genocide Convention, the Convention on the Privileges and Immunities of the United Nations, and agreements for the promotion of human rights and respect for civil, political, economic and social freedoms. Specialized agencies of the United Nations have produced many agreements and conventions regulating different aspects of international co-operation, among the most effective of which has been the work of the International Labor Organization, resulting in over a hundred conventions. He stated, however, that the effectiveness of the most important multilateral agreements is largely reduced by the reluctance of some states to become parties to them, thus diminishing the international binding force of those obligations.

Referring to the work of the International Law Commission since its establishment in 1949, Dr. Wyzner stated that "a number of positive results . . . justifies the conclusion that the Commission has proved its ability to use successfully both the method of progressive development and that of codification." However, a few draft articles containing departures from universally recognized principles of international law have proved to be completely ineffective. He declared that only in those cases where different political and legal points of view were taken into consideration, would the Commission draw up documents which were generally acceptable and thus could be considered as part of generally recognized international law. On the other hand,

those documents which reflected only the opinions of certain members of the Commission and were approved despite serious objections raised by other members, including those representing socialist legal systems, failed to have a major impact on relations between different States.

He added that the tendency to approve drafts which disregarded objections raised by some members of the Commission contradicted the spirit of its Statute. As an example, the speaker pointed to the draft articles on arbitral procedure which were drawn up by the Commission in 1953, and declared that a survey of its work as well as of the work of other organs of the United Nations and specialized agencies shows that the documents formulated by these organs dealt mainly with less important and mostly technical issues, and that almost none of them were concerned with the

major problems of contemporary international life, such as the safeguarding of peace and security, or peaceful co-existence among different systems.

Dr. Wyzner went on to analyze the meaning and mutual relations of the expressions "progressive development" and "codification" of international law in the light of the debate of the Legal Committee in the General Assembly on the item entitled "Future work in the field of the codification and progressive development of international law," which had been placed on the agenda of the 16th Session of the Assembly by a resolution of December 12, 1960, stressing the increased importance of international law in "strengthening international peace, developing friendly and co-operative relations among the nations, settling disputes by peaceful means and advancing economic and social progress throughout the world," which objectives, he said, are the most important and fundamental purposes of international law. As a result of the discussion at the 16th Session, the Assembly adopted a resolution requesting the International Law Commission to continue its work in the field of the law of treaties and of state responsibility and to include on its priority list the topic of succession of states and governments. On the topic of the law of treaties, Dr. Wyzner stated that the Commission should not disregard the more important problems in this field, prominent among which is the question of

safeguarding the newly independent States from the imposition of unjust and unequal treaties. Careful consideration should also be given to the expression of free will of the parties and the application of sovereign equality between them, as well as non-discrimination against any State, whether a Member or not of the United Nations, regarding participation in multilateral agreements.

With regard to state responsibility, Dr. Wyzner stated that the process of preparing the principles of state responsibility should alter its direction at least in part, that is, it should

lay down the rules . . . in such areas, as the preparation, initiation or waging of acts of aggression; war propaganda; the violation of the right of peoples to self-determination; the violation of a treaty, and so forth.

The prevailing trend had been to lay main emphasis on protection of the property and rights of aliens, which are some of the more superficial aspects of the problem. He stated that the Commission has tended to neglect the more important questions of the permanent sovereignty of peoples and nations over their natural wealth and resources. This question, together with that of the right of nations to self-determination, and the problems of state recognition and succession, "belongs to the more general issue of the elaboration of legal principles relating to the granting of independence to colonial countries and peoples." He added that the new formulation of the principle of self-determination in the General Assembly declaration of 1960 on the granting of independence to colonial countries and peoples constitutes "an extremely important legal document, which should give rise to a fundamental change of the legal status of the colonial and trust territories and to their independence."

Dr. Wyzner referred finally to the part of the General Assembly resolution placing on the agenda of its 17th Session the question of "Consideration of principles of international law relating to friendly relations and co-operation among States." He questioned the alteration of the wording, and quoted Professor Gregory Tunkin as saying:

In the age of co-existence of States belonging to socialism and to capitalism norms of general international law may only be those norms which correspond to the objective of strengthening peaceful relations between States irrespective of their social and economic systems. As far as this objective is concerned there is no other ground for agreement between socialist and capitalist States.

Dr. Wyzner concluded by saying that the discussion developed in the Legal Committee during the last two sessions of the General Assembly, as well as the discussion in the International Law Commission, has greatly clarified the problem of the codification and progressive development of international law and has facilitated future work in this field.

Dr. Wyzner was followed on the program by Mr. Ernest L. Kerley, of the Office of the Legal Adviser of the Department of State. The topic of Mr. Kerley's remarks was "United Nations Contribution to Developing International Law." Stating that the function of the United Nations in the present divided world is to find "those areas in which there exists, if not a common conviction, at least a common acquiescence," he asserted that this function is being performed well by the Legal Committee of the General Assembly and by the International Law Commission. Since the second World War "the Communist conception of international law has become an important factor in international relations." According to this concept, international law is based on the acceptance of states, and, accordingly, the state is bound only by such rules as it accepts. Hence it cannot be assumed that a Communist state regards itself as bound by long-standing rules of international law. In addition, the Communist states have asserted the "colonialist" character of certain rules as justification for refusal to be bound by them. It is now held in some quarters that the legal duties of statehood require no more than adherence to those rules of international law which the new state is disposed to accept. Consequently, much of the customary international law which has been regarded as settled "is in fact in a highly uncertain state."

Referring to the work of the International Law Commission, Mr. Kerley stated that among the characteristics of its texts was "a disinclination . . . to identify which parts of its draft articles should be considered as codification and which should be considered as progressive development. This concept of progressive development as a process by which gaps in customary international law are filled, and by which obsolete provisions . . . are renovated, is an evolutionary one," which may be partly "attributable to the fact that when the Commission has departed substantially from customary international law, the reception accorded its efforts has not generally been gratifying."

The Legal Committee of the General Assembly, Mr. Kerley stated, was not always devoted primarily to work connected with the International Law Commission, but in recent times has given more attention to the reports of the International Law Commission and topics which have arisen from or in connection with the work of the Commission. The Committee now has on its agenda for its next session the topic of "Friendly relations and co-operation among states in accordance with the Charter." He disagreed with the statement by Dr. Wyzner that the next session of the General Assembly is definitely committed to study this topic, including the question of "peaceful co-existence." No definite position regarding that resolution had been taken in the Legal Committee discussions.

Among the reasons for the decline in the work of the Legal Committee of the General Assembly, Mr. Kerley gave the following: Many of the early projects of the Committee arose from the establishment of the United Nations; the Committee is relatively reluctant to undertake drafting functions; the General Assembly, in deciding which of its committees should consider a topic having both legal and other aspects, reflects the status which international law bears in world affairs generally. In assigning certain questions to the agenda of other committees, the General Assembly has made an implicit evaluation of the significance of contemporary international law.

The Legal Committee has been faced with two alternatives: to concentrate its work on matters of modest but constructive character, or to deal on a legal basis with the vital issues of our time. Hitherto it has followed the first alternative, but has considered and will consider whether it should embark on the second alternative, which has been raised in the proposal that the Legal Committee should begin codification of the "Legal principles of peaceful co-existence." As to the distinction between "legal" and "political" questions, Mr. Kerley pointed out that a question is a legal question when the states concerned are prepared to acknowledge that it must be disposed of pursuant to norms of international law. The issues which are vital today are presently not "legal questions" precisely because states are not willing for them to be. He stated that the expression "peaceful co-existence" is a relatively undesirable way to cast the proposal. In early Communist theory, it denoted a temporary period of relaxation while the Communist forces gathered strength to crush their opponents; but "Even if this conception has now been abandoned . . . the phrase has little inherent precision as a legal concept." The issue presented by the proposal to codify the principles of peaceful co-existence is "whether the Legal Committee should undertake the formulation of legal rules where agreement is unlikely," and where compliance with such rules is improbable. Mr. Kerley declared that the answer should be in the negative for two reasons: (1) discussion of "peaceful co-existence" in the Legal Committee, like discussion of the definition of aggression, would degenerate into a propaganda exercise; (2) efforts to extend the rôle of international law beyond that which the world community is willing to give it weakens, rather than strengthens, the impact of international law on world affairs.

If our efforts are not related to a realistic appraisal of what the rest of the world community is willing to accept from us, the international lawyers of the world may become a group of old men, sitting at the sidelines of world events, telling heroic stories to each other.

If the major Powers were in agreement "not merely on the objective of general and complete disarmament but also on the steps to bring that objective about," a different political climate would exist, and in such a climate the Legal Committee might validly undertake tasks which are not feasible for it now. "Responsible states must realistically appraise the possibilities of accomplishment in establishing a program of work." In Mr. Kerley's opinion, such an appraisal "does not, at the present time, justify a radical departure from past activities" on the part of either the International Law Commission or the Legal Committee of the General Assembly.

Miss Joyce Gutteridge, Legal Adviser to the United Kingdom Mission to the United Nations, commenting on the preceding papers, noted that they had brought out certain common ground, namely, "the concept of the evolution of international law and the important constructive rôle which the United Nations, particularly the International Law Commission and the Sixth Committee, have to play in its further evolution." She stated that

no organ of the United Nations concerned with progressive development can work in a legal vacuum. . . . With regard to new law and new fields, new rules must have relevance to the practice of states and to existing international law. . . . Every legal question has some political content or significance.

"The United Nations should not try to clothe in legal guise concepts which are basically political," but should bear in mind the concept of progressive development in which there must be continuity.

Professor Maxwell Cohen, of the Faculty of Law of McGill University, noted that in both papers three problems had not been touched upon: (1) What is the reason for the continuing decline of law in all power situations in which law and lawyership are suspect? (2) What is the reason for the special development in the United Nations, the decline in the Sixth Committee and the narrowing scope of the International Law Commission? (3) What can be done to arrest these trends in both the public and private law fields? Commenting on the views of Dr. Wyzner and Mr. Kerley as to the rôle of the International Law Commission and the progressive development of international law, Professor Cohen stated that in essence both views are the same in that they purport to assure a limited rôle for international law. Dr. Wyzner's horizons are "the *status quo* as limited by co-existence and anti-colonialism." According to him, "international law forms a part of the struggle of the two opposing camps."

Referring to the Sixth Committee of the General Assembly, Professor Cohen said that, in his view, in the last fifteen years no distinguished lawyers from the United States, the United Kingdom and Canada were represented in that Committee as able advisers. There had been a decline

of real professional scholarship. On the other hand, there was a high level of expertise from the representatives of the Communist countries.

Professor Cohen stated that the International Law Commission "tended to be filled with foreign office lawyers," who are under instructions and do not take even the small risk required by progressive development. Moreover, the Commission, with twenty-five members, is too cumbersome, and possibly represents an overlapping of resources in the field of international law research. Referring to the numerous international and national organizations contributing efforts in international law, he suggested that the International Law Commission might be authorized to convene meetings of all the interested organizations for the purpose of mobilizing such resources more effectively.

On Friday evening, April 27, at 8:30 p.m., the session was devoted to "International Aviation Policy," with specific reference to the Warsaw Convention, The Hague Protocol and international limitation of liability. Mr. Robert Dechert, of the Philadelphia Bar, presided. The first speaker, Professor Oliver J. Lissitzyn, of Columbia University, discussed "The Warsaw Convention Today." He stated that the Warsaw Convention, governing the relations of air carriers with passengers and shippers, limits liability for death or injury to passengers to \$8300, such limitation being unchanged since 1929, despite changes in the value of money and the earning power of individuals. Some fifty-five states, including the United States, are parties to the Convention. The question of the withdrawal of the United States from the Convention is now under consideration by the Executive branch of the Government. The Convention is of relatively little importance to American air carriers in terms of provision for traffic liability insurance. The impact of the Convention on passengers varies according to the extent of the injury, the earning power of the injured and the insurance carried by them. The impact is most unfortunate in cases of permanently disabling injuries.

Professor Lissitzyn stated that among the reasons given for continued adherence by the United States to the Convention is the danger that under the laws of some foreign countries American passengers might be exposed to even lower limitations of liability than under the Convention; and, conversely, American carriers might be exposed in some foreign courts to the danger of unreasonably high awards. These arguments need further study, particularly with respect to the limitations that might be applied by foreign courts. The alleged danger of American air carriers being subjected to unreasonably high awards is purely speculative. Nothing in the experience of American air carriers in countries which are not parties to the Warsaw Convention indicates that the danger is a real one. Another argument against withdrawal is that it will be a backward step from the viewpoint of international co-operation. But if a treaty does not serve the interest of the American people, the cause of international co-operation can only be damaged if the United States Government clings to it as a mere symbol.

Among the proposals for remedying the effects of excessively low limi-

tations of liability is that for compulsory insurance of all passengers. This proposal has the defect of not taking into account the individual differences between the passengers and their characteristics. A socially desirable insurance system would seem to require the setting up of an agency similar to a workmen's compensation board which would relate the amounts of the awards to the individual characteristics of each case. A conceivable but largely neglected alternative to continued United States adherence to the Warsaw Convention is the passage of a Federal liability law for international air commerce which might eliminate some of the possibly harmful effects on Americans of a withdrawal from the Warsaw Convention. Further study is needed before final decision is made.

Mr. G. Nathan Calkins, Jr., formerly Chairman of the U. S. Delegation to the Hague Conference to Amend the Warsaw Convention, who had been scheduled to deliver a paper on "Hiking the Limits of Liability at The Hague," was unable to be present. His paper was made a part of the printed PROCEEDINGS which will appear later this year. In his place Mr. Clifton J. Stratton, Jr., Associate General Counsel of the Air Transport Association of America, spoke on Article 22 of the Warsaw Convention limiting air carrier liability, and the Hague Protocol of 1955 raising the limits of such liability. The latter has been acceded to by 21 states, and requires ratification by 30 states in order to go into force. Mr. Stratton stated that the importance of the rules laid down in the Warsaw Convention "lies in the creation of procedural uniformity in international air transportation, allowing a free flow of goods and people in world commerce." They have "a special value to the United States as the 'hub' of civil aviation," and "as an example of world-wide international contact controlled by rule of law. . . . The United States in its position as a leader in the movement toward international co-operation should promote the Warsaw Convention as a symbol of the unification of world law."

Mr. Stratton pointed out that the Hague Protocol would raise the air carrier liability limitation to \$16,600 plus court costs and attorneys' fees, but that there is "no statutory authority to take advantage of the cost and attorney fee provision in the United States." He stated that "the Warsaw Convention and the Hague Protocol must be taken as a package" and that "a decision to withdraw from the liability provisions of the agreement must include a decision to abandon its procedural advantages." Mr. Stratton declared that "the Convention gives absolute protection to United States citizens in foreign courts where a lower statutory limitation exists" or where the law of the forum "allows a common carrier to limit his liability by contract with the passenger." He pointed out that between 1950 and 1960 the average recovery for death in non-Warsaw cases in the United States was \$25,281. If a contingent legal fee of one-third is subtracted from this figure, the net amount recovered comes close to the limit fixed by the Hague Protocol. That limit represents the most that may be achieved at the present time by international agreement. "To denounce this Agreement is to turn our backs on the rest of the world."

He concluded by stating that limited liability is not a new concept in

the United States, and that trip insurance is available for the passenger who needs more coverage. "Insurance has advantages over raising liability limitations, since it provides absolute protection . . . in case of a judgment-proof corporation," and "gives the beneficiary an immediate and full recovery not reduced by a contingency fee."

Following the remarks of Mr. Stratton, Mr. George Buschmann, Counsel and Administrative Assistant to Senator Homer C. Capehart, spoke in favor of the United States withdrawal from the Warsaw Convention, and stated that Senator Capehart is prepared to ask the Senate Foreign Relations Committee to appoint a subcommittee to conduct an investigation of the whole question. Mr. Buschmann asserted that limitation on the liability of the international air carriers is the main point covered by the Convention, and it was his belief that passengers on such carriers involved in accidents "are getting 'medieval treatment.'" He stated that the limitation of \$8300 is not automatically recovered by the widows and orphans, and that the value set on human life in the Convention and Protocol is completely unreal. He suggested that the procedural aspects of the Warsaw Convention are desirable and should be separated out and retained, but that with regard to liability for death and injury there should be coverage by compulsory insurance.

Mr. Buschmann was followed by Professor Stanley Metzger, of Georgetown University Law School, who stated that limitation of liability of public carriers has never been popular in the United States, and that it had been established in some cases by statute in order to aid the development of a public service. In the international air transport field, the conditions at the time of the conclusion of the Warsaw Convention led the carriers to consider that their development would be hampered unless a limitation were placed on their liability, since insurance companies were unwilling to write insurance on reasonable terms covering air accidents. Professor Metzger stated that the original limitation of \$8300 for death or injury of passengers established in 1929 was inadequate then and is now, in the view of the United States. He stated that at the Hague Conference of 1955 to Revise the Warsaw Convention the United States tried to have the limitation raised to \$25,000, but only obtained a limitation of \$16,600. In his view both of these limitations were inadequate in 1955, and are even more so in 1962. He stated that there is little chance that the United States will become a party to the Hague Protocol, and cannot be expected to continue to adhere to the Warsaw Convention, since these treaties cast whatever burdens may still flow from unlimited liability solely upon the passengers.

Professor Metzger proposed that the United States Civil Aeronautics Board require that all air carriers engaged in international transportation involving the United States act as agent for each passenger carried to secure \$150,000 coverage per passenger in flight accident insurance. These regulations would only add infinitesimally to the costs of the carriers, and there is nothing in the Warsaw Convention or Hague Protocol inconsistent

with this proposal. He also suggested that the United States should request the calling of a new international conference, following the adoption of the proposed Civil Aeronautics Board regulation, to consider improvements in the Warsaw Convention. If at that time it should not be possible to secure a revision of the limitation of liability, efforts should be made to split the Warsaw Convention and to conclude an agreement with the transportation documents provisions, while withdrawing from the Warsaw provisions relating to the limitation of liability. Professor Metzger concluded that such an arrangement would in his view provide adequate compensation to passengers and place no undue burden on air carriers.

On Saturday morning, April 28, at 10:00 a.m. a session was held dealing with the "Implications for International Trade Co-operation of the New Foreign Trade Proposals" by the Administration. Mr. Richard N. Gardner, Deputy Assistant Secretary of State for International Organization Affairs, presided, and opened the meeting with a summary of the history of trade legislation in the United States, including the various international trade organizations proposed since the end of the second World War. The first speaker, the Honorable Nicholas deB. Katzenbach, Deputy Attorney General of the United States, discussed the implications of the President's trade legislation (H.R. 9900) for foreign trade policy. He outlined the history of United States tariff policies since the earliest days of the Republic, and stated that in view of the creation of the European Common Market, the United States must now determine what its tariff policy should be in relation to the European Customs Union. H.R. 9900 is designed to create a United States-European partnership, and adapts the concepts of the Trade Agreements Act of 1934 as modified by the General Agreement on Tariffs and Trade (GATT) and other developments. After outlining the principal provisions of the pending bill, Mr. Katzenbach cited various decisions of the Supreme Court upholding the authority of the President to suspend imports or modify tariff duties delegated to him by successive tariff acts. He quoted Chief Justice Taft in the case of *Hampton & Co. v. United States*, 276 U. S. at 408 (1928), as stating the applicable test for determining whether a grant of discretionary authority over tariff duties involves an improper delegation of legislative power, as follows:

If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority.

Mr. Katzenbach concluded that H.R. 9900 clearly satisfies this test, and its Constitutionality is settled.

Robert Triffin, Professor of Economics at Yale University, speaking on "The Trade Expansion Act of 1962," defended the proposed foreign trade legislation from the economic point of view. He stated that:

The real impact of our protective tariffs is not to create jobs. It is to shift jobs around, away from our most efficient industries and toward our least efficient ones. Tariffs subsidize the latter, but by penalizing the first in two ways. They increase their production costs beyond what they would be otherwise, and they prevent us from negotiating feasible reductions in foreign tariffs and restrictions against our exports.

We stand far more to gain from expanding our sales in a large and fast growing world market (\$118 billion last year) than from attempting to close our own market to goods which we can buy more cheaply abroad than we can produce at home.

Citing the economic record of the United States under high tariff protection and under low tariffs pursuant to the Trade Agreements Acts, Professor Triffin stated that under the protective tariff the United States experienced the worst depression in its history, and lost more in exports than in imports in that period. On the contrary, under lower tariffs, after the second World War, imports expanded tremendously and exports even more so. The speaker pointed to the condition of postwar Western Europe as evidence of the advantages of liberal trading policies, which have resulted in the creation of the European Economic Community and the Common Market. He stated that the main aspects of the movement toward European integration are political, with the ultimate aim of creating a United States of Europe, ending once and for all the wars that have ravaged Europe in the past. He declared that "there is little reason to doubt that this will indeed be the outcome of European economic integration."

With regard to the United States and its relations with the European Community, Professor Triffin stated that United States membership may some day become both desirable and feasible, but at the present time it is not possible. However, the present Administration is following two directions with regard to this relationship. The first is through the Trade Expansion Act by which the United States can negotiate with the Community for a progressive lowering of trade barriers. The second is the broader harmonization of the policies of the Atlantic world for the acceleration of economic growth, for a fairer sharing of development financing overseas, and for mutual assistance against balance of payments disruptions. Professor Triffin stated:

We have now resumed, at long last, the same evolution which erased the medieval borders of duchies, counties and principalities, to merge them into the national states of modern times. National states—at least all but the largest ones—are as obsolete today as the duchies, counties and principalities of yesteryears. They will be merged some day into a world community, but—barring a world cataclysm—the process is likely to be a gradual one.

He said that the threat of an atomic suicide of the human race is the greatest political unifier of all, and would promote faster action toward ultimate world, rather than merely Atlantic, unity.

Professor Triffin then referred to the implications of the Trade Expansion Act for the United States balance of payments. He stated that, in order to improve the balance of payments, "some redistribution of our military and foreign aid burden between us and our Allies is clearly called for, as well as some reform of existing tax provisions discouraging the repatriation of foreign earnings of American subsidiaries abroad." The improvement must also involve primarily our relations with Western Europe and other industrial countries, since our gold and dollar outflow is entirely with these countries. On the basis of his analysis of the situation, Professor Triffin suggested two broad lines of policy: first, "to reduce our gold and dollar losses to *Europe*, by curtailing our *overall* military expenditures, foreign aid and private capital exports without unleashing thereby corresponding decreases in our current account surplus"; second, to expand further our current account surplus by improving our competitiveness in the world market, accelerating our rates of investment and holding wage rises here somewhat below the rapid wage increases now taking place in Europe, and by negotiating for better access of our exports to foreign markets.

Professor Triffin concluded by referring to the gold problem related to United States foreign trade policy. He stated that:

The restoration of full equilibrium in our overall balance of payments will curtail drastically—by two-thirds or more—the sources from which international monetary reserves and liquidity have been fed over the recent past . . . gold production is far insufficient today to meet in the long run the monetary requirements of an expanding world economy. And the whole fabric of our present international monetary system is now threatened, even in the short run, by its vulnerability to erratic movements of monetary reserves, as well as of private capital, among the major currencies and between such currencies and gold metal.

The consolidation of past progress and the further expansion of world trade and production urgently call for fundamental reforms of our outworn international institutions in the monetary field, as well as in the fields of trade and finance and, of course, in the military and political arenas themselves. . . .

The Organization for Economic Co-operation and Development, the European Economic Community and the Trade Expansion Act, he said, are some of the "instruments through which progress seems most likely to prove politically achievable at this juncture."

Mr. Eugene L. Stewart, of the District of Columbia Bar, concluded the panel discussion of H.R. 9900. He stated his belief that existing legislation should be retained because it contained distinct safeguards as well as reciprocity and item-by-item negotiation. The proposed legislation was loose and without safeguards. He stated that it does not give the Presi-

dent the same authority he now has, and does not require reciprocity. Mr. Stewart asserted that the President should get new authority to negotiate by seeking an extension of the Trade Agreements Act, that the Administration should have due regard for the wisdom of previous Administrations and Congresses, and should ask only for the authority which is needed. Mr. Stewart said it was not true that the requested authority would help the underdeveloped nations, since most of the pending bill is inapplicable to their problems. He suggested that tariff negotiations are not necessary for trade with Europe, which will take place without regard to what the external tariff might be. However, "the United States cost advantage in production has been lost because European Economic Community technology is equal to ours." Consequently, emphasis should be given "to expanding the trade of the underdeveloped nations and to increasing United States development." He concluded by stating that the pending legislation "embodies the negation of too many established concepts." Whereas the old legislation requires a hearing to establish whether serious harm is threatened to United States industry, the new bill requires only the advice of the Tariff Commission. Under the new bill there are three conditions which must exist or be threatened: (1) probability of widespread significant idling of productive facilities of firms; (2) prolonged and consistent inability of firms to operate at a profit; and (3) the probability of unemployment or under-employment of workers. In addition, before tariffs may be increased, "there must have been an unsuccessful effort to adjust by the industry and failure of adjustment assistance to mitigate substantially the first three conditions. It would be impossible to meet all the conditions precedent to the Tariff Commission speaking," but even if they were met, the Commission only gives advice, which advice may be cheerfully ignored.

On Saturday morning also a Student Moot was held on the request for an advisory opinion from the International Court of Justice as to Financial Obligations of Members of the United Nations, then pending before the Court. The members of the court were: The Honorable Green H. Hackworth, former Judge of the International Court of Justice, presiding; John G. Laylin, of the District of Columbia Bar; and Professor Maxwell Cohen, of McGill University Faculty of Law. The United States was represented by student members of the Columbia Society of International Law; the United Arab Republic, by students from the Duke International Law Society; and Belgium, by students from the Osgoode Hall Law School in Toronto. Student counsel presented written and oral statements before the Moot Court, which awarded the decision for the best oral statement to the team from Osgoode Hall Law School, the decision for the best response to questions from the Bench to the team from the Duke International Law Society, and the decision for the best written statement to the team from the Columbia Society of International Law. The court did not render an advisory opinion on the merits of the question.

The meeting concluded with the annual dinner on Saturday evening at 7:00 o'clock in the Federal Room of the Statler Hilton Hotel, which was preceded by a reception in the South American Room. The after-dinner speakers were His Excellency Mr. James Plimsoll, C.B.E., Australian Ambassador to the United Nations, and General Alfred M. Gruenther, President of the American National Red Cross, who spoke informally and off the record.

Mr. Plimsoll spoke on "The United Nations Charter: 1945 and 1962." He discussed the various factors contributing to changes in the membership and activities of the United Nations under the Charter, and stated that one difference between the United Nations Charter as a legal document and a state's national constitution is that under the Charter there is no right of appeal to the International Court by an individual Member of the United Nations to have a point of law decided. If a Member of the United Nations feels that the Charter is not being interpreted correctly with regard to itself, there is no way in which it can challenge what the United Nations is doing unless it can persuade the majority of Members to agree to some reference to the International Court for an advisory opinion, or can persuade the majority of the membership to take its view. If such a condition obtained in municipal law, there would be very few references. This is the situation in the United Nations.

As examples of problems in the United Nations involving changes, Mr. Plimsoll discussed the questions of domestic jurisdiction, and the powers of the General Assembly. In the field of domestic jurisdiction Mr. Plimsoll stated that there is a contradiction in the Charter between the provision that states have an international obligation to promote human rights, and the provision that matters essentially within the domestic jurisdiction of a state are outside the competence of the United Nations. Domestic jurisdiction is a field where the United Nations is tending to move in a new direction or in a way that was not foreseen by most of the signatories of the Charter, and in a way that carries very great implications. Citing the cases of South Africa and the Congo, Mr. Plimsoll stated that these are cases where the United Nations is being pressed to move into the field of domestic jurisdiction.

With regard to the powers of the General Assembly, he stated that the rôle of the Assembly in relation to the Security Council is much enlarged compared with what was foreseen by the framers of the Charter. Again referring to human rights, he stated that this was a field where, given some competence of the United Nations, the competence of the Assembly is in dispute. He said it is clear from the Charter that the General Assembly in general has power to make recommendations, but its power to make binding and enforceable decisions is very limited. This view is contested by many Members of the United Nations today, particularly Members from Africa and Asia, on the ground that the United Nations is no longer a body where recommendations can be made, but is a body where decisions are made which are regarded as binding upon the Members.

Mr. Plimsoll stated that perhaps the biggest issues of all in the United Nations today relate to the ending of colonial regimes, and include attempts to apply pressure on governments that are not moving in that direction. Some of the current discussions in the United Nations proceed on the assumption that the existence of a colony is contrary to the Charter. Mr. Plimsoll declared that the existence of colonial regimes is not contrary to the Charter, which looks forward to the end of colonialism and states some of the conditions that should bring about the end of colonial regimes and govern the control of such territories until they are self-governing.

He pointed out that from the early days of the United Nations, there has been a great emphasis on avoiding resort to force or a threat of force, and that, whatever the merits of a claim, force should not be used to settle it, but other peaceful methods should be found. On the other hand, there is the Communist doctrine that national liberation movements do not constitute aggression and that it is legitimate for one country to assist a national liberation movement in another country. There has also been a loosening of thought on what constitutes a threat to peace. Mr. Plimsoll stated that the first conclusion he would draw is that there are considerable limitations on the reliance which can be placed on legal protection alone; the second conclusion is that it is necessary to be careful about attempting to force solutions. The General Assembly has been most successful in the past where it has attempted to lay down principles.

He concluded that it is necessary to bear in mind that the United Nations is not going to be able to correct everything at once, that there are many problems that have been before mankind since the world began. There is a great temptation now in the United Nations to adopt resolutions generally representing unattainable ideals, and member nations are confronted with the dilemma of either voting for something that cannot be put into effect and which might cause mischief by its adoption, or voting against it because it is not regarded as a practical solution. Mr. Plimsoll quoted a remark of Justice Frankfurter, which he said somewhat paralleled the situation in the United Nations, that "There is not under our Constitution a judicial remedy for every political mischief." He stated that the United Nations must play an essential part in this period of change, and that the world's hope lies not in tearing it down but in building it up, and in that process, informed criticism must play an essential part.

In conjunction with the annual meeting of the Society, the International Law Committee of the Federal Bar Association, under the chairmanship of Mr. George S. Leonard, sponsored a luncheon at the Statler Hilton Hotel on Thursday, April 26. The guest speaker was Rear Admiral Robert D. Powers, Jr., U.S.N., Deputy Judge Advocate General of the Navy, who spoke on "Problems of Insurgency in International Law."

On Friday, April 27, at the Statler Hilton Hotel, the Harvard Law School Association of the District of Columbia held a luncheon for all alumni in the District of Columbia and alumni attending the meeting of the Society. Professor Richard R. Baxter, Chairman of the Committee on

Annual Meeting of the Society, Professor Louis B. Sohn, of Harvard Law School, and Professor Roger Fisher, disarmament consultant to the Defense Department, were guests at the luncheon, which was in the charge of Mr. George L. Christopher, of the District of Columbia Bar. Professors Sohn and Fisher spoke briefly on the topic of "Problems of Disarmament: Vignettes from Inside and Outside Government."

At the business meeting of the Society, which took place on Friday morning, April 27, at 9:30 a.m., the Executive Director made a brief statement on the activities of the Society during the past year. He reported that there had been an increase in the membership and that the Society has now nearly 550 professional members, that is, lawyers who have been in practice for at least ten years. On the financial side, he reported that the Society was in good condition and that the budget has temporarily quadrupled and quintupled. Its present funds will cover the expanded activities for the next two or three years, but the Society may find itself in financial difficulties if there is not a constant effort to increase its usefulness in public service, to enlarge its membership and to enlist the interest of corporate contributors and members. Out of \$102,000 in receipts during the past year (apart from special foundation grants) one fourth came from special contributions of corporations and individual members. Mr. Merillat emphasized that the Society must build on a growing membership as the most permanent basis of its income.

He also reported that the response to the announcement of available fellowships in various areas of international law had been most gratifying. These fellowships have been made available through funds from the Ford Foundation, and are a useful activity of the Society in future years. The recent foundation contributions have neither committed the Society to any particular course of development nor underwritten the more limited core activities into the indefinite future. Mr. Merillat stated that the Society is just at the beginning of the road and the kinds of actions and decisions taken in the next two or three years will determine whether it will continue to move ahead or fall back in various respects. The nature and scope of the Society's activities, including its publications, the build-up of its membership, the ability to attract other financing, the future of Tillar House, and the structure of the Society's organization are all interrelated factors. He stated that he did not believe in the ability of the Society to attract large numbers of members unless it is doing things that appeal to their interests and needs. This raises some questions of what the Society's main direction should be. In the next two or three years it should set its sights firmly on some agreed goal.

The Society next heard the report of Professor Richard R. Baxter, Chairman of a Committee to Consider and Report upon Revisions of the Regulations and the Constitution of the Society. The proposed amendments to the Constitution had been approved by the Executive Council and had been previously circulated to the membership in advance of the meeting. The purpose of the proposed amendments was primarily to make

the Constitution conform to the more recent practice of the Society. The following amendments were thereupon unanimously adopted:

Article III, second paragraph: To be amended by deleting the words "shall pay such dues" and substituting therefor "may be divided into such classes and shall pay such dues"

Article IV, third paragraph: To be amended by inserting between the words "placed in nomination" and "by a Nominating Committee" the words "either by a motion signed by not less than ten members of the Society or"

Article IV, fourth and fifth paragraphs: To be amended by deleting the present language and substituting therefor: "All officers shall be elected by a majority vote of the members present and voting at the annual meeting of the Society or other meeting called by the President for this purpose. All officers shall serve until their successors are chosen. The Council may fill vacancies until the next annual meeting of the Society."

Article V: To be amended by deleting the present first paragraph and substituting therefor the following: "The President shall preside at all meetings of the Society; shall be responsible for executing the Regulations of the Society and the decisions of the Executive Council; shall appoint committees, except as otherwise determined by the Executive Council; and shall perform such other duties as the Executive Council may assign to him. In the absence of the President his duties shall devolve upon one of the Vice Presidents to be designated by the President, or, if there be no President, or if the President be unable to act, by the Executive Council."

Article VI, first paragraph: To be amended by deleting the present third sentence and substituting therefor the following: "The Council shall adopt regulations consistent with this Constitution, appropriate money, and have power to arrange for the issue of publications. The Council shall appoint committees in those cases in which it has reserved that power to itself."

Article VII, third paragraph: To be amended by deleting the words "twenty-five members" and substituting therefor "fifty members"

Professor Oliver J. Lissitzyn, Chairman of the Committee on Annual Awards, reported the recommendation of the Committee, approved by the Executive Council, that the Society's Certificate of Merit be awarded to Professor Myres S. McDougal and Associates for the publication entitled *Studies in World Public Order*. The recommendation was unanimously adopted by the Society.

In the absence of the Chairman of the Committee on Selection of Honorary Members, the Secretary of the Society presented the Committee's report, approved by the Executive Council, that Dr. Julius Stone, Professor of International Law and Jurisprudence at the University of Sydney, Australia, be elected an honorary member of the Society. Professor Stone was thereupon elected an honorary member.

Mr. Denys P. Myers, Chairman of the Committee on Publications of the Department of State and the United Nations, presented the report

of the Committee. He stated that the *Digest of International Law*, under preparation by Miss Marjorie M. Whiteman, Assistant Legal Adviser, Department of State, was well under way and that the first volume was due to be published this year. Six volumes have been prepared to date, and during the next year possibly four or five more volumes will be prepared.

Mr. Myers reported that the Committee had also looked into the publications of the Organization of American States, the work of the Inter-American Council of Jurists, and its working body, the Inter-American Juridical Committee. With regard to these latter, their studies were rather scattered, and the Committee recommended a periodic publication covering them.

In connection with his report, Mr. Myers moved the adoption of the following resolution, which, after discussion and amendment, was adopted as follows;

RESOLUTION ON PUBLICATIONS OF THE DEPARTMENT OF STATE AND THE
UNITED NATIONS

The American Society of International Law at its 56th annual meeting

1. Looks forward eagerly to the publication this summer of the first volume of the *Digest of International Law* being compiled by Marjorie M. Whiteman and staff and calls upon the Secretary of State to give adequate support to the completion of its preparation and publication;

2. Regards it as imperative that the Hackworth *Digest of International Law* for the period 1906-40 be reprinted in order to satisfy the unfulfilled demand for it;

3. Welcomes the advocacy of the President of prompter issuance and clearance of the *Foreign Relations* series, but notes that additional staff and continuous supervision are required if the President's intention is to be realized;

4. Suggests that the pamphlet *Treaties and Other International Acts Series* (T.I.A.S.) be made legal evidence by act of Congress;

5. Welcomes the continued publication by the Foreign Claims Settlement Commission of its decisions, noting that use of Panel, Pilot and Specific Decisions is a most effective way of handling very large groups of claims;

6. Directs the attention of the Council of the Organization of American States and the Secretary of State to the desirability of publishing periodically the perfected papers of the Inter-American Council of Jurists and its working body, the Inter-American Juridical Committee, in order that they may be generally available;

7. Notes with satisfaction that the *United Nations Treaty Series* is being published up to one year of registration and expresses the hope that this schedule may be even more accelerated;

8. Invites the Department of State to initiate a study by the United Nations of the extent to which treaties are registered by Member States in accordance with Article 102 of the Charter;

9. Regards publication of the records of diplomatic conferences resulting in signed instruments as a desired standard of procedure by all international organizations in order that their interpretation may be facilitated.

Upon the report of the Committee on Nominations, the Society elected the following officers for the coming year:

Honorary President: The Honorable Dean Rusk, Secretary of State

President: Professor Hardy C. Dillard, University of Virginia Law School

Vice Presidents: James N. Hyde, of the New York Bar; Professor Brunson MacChesney, of Northwestern University Law School; Miss Marjorie M. Whiteman, Assistant Legal Adviser, Department of State.

The incumbent honorary vice presidents were re-elected, and Ambassador Arthur H. Dean, the outgoing President, was elected an honorary vice president.

The members of the Executive Council to serve until 1965 were elected as follows: Professor Maxwell Cohen, of McGill University Law Faculty; Eli Whitney Debevoise, of the New York Bar; Professor Lawrence F. Ebb, of Stanford University Law School; Professor Louis Henkin, of the University of Pennsylvania Law School; Professor Cecil J. Olmstead, of Westport, Connecticut; Walter S. Surrey, of the District of Columbia Bar; Professor Oscar Svarlien, of the University of Florida; Francis O. Wilcox, Dean, Johns Hopkins University School of Advanced International Studies.

In connection with the report of the Nominating Committee presented by Chairman David R. Deener, reference was made to the motion presented at the last annual meeting with regard to the abolition of the office of honorary president of the Society. Professor Deener stated that, in view of the opinion of the Committee on the Revision of the Regulations and the Constitution that no change should be made in the present provisions concerning the office, the Nominating Committee had no recommendation to make. However, Professor Deener offered a motion on behalf of the Committee that the Executive Council give consideration to the office of president-elect or designate, and through appropriate means make recommendations to the next annual meeting. The motion was duly adopted.

Upon the nomination of the Executive Council, the members of the Nominating Committee for the ensuing year were elected as follows: John G. Laylin, Chairman; Professor David R. Deener, Professor Wesley L. Gould, Professor Myres S. McDougal, and Mr. I. N. P. Stokes.

Before it adjourned, the Society gave a rising vote of thanks to retiring President Arthur H. Dean for his outstanding services to the Society.

The Executive Council of the Society, at its meeting on April 27, adopted certain revisions to the Regulations of the Society, previously amended on November 18, 1961. The Regulations as amended to April 27, 1962, will appear in the *Proceedings* of the annual meeting. Among the changes made were the repeal of the regulations concerning the length of papers and speeches at annual meetings and the substitution of a provision that the Committee on Annual Meeting may fix such limits; and authorization of the Executive Director of the Society to pay bills not exceeding \$350 in amount and within the limits authorized for expenditure in the

approved annual budget, and to draw checks on the Society's bank account up to the amount of \$350, the counter-signature of the Treasurer or Assistant Treasurer being required on checks in greater amounts.

A new regulation was also adopted specifically authorizing the Executive Council to determine the subscription rates and terms and conditions under which the *Journal*, *Proceedings* and other publications of the Society shall be furnished to subscribers and others. The Council also abolished the office of Honorary Editor-in-Chief of the *Journal*, and adopted a regulation enabling it to establish an honorarium to reimburse the Editor-in-Chief or another editor acting for him, for expenses incurred in connection with his duties on the *Journal*.

In pursuance of a proposal presented to the Executive Council by Professor Roger Fisher and Professor Louis B. Sohn for a series of meetings between American and Soviet international lawyers on selected legal questions, such meetings to be arranged in both the United States and the Soviet Union or at an agreed place in Europe, and to be devoted to joint exploration of problems of common interest, the following resolution was adopted by the Executive Council:

Resolved, That, subject to the availability of special outside financial assistance for the purpose, and the ability to work out the necessary arrangements to the satisfaction of the Executive Committee, the Society (either alone or jointly with an appropriate Soviet institution) is authorized to sponsor a series of meetings of international lawyers of the United States and the Soviet Union along the lines of the first two paragraphs of Mr. Sohn's memorandum submitted to the Executive Council; that the President is authorized to appoint a committee to plan and make arrangements for such meetings; and that the Executive Director is authorized and requested to work with the Committee in seeking the necessary financing; *Provided*, That no final commitment is made until approval by the Executive Council.

The Executive Council, at its meeting of April 27, re-elected the Honorable Edward Dumbauld Secretary, and Mr. Monroe Leigh Treasurer, of the Society. It also appointed Mr. Donald E. Claudy as Assistant Treasurer in place of Mr. Denys P. Myers.

The Executive Committee, established by the Council last year, was elected as follows: Professor Maxwell Cohen, Robert Dechert, Professor Myres S. McDougal, John R. Stevenson, Professor Robert R. Wilson. President Hardy C. Dillard and Treasurer Monroe Leigh are *ex officio* members of the committee.

Professor William W. Bishop, Jr., was elected Editor-in-Chief of the *Journal* to succeed Professor Herbert W. Briggs, who retired from the position in view of his election as a member of the United Nations International Law Commission. The Executive Council approved last year the increase of the number of active members of the Board of Editors from seventeen to twenty. To fill the vacancy created by the resignation of Judge Philip C. Jessup and to add another member, Professor Eric Stein, of the University of Michigan, and Mr. John R. Stevenson, of the

New York Bar, were elected members of the Board. As elected for the coming year, the Board of Editors of the *Journal* is as follows:

William W. Bishop, Jr., *Editor-in-Chief*

R. R. Baxter
Herbert W. Briggs
Hardy C. Dillard
Alwyn V. Freeman
Leo Gross
John N. Hazard
James Nevins Hyde
Oliver J. Lissitzyn

Brunson MacChesney
Myres S. McDougal
Covey T. Oliver
Oscar Schachter
Louis B. Sohn
Eric Stein
John R. Stevenson
Robert R. Wilson

Richard Young

Honorary Editors

Philip Marshall Brown
William C. Dennis
Charles G. Fenwick
Hans Kelsen

Josef L. Kunz
Pitman B. Potter
John B. Whitton
Quincy Wright

REGIONAL AND LOCAL MEETINGS OF THE SOCIETY

Eight regional and local meetings sponsored by the Society in co-operation with other organizations have been held this year in Washington, D. C., Columbus and Toledo, Ohio, Gainesville, Florida, New Haven, Connecticut, Newark, New Jersey, and Durham, North Carolina.

George Washington University, January 20, 1962

The first local meeting, held January 20 at Lisner Auditorium, in Washington, D. C., was co-sponsored by the Middle Atlantic Branch of the American Society for Legal History, the George Washington University National Law Center, the Washington Foreign Law Society, the Bar Association of the District of Columbia, the Junior Bar Section, Subcommittee on World Peace through Law, the Peace Research Institute and the Natural Law Institute.

The general topic of the program was "Efforts to Achieve a Rule of Law for Control of International Conflicts." The speakers were the Honorable Edward D. Re, Chairman of the Foreign Claims Settlement Commission of the United States, who discussed "National Claims Commissions and the Protection of Property in International Law"; Professor John Baldwin of Johns Hopkins University, who spoke on "The Medieval Church and International Peace: Theory and Practice"; Professor John T. Noonan, Jr., Director of the Natural Law Institute of the University of Notre Dame, who spoke on "Morality as a Model for International Law"; and Mr. Richard J. Barnet, Deputy Director of the Office of Political Research and Analysis of the U. S. Arms Control and Disarmament Agency, who spoke on "Principles of Organization in a World of Disarmament." Following each address there was a short question period, and at the close of the program further questions were addressed

to the speakers. Arrangements for the meeting were in charge of Professor Monroe H. Freedman of George Washington University Law School, President of the Middle Atlantic Branch of the American Society for Legal History.

University of Toledo, February 23, 1962

The second meeting was held at the University of Toledo, Toledo, Ohio, on February 23, 1962, in co-operation with the Toledo Area Chamber of Commerce, the Toledo Bar Association, and the Toledo-Lucas County Port Authority. The topic of the meeting was "International Trade and International Law."

The opening session began at 9:00 a.m., when the President of the University, Dr. William S. Carlson, and the Dean of the College of Law, Dr. J. Allen Smith, gave welcoming addresses. Dr. Josef L. Kunz, Chairman of the meeting, made the opening address. Professor Stanley D. Metzger, of Georgetown University Law School, and Consultant to the Department of State on Trade Policy, spoke on "United States Trade Legislation of 1962." He was followed by Professor Saul H. Mendlovitz, of Rutgers University Law School, who discussed "Expropriation of Private Property Abroad." Following the two principal papers, the meeting divided into two simultaneous discussion groups to consider questions raised by the speakers. At the close of the morning session a luncheon was held at the University Student Union.

In the afternoon a panel session was held, beginning at 2:00 p.m., on the general subject of "Overseas Trade—Problems and Opportunities." Dr. Kunz presided. Dr. Carl D. Perkins, Jr., Vice President of Lawrence & Ebrausquin, Inc., delivered a paper on "International Trade and Toledo"; Michael Scott, of Squire, Sanders and Dempsey (Cleveland), discussed "U. S. Taxation of Business Abroad"; Sigmund Timberg of the D. C. Bar spoke on "European and American Anti-Trust Laws: A Comparison"; Thomas L. Nicholson, of Isham, Lincoln & Beale (Chicago), spoke on "Problems of Organizing a Business Abroad"; and Alex Currall, Director of the British Industrial Development Office, U. K. Consulate General, New York, discussed "Market and Investment Outlook for American Manufacturers in Europe." These papers were followed by inter-panel and general discussions.

The final session of the meeting was held at 8 p.m. in the Moot Court Room of the University Library. Professor Myres S. McDougal, of Yale University Law School, spoke on "The Emerging Customary Law of Space."

The Organizing Committee for this meeting was composed of Dr. Josef L. Kunz, Chairman, Professor James B. Lowe, of the University of Toledo College of Law, Dean Donald B. Setterbo, of the Division of Adult and Continuing Education of the University of Toledo, Mr. Philip B. Carter, Manager of the Toledo Area Chamber of Commerce World Trade Council, Mr. Michael E. Judge, of the Toledo Bar Association, Mr. Robert J. Mey, Manager of Public Relations, Toledo-Lucas County Port Authority and

Mr. John A. McWilliam, Staff Attorney of the Toledo-Lucas County Port Authority.

University of Florida, March 1-2, 1962

The third regional meeting was held March 1 and 2, 1962, at the University of Florida, Gainesville, and was co-sponsored by the Graduate School, Department of Political Science, and the College of Law of the University. The topic of the meeting was: "Is the Exploding of Atomic Devices in the Atmosphere in Contravention of Public International Law?" The first session opened at 9 a.m. on March 1 in the auditorium of the Florida Union, with Professor Oscar Svarlien, of the Department of Political Science, presiding. Professor Howard J. Taubenfeld, of Southern Methodist University School of Law, delivered a paper on "High Altitude Nuclear Explosions and a Developing Aero-Space Law," which was followed by comments by Professor Stojan A. Bayitch, of the University of Miami Law School, Professor Manning J. Dauer, Chairman of the Political Science Department, and Professor Walter O. Weyrauch, of the College of Law, of the University of Florida. There was general discussion from the floor following the prepared comments.

On March 2, 1962, at 9 a.m., the session was presided over by Assistant Dean Harold B. Crosby, of the College of Law of the University of Florida. Professor Peter J. Fliess, of the Department of Government of Louisiana State University, delivered a paper entitled "Is International Law Adequate to Deal with the Cold War?" Comments were submitted by Professors Svarlien, Bayitch and Weyrauch, followed by general discussion from the floor. The local committee in charge of arrangements for the meeting was composed of Professors Oscar Svarlien, Chairman, Walter O. Weyrauch and Eli Kaminsky.

Yale Law School, March 1-3, 1962

The fourth meeting was held at the Yale Law School from March 1 to 3, 1962, as a Conference on Legal Problems of International Financing. The sponsors for the conference were the Harvard International Law Club, the Columbia Society of International Law, the John Bassett Moore Society of International Law, the Duke International Law Society, and the World Community Association. Co-sponsors were the American Society of International Law, the Committee on Foreign Law of the Association of the Bar of the City of New York, and the International and Comparative Law Section of the American Bar Association.

The first session of the conference was held on Thursday afternoon, March 1, and was opened by Dean Eugene V. Rostow, of the Yale Law School. Mr. Per Jacobsson, Chairman of the Board and Managing Director of the International Monetary Fund, delivered an address on "The Monetary Background of International Finance."

The general topic of the sessions on Thursday was "Financing in Developed Nations." Mr. Pierre Uri, of Lehman Brothers, Paris, spoke on "Legal and Banking Problems of Financing Operations in Developed

Nations." His paper was followed by two panel discussions, the first being devoted to "Local Financing Facilities in Inner Europe," and the second to "Multi-Market Transactions by International Institutions." On the first panel, of which Mr. Uri was Chairman, the European financing facilities were discussed with regard to Belgium by Mr. Frank Boas, Attorney, Brussels; France, by Mr. Yves-Andre Istel, of White, Weld and Company, New York; Italy, by Mr. Giuseppe Bisconti, Attorney, of Rome and Milan; The Netherlands, by Mr. Louis R. W. Soutendijk, of Brown Brothers Harriman and Company, New York; Switzerland, by Mr. Paul E. Hollos, President, American Swiss Credit Company, Ltd., New York; and West Germany, by Mr. Michael Gellert, of Burnham and Company, New York.

The Chairman of the second panel, Mr. Hans Skribanowitz, Director of the Department of Credit and Investments of the High Authority, Luxembourg, and Mr. K. P. Zimmer, Legal Adviser to the High Authority, spoke on "The Experience of the High Authority of the European Coal and Steel Community." Mr. A. Broches, General Counsel of the International Bank for Reconstruction and Development, Washington, spoke on "The Experience of the International Bank for Reconstruction and Development."

On Thursday evening at eight o'clock there was a buffet dinner at which Robert Triffin, Pelatiah Perit Professor of Political and Social Sciences, Yale University, delivered an address.

On Friday morning, March 2, at 9:30 a.m., further panel discussions were held on the subject of "Financing in Developing Nations." Simultaneous group discussions considered "The Public Sources of Funds" and "Special Problems of Equity and Debt Financing in Latin America." Under the first topic the following subjects were discussed: "The Rôle of the International Bank for Reconstruction and Development, the International Finance Corporation, and the International Development Agency," by Mr. Broches, Chairman of this panel; "The Rôle of the Agency for International Development," by Mr. Seymour J. Rubin, General Counsel of the Agency; and "European Sources of Funds," by Mr. Norbert G. Leroy, Assistant Vice President, International Division of the Morgan Guaranty Trust Company, New York. Under the second topic the following subjects were discussed: "Financing the Alliance for Progress," by the panel Chairman, Mr. Teodoro Moscoso, Assistant Administrator for Latin America, Agency for International Development; "Some Legal Considerations of Financing in Latin America," by Mr. Albert J. Parreno, of Curtis, Mallet-Prevost, Colt & Mosle, New York; and "The Rôle of the Inter-American Development Bank," by Mr. Elting Arnold, General Counsel of the Inter-American Development Bank.

At 11:00 a.m. panel discussions were continued on "The Private Sources of Funds," in which the following participated: the panel Chairman, Mr. John G. Burnett, General Counsel of the Development and Resources Corporation, New York, who spoke on "General Economic and Legal Considerations"; Mr. Istel, who discussed "The Rôle of the Investment Banker in Supplying Funds for Economic Development"; Mr. Victor E. Rockhill, President of Chase International Investment Corpora-

tion, New York, who spoke on "The Rôle of the Edge Act Corporation"; and Mr. N. A. Bogdan, of N. A. Bogdan & Company, New York, who spoke on "The Rôle of the Specialized Investment Company."

A second simultaneous panel discussed "Sources of Capital in Developing Countries," in which the following participated: the Chairman of the panel, Mr. Manuel Ulloa, President of The Deltec Corporation, Nassau, Bahamas, who spoke on "Underwriting and Sale of Local Securities in Latin America"; Mr. R. B. J. Richards, General Counsel of the International Finance Corporation, who spoke on "The Rôle of the International Finance Corporation in Building Local Equity Markets"; Mr. Ralph W. Golby, Assistant Chief of Private Enterprise for Development Banks, Agency for International Development, who spoke on "The Rôle of Local Development Banks"; and Mr. Richard S. Aldrich, Vice President, International Basic Economy Corporation (IBEC), New York, who discussed "Using Mutual Funds to Foster Local Capital Markets."

On the afternoon of Friday, March 2, the subject of the session was "Problems of Portfolio Investment: Issuing and Marketing Foreign Securities in the United States." The principal address was delivered by Mr. Nathaniel Samuels, of Kuhn, Loeb and Company, New York, who spoke on "The Investment Banking Operational Background." His address was followed by two panel discussions on the subjects of "Legal Procedural Problems of Issuing Foreign Securities in the United States" and "Advantages and Disadvantages of Investing in Foreign Securities." Mr. John R. Stevenson, of Sullivan and Cromwell, New York, discussed "When Registration of Foreign Securities is Required and Basis for United States Jurisdiction." Mr. Manuel Cohen, Commissioner of the Securities and Exchange Commission, spoke on "The SEC and Foreign Securities"; Mr. Harry Heller, of Hensel, vom Bauer & Heller, Washington, spoke on "The Legal Problems of Registering Foreign Securities"; Professor Louis Loss, of Harvard Law School, spoke on "Problems of Trading in Outstanding Foreign Securities"; and Mr. Peter O. A. Solbert, of Davis, Polk, Wardwell, Sunderland & Kiendl, New York, discussed "Simultaneous Offerings in the U. S. and Abroad and the Concurrent Legal Problems." The second panel, on the subject of "Advantages and Disadvantages of Investing in Foreign Securities," had as participants the following: the panel Chairman, Mr. Steward R. Bross, Jr., of Cravath, Swaine & Moore, New York, who spoke on "Legal Problems Encountered in Investing in Foreign Securities"; Mr. Frederick Peyser, Sr., of Hallgarten & Company, New York, who spoke on "Individual Portfolio Investment in Foreign Securities"; Mr. Hunter S. Marston, Jr., President and Treasurer of Eurofund, Inc., New York, who discussed "The Investment Company as a Medium for Investing in Foreign Securities"; Mr. Yeichi Kuwayama, of The Nomura Securities Company, Ltd., New York, who spoke on "Investing in Japanese Securities"; and Mr. Walter P. Stern, of Burnham & Company, New York, who discussed "The Special Situation."

On Friday evening at 7:30 p.m. a buffet dinner was followed by an address by Mr. Robert L. Garner, former President of the International Finance Corporation, Washington.

On Saturday, March 3, at 9:15 a.m., the session was devoted to "Export-Import Financing." Mr. Walter C. Sauer, Executive Vice President of the Export-Import Bank of Washington, delivered an address on "Current Issues of Export-Import Financing." His address was followed by a panel discussion on "Export Credits, Guaranties, and Insurance," in which the following participated: the panel Chairman, Mr. Walter S. Surrey, of Surrey, Karasik, Gould and Greene, Washington, who gave "A Critical Appraisal of American Programs"; Mr. Warren W. Glick, of the Office of the General Counsel of the Export-Import Bank of Washington, who spoke on "The Export-Import Bank as a Source of Export Financing and Insurance"; Mr. Rowland Burstan, former Assistant Secretary of Commerce for International Affairs, who spoke on "Financing Exports and the Manufacturer: A Case Study"; and Mr. Paul E. Hollos, President of the American Swiss Credit Company, Ltd., New York, who spoke on "The Private Sources of Export Financing."

Following the panel discussions on Saturday morning, Mr. Max A. Stolper, Vice President of The Deltec Corporation, delivered an address on "Techniques and Problems of Hard Currency Debt Financing for Latin American Enterprises in the International Markets."

On Saturday afternoon, beginning at 1:45 p.m., two simultaneous panel discussions were held on "Special Aspects of International Financing." The first panel, on the subject of "Guaranties in Equity and Debt Investments," had as participants: the Chairman, Mr. Dean Lewis, Assistant General Counsel for International Affairs of the United States Department of Commerce, who spoke on "The Guaranty Program of the Agency for International Development"; Mr. Lester Nurick, Assistant General Counsel of the International Bank for Reconstruction and Development, who spoke on "Proposals for a Multilateral International Guaranty Program"; and Mr. Samuel V. Goekjian, of Surrey, Karasik, Gould and Greene, Washington, who spoke on "Guaranty Programs and the Investor."

The second panel considered "Participation in Joint Ventures." The participants were the Chairman, Mr. Lloyd N. Cutler, of Cox, Langford, Stoddard & Cutler, Washington, and Mr. Matthew Kust, Washington attorney, who spoke on "The Case for Minority Stock Ownership"; and Mr. J. W. Sundelson, of Ford International Staff, Dearborn, Michigan, who spoke on "The Disadvantages of Minority Ownership."

At three p.m., two simultaneous discussions were held on "Remedies in International Financing," and "International Financing in Conditions of Greater Currency Convertibility." Participants in the first panel were: the Chairman, Mr. Leonard C. Everson, Secretary of Transoceanic-American Overseas Finance Corporation, New York, who spoke on "Creditors' Rights on Default"; Mr. Charles M. Spofford, of Davis, Polk, Wardwell, Sunderland & Kiendl, New York, who spoke on "Problems of Subrogation on Bonds in Default"; and Dr. Martin Domke, of the American Arbitration Association, New York, who discussed "Settlement of Disputes by Arbitration."

On the second panel, Mr. George P. Nicoletopoulos, Assistant General Counsel of the International Monetary Fund, discussed "International

Financing in Conditions of Greater Currency Convertibility." "The Volta Aluminum Company Project" was the subject of remarks by the panel Chairman, Mr. Nurick, Mr. Spofford, Mr. Bruce E. Clubb, of Chapman, Wolfsohn, and Friedman, Washington (formerly of the Office of General Counsel of the Agency for International Development), and Mr. Cutler.

The conference concluded on Saturday evening with a banquet at 7:30 p.m.

Ohio State University, April 20, 1962

A regional meeting of the Society was held on April 20, 1962, in the auditorium of the College of Law of Ohio State University, Columbus, Ohio. The topic for discussion was "Intervention," and the principal speakers were Professors Roger D. Fisher, of Harvard Law School, Michael H. Cardozo, of Cornell Law School, and Richard A. Falk, of Princeton University. Funds for the meeting and the publication of its proceedings were made available by the Mershon Center for Education in National Security. Professor Roland J. Stanger, of the College of Law of Ohio State University, was in charge of arrangements for the meeting.

Rutgers University School of Law, May 4, 1962

The New Jersey-New York Regional Meeting of the Society was held on May 4, 1962, at the Military Park Hotel in Newark, and was sponsored by the School of Law and Institute for Continuing Legal Education of Rutgers University, the New Jersey State Bar Association, the New Jersey Practicing Lawyers Institute, the Foreign Trade Club of the Newark Association of Commerce and Industry, and the Association of the Bar of the City of New York. Professor Saul H. Mendlovitz of the Rutgers University School of Law, was in charge of arrangements.

The meeting considered the general topic of "Legal Problems of Foreign Investment and Foreign Enterprise" with particular reference to the differing legal and economic treatment received by foreign enterprise in India, Africa, Mexico, the United States and the Common Market.

The meeting was opened with a welcoming address by President Mason Gross of Rutgers University. Professor Saul H. Mendlovitz presided as Chairman. The treatment of foreign enterprise by India was discussed by Mr. Matthew J. Kust, of the D. C. Bar, followed by comments by Mr. H. C. L. Merillat, Executive Director of the Society. Mr. Bernard Blankenheimer, of the United States Department of Commerce, spoke on African treatment of foreign enterprise, and Mr. Peter Weiss, of the New York Bar, offered comments.

Following luncheon, there was a discussion of Mexico's treatment of foreign enterprise, with Professor Rodolfo Batiza, Associate Professor of Latin American Legal Studies of Tulane University School of Law, delivering the principal paper, followed by comments by Mr. Frank E. Nattier, Jr., of the New York Bar. The treatment of foreign enterprise

by the United States was discussed by Professor Detlev F. Vagts, of Harvard Law School, who was followed by Professor Robert Knowlton, of Rutgers School of Law, as commentator. Foreign enterprise and the Common Market was the subject of a paper by Professor Peter Hay, of the University of Pittsburgh School of Law. Comments were offered by Dr. Ernest C. Steefel, of the Bars of New York, London, Paris and Germany. The papers and comments on each subject were followed by general discussion.

The meeting concluded with a dinner at which Dean Lehan K. Tunks, of the Rutgers School of Law, presided. The Honorable Nicholas deB. Katzenbach, Assistant, now Deputy, United States Attorney General, delivered an address on "Foreign Enterprise and International Law."

The papers delivered at this meeting are to be published in a Symposium Edition of the *Rutgers Law Review* devoted to "Legal Problems of Foreign Investment and Foreign Enterprise."

Howard University, May 5, 1962

The meeting at Howard University, on May 5, 1962, was sponsored by the School of Law, and co-sponsored by the Department of Government, and the Political Science and World Affairs Clubs of the University. It was held in the Moot Courtroom, beginning at 1:30 p.m., and was arranged by Professor Newton Pacht of the Law School.

The general theme of the symposium was "International Law Standards in an Era of Rapid Historical Change." The principal papers were delivered by Professor Kenneth S. Carlston, of the University of Illinois School of Law, Professor Richard A. Falk, of Princeton University, and Mr. George Abi-Saab, of the Graduate Institute of International Studies, Geneva, Switzerland. Professor Carlston discussed "Jus Gentium and Jus Gestionis in Today's World Society." Comments on the paper were made by Professor Arthur S. Miller, of George Washington University Law School. Professor Falk spoke on "Historical Tendencies, Revolutionary Nations, and the International Legal Order." Professor Saul H. Mendlovitz, of Rutgers University Law School, made comments on the paper. "The Newly Independent States and Standards of International Law" was the subject of Mr. Abi-Saab's paper, which was followed by comments by Professor Stanley D. Metzger, of Georgetown University School of Law.

The proceedings of the meeting are to be published in a symposium issue of the *Howard Law Journal*.

Duke University School of Law, May 11-12, 1962

The meeting at Duke University Law School was held on May 11 and 12, 1962, and was devoted to the general subject of "Legal Problems of the Emerging States of Africa." It opened in the Law School on May 11 at 11:00 a.m., with a paper on "Protection of Fundamental Rights in British-Made African Constitutions," delivered by Professor Thomas M.

Franck, of New York University School of Law. Following lunch, there was an address by Dr. Herman J. Walker, Chief, Trade Agreements Division, Department of State, on "United States Commercial Policy and European Integration" (in conjunction with the Political Science Graduate Seminar of the University). At 5:30 p.m., the World Rule of Law Center was host at Holiday Inn to the participants in the meeting.

At 6:30 p.m., the School of Law was host at a banquet at which Professor Robert B. Wilson, of the Department of Political Science of Duke University, and a former President of the Society, delivered an address on "International Law and Some New National Constitutions." At 8:15 p.m., Dean William B. Harvey, of the University of Ghana Law Faculty, and Director of Legal Education of Ghana, spoke on "The Evolution of Ghana Law Since Independence."

On Saturday morning, May 12, at 10:15 a.m., Professor Denis V. Cowen, of the University of Chicago School of Law, spoke on "Aspects of Teaching and Research in the Field of African Legal Studies." The meeting concluded with a luncheon for international law teachers tendered by the Duke University School of Law.

Arrangements for the meeting were in charge of Professor Hans W. Baade of Duke University Law School.

ELEANOR H. FINCH

FELLOWSHIP AWARDS

Legal Aspects of Space Activities

Research fellowships for studies on the legal aspects of space activities have been awarded by the American Society of International Law to the following applicants: Spencer M. Beresford of Bethesda, Maryland, David M. Leive of Chevy Chase, Maryland, Robert D. Crane of Vienna, Virginia, and Stephen Gorove of Akron, Ohio.

As announced in the January, 1962, issue of this JOURNAL (pp. 163-164), the Society's study program on the legal aspects of space activities is one of several made possible by a grant of \$500,000 received last year from the Ford Foundation. In administering the space research program the Society is assisted by an advisory group drawn from experts in universities, the Government, and law practice. The fellowships are expected to result in detailed studies that will help to shape new international rules and agreements and improved international organizational structures for dealing with the coming problems of the space age. Two of the studies will deal with the regulation of space communications, a third will explore the rules governing liability for damage done to persons and property by space objects, and the fourth will examine the recent experience under international programs to control nuclear materials shared for non-military uses, which may throw some light on similar problems in regulating space activities.

Spencer M. Beresford, a lawyer, who has recently been Special Counsel to the House Committee on Science and Astronautics, will study the law

governing personal injury and property damage resulting from space activities. His study will explore the principles governing liability for injury by a space craft to persons or property on the ground, as well as to aircraft or other space craft, and will also consider the right to recover, and the duty to return, space craft which land in foreign territory. This problem has become urgent with the advent of manned space craft. The United Nations Committee on the Peaceful Uses of Outer Space has recommended that early consideration be given to space craft liability.

Robert D. Crane, Director of the Space Research Institute at the World Rule of Law Center, Duke University, will examine the administrative practices and concepts of the Communist countries in the field of international telecommunications in order to facilitate effective international negotiations and arrangements for co-operation in space communications. By considering the administrative and dispute-settling mechanisms used within Communist countries and among themselves, light may be thrown on mechanisms that would satisfy both the needs of Communist countries and the requirements of international order and effective co-operation in space communications.

David M. Leive, a Legislative Attorney in the Legislative Reference Service of the Library of Congress, will study the international regulation of space communications. His study will explore the question of what international agreements may be necessary for the effective operation of an international system of communication by space satellites, and will examine the International Telecommunication Union and other international organizations which have responsibilities for international communications, with a view to determining whether existing international procedures are adequate to meet the new demands of space communications, and if not, what new procedures might be developed.

Stephen Gorove, recently appointed Professor of Law and International Relations at the University of Denver, will study the experience of international co-operation in atomic energy as a possible guide in providing for international regulation of space activities. He will explore the negotiations that led to the establishment of procedures and regulations under international agreements to prevent shared nuclear materials from being used for military purposes. He will also study co-operation in atomic energy among countries in Europe and the experience under United States bilateral agreements under which the United States shares nuclear materials with other countries.

International Problems of Federalism

Fellowships have also been given to the following:

Jasper Y. Brinton, of Cairo, Egypt, former President of the Mixed Courts of Egypt, and now Vice President of the Egyptian Society of International Law. Judge Brinton will engage in studies of federal movements in the Middle East, and Central and West Africa.

Fred G. Burke, Chairman of the Committee on East African Studies, Maxwell Graduate School, Syracuse University. Professor Burke will

make a socio-political study of the factors tending to promote or impede transnational association among the emerging nations of East Africa.

Cesare Fabozzi, of the University of Milan, Italy, who will study the machinery for settlement of disputes among states in the European Communities.

Thomas M. Franck, of the faculty of New York University Law School. Professor Franck will study the legal and administrative institutions through which the emerging nations of East Africa are associated.

Dr. Kazimierz Grzybowski, of Washington, D. C., who will study the techniques of international co-operation and settlement of disputes among the members of the Soviet bloc under such institutions as the Warsaw Treaty of Friendship, Cooperation and Mutual Assistance, and the Council for Mutual Economic Aid.

Dr. Ruth C. Lawson, Chairman of the Department of Political Science, Mt. Holyoke College. Dr. Lawson will make a study of NATO as an example of the evolution of an international security organization.

Edward McWhinney, of the Faculty of Law, University of Toronto, who will make a methodological study of supranational integration in Western Europe and in Soviet bloc countries.

Leroy S. Merrifield, of George Washington University Law School. Mr. Merrifield will make a study of the labor and social security laws of the European Communities relating, *inter alia*, to retraining and resettlement of displaced workers, industrial redevelopment, freedom of movement of workers among Community countries.

Ralph Reisner, of the University of Pittsburgh Law School. Mr. Reisner will make a study of the status of member aliens in the European Communities.

Robert O. Tilman of Duke University, who will make a study of the development of the Federation of Malaya and of the proposed Malaysian Federation.

Foreign Investment and Economic Development

Awards have also been made for country studies of the legal environment for foreign investment to Dan F. Henderson, of the University of Washington Law School, for a study of Japan; Matthew J. Kust, of Washington, D. C., for a study of India; and Paul O. Proehl, of the University of California School of Law, Los Angeles, for a study of Nigeria.

E. H. F.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of RICHARD B. BILDER, GORDON A. CHRISTENSON, STANLEY L. COHEN, THOMAS T. F. HUANG, SYLVIA E. NILSEN, HERBERT K. REIS, and ALFRED P. RUBIN, under the chairmanship of ERNEST L. KERLEY, all of the Office of the Legal Adviser, Department of State, with the exception of Mr. Rubin, who is in the Department of Defense.

TREATIES

Termination—inoperative prior treaty—Death Duty Convention with Canada

A convention between the United States and Canada for the avoidance of double taxation and the prevention of fiscal evasion in the cases of estate taxes and succession duties, signed at Ottawa on June 8, 1944, sometimes referred to as the death duty convention, was brought into force by the exchange of instruments of ratification on February 6, 1945, operative retroactively June 14, 1941 (Treaty Series, No. 989; 59 Stat. 915). Pursuant to Article I, the taxes to which that convention related were (a) for the United States, the Federal estate taxes, and (b) for Canada, "the taxes imposed under the Dominion Succession Duty Act." That Act imposed tax on the shares of beneficiaries and thus had the character of an inheritance tax. The convention as modified by a supplementary convention signed at Ottawa on June 12, 1950 (Treaties and Other International Acts Series, No. 2348; 2 U. S. Treaties 2247), remained in full force and effect through 1958.

Effective January 1, 1959, the Dominion Succession Duty Act was replaced by the Canadian Estate Tax which imposes tax on the estate and thus is an estate tax analogous to that imposed under the United States Internal Revenue Code. Consequently, the 1944 convention as modified by the 1950 convention was rendered administratively inoperative, although it was considered as remaining in effect with respect to the settlement of estates of persons dying prior to January 1, 1959.

On February 17, 1961, there was signed at Washington a convention between the United States and Canada for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on the estates of deceased persons (T.I.A.S., No. 4995). That convention was brought into force by the exchange of instruments of ratification on April 9, 1962. It is provided in Article XIV that, upon entry into force of this convention, the 1944 and 1950 conventions "shall be deemed to have terminated on the first day of January, 1959, in so far as application to estates of decedents dying on or after the last-mentioned date is concerned, but shall continue in effect with respect to the estates of decedents dying

prior to that date." Pursuant to Article XV, the convention, upon its entry into force, became operative retroactively as of January 1, 1959, "with respect to the estates of decedents dying on or after that date."

SOVEREIGNTY

Supremacy of territorial sovereign—service of judicial documents by mail in foreign state

In an aide-memoire delivered to the Department of State on November 16, 1961, the Embassy of Switzerland noted that an agency of the United States Government had, on several occasions, served documents through the mail on a Swiss corporation in Basle. The aide-memoire pointed out that "the service of judicial documents on persons residing in Switzerland is, under Swiss law, a governmental function to be exercised exclusively by the appropriate Swiss authorities," and that "service of such documents by mail constitutes an infringement of Switzerland's sovereign powers, which is incompatible with international law." The aide-memoire added that "documents destined for Switzerland should be transmitted by the U. S. Embassy in Berne to the Federal Division of Police."

In an aide-memoire to the Embassy of Switzerland, dated November 28, 1961, the Department of State replied:

The Department of State has informed the competent United States authorities of the Swiss law referred to in the aide-memoire. The Department believes that this action will avoid any future transmittals of such documents in a manner inconsistent with Swiss law. The inadvertent violation of applicable Swiss law by United States authorities is regretted.

(Dept. of State, MS file 711.331/11-1661, Nov. 28, 1961.)

PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

International adjudication—settlement of disputes clauses—International Court of Justice

In response to a private inquiry dated December 29, 1961, the Department of State replied by letter of January 24, 1962. In part the letter states:

Your letter appears to urge halting the long-standing practice of the United States of including in many of its treaties a clause which vests the International Court of Justice with jurisdiction to adjudicate disputes arising from the interpretation or application of the provisions of such treaties.

When the United States decides to enter into treaty relations with another State it does so because it believes that the rights and benefits accruing to our national interest in ratifying the treaty are sufficiently important to outweigh the treaty obligations we assume to the other State. The resulting rights and obligations of the United States become part of international law upon the entry into force of the treaty. If a dispute arises concerning the interpretation or applica-

tion of a treaty, and if this dispute cannot be settled amicably by the diplomatic process, it is likely to be strongly in the national interest of the United States to be able, if we wish, to take our case to the International Court of Justice for impartial adjudication. It is for this reason that the United States has included settlement of disputes clauses in the treaties to which you refer, namely, (1) the United States-Belgium treaty of friendship, establishment and navigation, signed at Brussels, February 21, 1961; and (2) the United States-Viet-Nam treaty of amity and economic relations, signed at Saigon, April 3, 1961. It is for the same reason that the Executive branch has asked that the Senate give its advice and consent to ratification of the 1958 Geneva optional protocol of signature to the four conventions on the law of the sea, which provides for settlement of disputes.

It may interest you to know that the International Court of Justice has never had before it a case involving the United States which went to the Court by virtue of a settlement of disputes clause. This is almost entirely due to the fact that the record of our Government in living up to its treaty obligations has in general been excellent. By the same token, the excellence of our record means that we need have little to fear from adjudication by the Court.

(Letter on file at Office of the Legal Adviser, Department of State.)

United Nations—progressive development of international law—International Court of Justice—United States acceptance of compulsory jurisdiction

In response to a private inquiry, the Department of State replied by letter of February 20, reading, in part, as follows:

Thank you for your letter to the Secretary, dated February 6, which has been referred to this office for reply. I appreciate having the opportunity to describe some of the steps which the Administration is taking in order to further the rule of law in international affairs.

President Kennedy's address to the United Nations General Assembly, delivered on September 25, 1961, contained the following passage:

"To destroy arms, however, is not enough. We must create even as we destroy—creating world-wide law and law enforcement as we outlaw world-wide war and weapons. In the world we seek, the United Nations Emergency Forces which have been hastily assembled, uncertainly supplied and inadequately financed will never be enough.

"Therefore, the United States recommends that all member nations earmark special peace-keeping units in their armed forces—to be on call of the United Nations—to be specially trained and quickly available—and with advance provision for financial and logistic support.

"In addition, the American delegation will suggest a series of steps to improve the United Nations' machinery for the peaceful settlement of disputes—for on-the-spot fact-finding, mediation and adjudication—for extending the rule of international law. For peace is not solely a matter of military or technical problems—it is primarily a problem of politics and people. And unless man can match his strides in weaponry and technology with equal strides in

social and political development, our great strength, like that of the dinosaur, will become incapable of proper control—and like the dinosaur vanish from the earth.”

These parallel concepts of the development and application of international law are reflected in specific aspects of United States foreign policy.

With regard to the development of international law, we are pleased that Herbert W. Briggs, professor of international law at Cornell University and past president of the American Society of International Law, was last year elected by a very substantial majority of the General Assembly to the International Law Commission which, as you know, has been entrusted by the Assembly with the task of codifying and progressively developing international law. The election of this distinguished scholar should help the International Law Commission better to fulfill its tasks.

The United States has actively participated in the various international conferences of plenipotentiaries which have been called under the aegis of the United Nations for the purpose of drawing up multilateral conventions on subjects of universal concern. Thus, the United States participated in the First United Nations Conference on the Law of the Sea, held in Geneva in 1958, which produced the four conventions on the law of the sea and an optional protocol of signature concerning the settlement of disputes. The United States also participated in the United Nations Conference on diplomatic intercourse and immunities, held at Vienna in 1961, which produced the Vienna Convention on Diplomatic Relations. Similar participation is anticipated in the United Nations Conference on consular relations which will be convened in Vienna in 1963.

With regard to the application of international law, I should like to point out that the Administration has gone on record in a letter dated March 15, 1961, to the Chairman of the Senate Committee on Foreign Relations as strongly favoring the adoption of Senate Resolution 39, 87th Congress, which would delete the self-judging domestic jurisdiction reservation from the United States acceptance of the compulsory jurisdiction of the International Court of Justice. There are a number of reasons for this position. First, the self-judging provision enables the United States in every international legal dispute to which it is a party to determine unilaterally whether that dispute falls within the terms of our declaration accepting compulsory jurisdiction. This provision is inconsistent with a meaningful general acceptance of such jurisdiction. Second, possession of this unilateral power is not consistent with Article 36(6) of the Statute of the Court which provides that “In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.”

Third, the availability of the self-judging provision for reciprocal use against us by any State which is a party to an international legal dispute with our Government can deprive us of recourse to the Court in cases in which it is in the national interest to secure international adjudication. Fourth, our possession of self-judging power prevents us from urging others to accept the compulsory jurisdiction of the Court and thus tends to put into question our good faith in favoring the judicial settlement of international legal disputes.

Deletion of the self-judging provision would not vest the Court with jurisdiction over United States domestic legal disputes. Con-

sistent with Article 2(7) of the United Nations Charter and Article 36(2) of the Statute of the Court, the United States acceptance of compulsory jurisdiction would remain subject to our reservation excepting from that jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America". It should be emphasized that our experience with the Court since 1946 demonstrates that the Court has acted and may be expected to act in a conservative manner with regard to its jurisdiction.

It is also our aim to include in international agreements to which we become a party clauses referring disputes arising from the interpretation or application of substantive treaty rights and obligations to the Court for adjudication.

As a further manifestation of the application of international law referred to in the President's address to the General Assembly, the Administration is engaged in the fundamental task of strengthening international institutions, particularly the United Nations and its specialized agencies, in order to endow these institutions with a greater capability of keeping the peace. In this connection, it may be recalled that the United States, together with a number of other States, co-sponsored a resolution, which was adopted by the Assembly as resolution 1731 (XVI) on December 20, 1961, by which the Assembly requested the International Court of Justice for an advisory opinion as to the legally binding character of General Assembly assessments on Member States for the peace-keeping operations involved in the United Nations Emergency Force in the Middle East and the United Nations operations in the Congo. The United States is participating in this proceeding and will argue forcefully, and, we hope, successfully, in favor of the principle of the collective fiscal responsibility of all United Nations Members. Lastly, I should add that the President's request to Congress for authorization to purchase one hundred million dollars of United Nations bonds is designed to strengthen the United Nations in order that it may carry on its indispensable peace-keeping activities. These peace-keeping activities, in turn, evidently contribute to the strengthening of international law.

(Letter on file at Office of the Legal Adviser, Department of State.)

LAW OF OUTER SPACE

International co-operation—United States initiative in the United Nations General Assembly

On March 12, 1962, the Deputy Assistant Secretary of State for International Organization Affairs delivered an address to the Twelfth Annual Conference of National Organizations, entitled "Extending Law Into Outer Space." Mr. Gardner said, in part:

Yet recent events justify a mood of cautious optimism. In his letter to President Kennedy of February 21 congratulating the U. S. on the successful orbiting of Lieutenant Colonel John H. Glenn, Premier Khrushchev noted significantly: "If our countries pooled their efforts—scientific, technical, and material—to explore outer space, this would be very beneficial to the advance of science and would be acclaimed by all peoples who would like to see scientific

achievements benefit man and not be used for 'Cold War' purposes and the arms race."

The next day the President replied: "I am instructing the appropriate officers of this Government to prepare new and concrete proposals for immediate projects of common action, and I hope that at a very early date our representatives may meet to discuss our ideas and yours in a spirit of practical cooperation."

The significance of this exchange is enhanced by the basis for cooperation which has been laid in recent months. The United States, of course, has called for cooperation with the Soviet Union in outer space on many occasions. This offer was eloquently restated by President Kennedy in his first State of the Union message on January 30, 1961. Further impetus has given to the idea when, on September 25, the President laid before the United Nations a four-point program of space cooperation under United Nations auspices. The program called for a regime of law and order in outer space; the registration of satellites and space probes with the United Nations; a world-wide program of weather research and weather forecasting; and international cooperation in the establishment of a global system of communications satellites. A resolution embodying the President's program, co-sponsored by the U. S. and several friendly states, was placed before the United Nations on December 4. The Soviet Union, after some apparent hesitation, decided to co-sponsor the resolution—with only a few minor amendments. Moreover, it cooperated in the solution of the procedural difficulties which had hitherto prevented the Outer Space Committee from beginning its work.

What happened to produce this modest advance in U.N. space cooperation? How substantial a cooperative venture does it portend?

To answer these questions we must take a closer look at the program which was recently approved by the General Assembly.*

The first part of the program looks toward a regime of law and order in outer space on the basis of two fundamental principles:

- 1) International law, including the United Nations Charter, applies to outer space and celestial bodies.
- 2) Outer space and celestial bodies are free for exploration and use by all states in conformity with international law, and are not subject to national appropriation.

The General Assembly did not seek, quite rightly in the judgment of the United States, to go beyond these two principles and to define just where air space leaves off and outer space begins. It has been the general view, not challenged by any nation, that satellites so far placed in orbit have been operating in outer space. But the drawing of a precise boundary must await further experience and a consensus among nations.

The U.N. program takes international law and the U.N. Charter as the standard for space activities. Mankind would thus be free to use space on the same basis as it uses the high seas—free of any restraint except those on illegal activity such as aggression and ex-

* The resolution referred to was tabled in Committee I of the General Assembly on Dec. 2, 1961, by Australia, Canada, Italy and the United States, U.N. Doc. A/C.1/L.301. It was subsequently revised and co-sponsored by 24 states, U. N. Doc. A/C.1/L.301/Rev.1 and Corr.1. It was then adopted unanimously by the Assembly on Dec. 20, 1961, as Resolution 1721(XVI); reprinted below, p. 946. The Outer Space Committee referred to is the United Nations Committee on the Peaceful Uses of Outer Space, which was continued and expanded by Resolution 1721(XVI).

clusive use. This formula is designed to promote the maximum exploitation of space technology in the service of human needs. It is designed to prevent space and celestial bodies from becoming the objects of competing national claims.

Within this general framework, the Outer Space Committee, through its technical and legal subcommittees, will now seek to develop further standards for the conduct of space activities which will serve the interest of all nations—standards covering such matters as liability for injury caused by space vehicles and the return of space vehicles and personnel.

A second aspect of the new U.N. program is the registration of objects launched into orbit or beyond. Under the resolution, information on these objects is to be furnished promptly to the outer space committee through the Secretary General, for the use of all members of the United Nations.

To fulfill its obligations under this part of the U.N. resolution, the United States has submitted a comprehensive inventory of all U. S. satellites in sustained orbit and will keep this initial registration up-to-date by the periodic filing of new information.

The establishment of a complete registry of space vehicles marks a modest but important step toward openness in the conduct of space activity. It will benefit all nations, large and small, interested in identifying space vehicles. It might make a modest contribution to the eventual establishment of a system of pre-launch inspection as part of a comprehensive disarmament agreement.

(Dept. of State Press Release No. 159, March 10, 1962.)

INTERNATIONAL CLAIMS

Continuous nationality

The Department received a request for assistance in obtaining compensation from the Government of Iran on behalf of a naturalized American citizen for personal property allegedly taken from the claimant's father. In answer to the request, the Department by letter dated January 30, 1962, declined to assist the claimant, since the claim had not belonged continuously to an American national from the date it accrued. The letter in part said:

An examination of the enclosures to your letter indicates that a number of camels belonging to the claimant's father were requisitioned by the Persian Government for its use in 1924. It is understood that the claimant's father was not an American national at that time and that the claimant did not acquire United States citizenship until 1945.

In these circumstances the Department of State regrets that it is not in a position to present a claim on behalf of the claimant. Under generally accepted principles of international law and practice, a state may not espouse a claim which is not continuously owned from the date the claim arose by nationals of the state asserting the claim. Since the claim originally accrued to a person who was a Persian and not an American national, the Department would have no basis in international law to take that claim up with the Iranian authorities.

(Letter on file at the Office of the Legal Adviser, Department of State.)

INTERNATIONAL ORGANIZATIONS

International peace and security—United Nations operations in the Congo

On January 22, 1962, the Department of State replied to a private inquiry dated January 4. The reply reads, in part:

You were good enough to inquire about the position taken by the United States with respect to United Nations actions in the Congo, and, in particular, the military action in Katanga. I hope that the following information may be of use.

In two reports, S/4940/Add.16, dated December 6, 1961, and S/4940/Add.17, dated December 9, 1961, from the Officer-in-Charge of the United Nations Operation in the Congo to the Secretary-General, relating to the Implementation of Paragraph A-2 of the Security Council Resolution of February 21, 1961, one finds the genesis and purpose of the recent military operations in Katanga set forth. In these reports, details are given upon the basis of which the statement is made that, as a consequence of a series of violent attacks upon and abductions of United Nations personnel and interference with vital United Nations communications on the part of the Katanga gendarmerie, the United Nations on December 5, 1961, began a "defensive action to restore law and order in Elisabethville and to regain freedom of movement." (S/4940/Add.17, p. 1.) These attacks and abductions, and this interference with vital communications coming at a time when, according to the latter report, the provincial authorities of Katanga were engaged in promoting an inflammatory campaign in support of further hostilities against the United Nations and were manifestly engaged in preparations for a concerted attack on United Nations positions, rendered it imperative for the ONUC Force "to take the essential measures necessary in self-defense for the maintenance of public order and restoration of freedom of movement." (*Ibid.*)

The Secretary-General, in his public statement of December 10, 1961, after noting that the military operations in Katanga were forced on the United Nations, and that this military action was undertaken only with the greatest reluctance and only when it became obvious that to continue negotiations would be useless, explains the purpose of these military operations in these terms:

"The purpose of the present military operations is to regain and assure our freedom of movement, to restore law and order, and to ensure that for the future the United Nations forces and officials in Katanga are not subjected to such attacks; and meanwhile to react vigorously in self-defence to every assault on our present position, by all the means available to us. These military operations *will* be pursued up to such time, and *only* up to such time, that these objectives are achieved, either by military or by other means, and we have satisfactory guarantees in this regard for the future, not only in Elisabethville but over the whole of Katanga. We shall also need to be satisfied that we shall be able to go ahead with the implementation of the Security Council and General Assembly resolutions, and especially the latest Security Council resolution of 24 November 1961, without let or hindrance from any source. We have endeavored to make our objectives known to the people of Katanga, as also the rest

of the Congo, by pamphlets, broadcasts and public announcements. I shall welcome any initiative which would enable us to achieve our aims as peacefully and as speedily as possible. In this connexion I am fully aware of the need for reconciliation and pacification, and I recall that I stated in the Security Council on 24 November 1961 that 'in my view national reconciliation should figure in our attempts to restore law and order in the Republic of the Congo.'

"Our long-term mandate is stated and restated in the various resolutions of the Security Council and the General Assembly, which it is my responsibility to implement. I shall continue to strain every nerve, and to use all the resources available to me to execute this mandate in the spirit of the Charter." (S/5035, pp. 3-4, (1961), enclosed.)

The Government of the United States knows of no basis for disputing this explanation by the Secretary-General of the purpose and the nature of the military action taken in Katanga. Accordingly, it puts no credence in the claims that have been made to the effect that the United Nations was guilty of "aggression" in undertaking military action in Katanga.

May I commend to your attention the analysis of our Congo policy that was made by Under Secretary of State Ball in an address at Los Angeles on December 19, 1961 (Department of State Press Release No. 893, and the pamphlet based thereon, Department of State Publication 7326).

It might be noted, in this connection, that the Government of the United States, in response to requests for cooperative action made by the United Nations, provides the United Nations Congo operation with noncombatant assistance of the kind which the Department of Defense may furnish pursuant to the authorization contained in Section 7(a) of the United Nations Participation Act of 1945 (59 Stat. 619, as amended, 22 U.S.C. § 287 d-1), and in paragraph 1 of the Executive Order No. 10206, January 19, 1951, 16 F.R. 529, issued in accordance therewith by the President of the United States. Under that Act and that Executive Order, the Secretary of State and the Secretary of Defense are authorized, in response to United Nations requests for cooperative action, to provide the United Nations with noncombatant assistance including personnel, facilities, services, supplies and equipment.

(Letter on file at Office of the Legal Adviser, Department of State.)

United Nations—functions and powers—authority to issue bonds

An opinion of the Legal Adviser was submitted to the Senate Committee on Foreign Relations on February 9, 1962:

OPINION OF THE LEGAL ADVISER OF THE DEPARTMENT OF STATE AUTHORITY TO ISSUE UNITED NATIONS BONDS

The question has been raised whether the United Nations has the authority to issue bonds. The answer is in the affirmative for the following reasons.

The United Nations has legal personality. As the International Court of Justice held in the case of *Reparation for Injuries Suffered*

in the Service of the United Nations (I.C.J. Reports 1949, pp. 174, 179):

“***the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state. Still less is it the same thing as saying that it is ‘a superstate,’ whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a state must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”

The capacity of the Organization to exercise its legal personality in the territory of Member States is reflected in Article 104 of the Charter:

“The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”

The Reparation case, when read together with Article 104, further demonstrates that the Organization has the authority to carry out, by necessary and proper means, the functions entrusted to it:

“It must be acknowledged that its (the Organization’s) Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged” (*loc. cit.*).

The United Nations is endowed with the authority to levy mandatory assessments to meet the expenses of performing its functions. Article 17 of the Charter provides in part that:

“1. The General Assembly shall consider and approve the budget of the Organization.

“2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.”

Political entities that enjoy legal personality and possess fiscal power characteristically have the right to issue bonds.

The authority of the United Nations to borrow was exercised in 1948 when the Organization borrowed \$65 million from the U. S. Government to finance construction of its headquarters. No question about its capacity so to borrow was raised. The Members have been regularly assessed to repay the loan, as part of the Organization’s annual budget, and no question about such assessments has been raised.

It is accordingly concluded that the United Nations is authorized to issue bonds in view of (a) the provisions of Articles 17 and 104 of the Charter, (b) the holdings of the International Court of Justice which confirm that the Organization may implement its express powers by appropriate means, and (c) the Organization’s undisputed practice in exercise of those powers.

Abram Chayes, The Legal Adviser.

(Hearings on S.2768 before the Senate Committee on Foreign Relations, 87th Cong., 2d Sess. 107-108 (1962).)

United Nations—International Court of Justice—advisory opinion proceeding

On February 9, 1962, the Assistant Secretary of State for International Organization Affairs submitted to the Senate Committee on Foreign Relations in connection with the Committee's consideration of the purchase of United Nations bonds, the following statement prepared by the Legal Adviser:

INTERNATIONAL COURT OF JUSTICE PROCEDURE: FINANCIAL OBLIGATIONS OF MEMBERS OF THE UNITED NATIONS, ADVISORY OPINION PROCEEDING

(1) General Assembly Resolution 1731(XVI), adopted December 20, 1961, requested the International Court of Justice to deliver an advisory opinion upon the question whether Assembly assessments upon Member States for ONUC and UNEF expenditures are "expenses of the Organization" within Article 17, paragraph 2, of the Charter. By the terms of that article, "expenses of the Organization" are legally binding upon Members as apportioned by the Assembly.

(2) This request of the General Assembly was forwarded by the Secretary-General to the President of the Court who, by order dated December 7, 1961, set February 20, 1962, as the time-limit within which written statements may be submitted to the Court by states Members of the United Nations. The Legal Adviser, pursuant to the authorization of the Secretary, is currently preparing an extensive written statement on this question which will be submitted to the Court within this time-limit.

This written statement will fully support the principle of the fiscal responsibility of all United Nations Members for United Nations expenditures (except, of course, voluntary expenditures, such as contributions to UNICEF). The United States will thus urge that the Court find that there exists a legal obligation upon United Nations Members to pay their assessed shares of ONUC and UNEF expenditures.

(3) The written statement to be submitted to the Court by the United States is, according to the practice of the Court, confidential, pending the termination of the proceeding.

(4) Oral hearings are likely to take place before the Court in late March, April, or early May. The United States will participate in this second session of the proceeding. The Secretary has designated the Legal Adviser, who customarily speaks for the United States before the Court, to argue the case orally.

(5) We have suggested to a number of governments which take a legal position similar to ours that they also participate both in the written and oral phases of the proceeding. We have been advised, as of February 1, that at least five or six of these governments will participate.

(6) We expect the Court to deliver its opinion before it recesses.

(Hearings on S.2768 before the Senate Committee on Foreign Relations, 87th Cong., 2d Sess. 105-106 (1962).)

The following opinion of the Legal Adviser was also submitted to the Committee on Foreign Relations on February 9:

OPINION OF THE LEGAL ADVISER OF THE DEPARTMENT OF STATE

EFFECT OF AN ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE
IN THE CURRENT PROCEEDING ON FINANCIAL OBLIGATIONS OF MEMBERS OF
THE UNITED NATIONS ON THE REPAYMENT OF THE UNITED NATIONS BONDS.

By resolution 1731(XVI) of December 20, 1961, the General Assembly requested from the International Court of Justice an advisory opinion on the question of whether the assessments for financing the United Nations Emergency Force (UNEF) and United Nations Operations in the Congo (ONUC), provided for in certain resolutions, constitute "expenses of the Organization" within the meaning of Article 17(2) of the Charter. It is the view of the Department of State that the answer to this question is affirmative. While the Department is confident of the soundness of its legal position, it has been asked to consider what effect any answer of the Court would likely have on payment of the annual installments of principal and interest to holders of United Nations bonds.

As a matter of law, an opinion by the Court would have no bearing upon repayment of the United Nations bonds. The question put to the Court relates to the legal effect in creating binding obligations on the Members of specifically designated, past assessment resolutions for special accounts of the budget of the Organization. The bonds will be repaid out of future assessments for the regular account of the budget. The questions of the validity of the bond issue, and of assessments to repay it, simply are not before the Court. They have not been submitted by the General Assembly. Moreover, the issuance of bonds by the United Nations gives rise to a distinct and binding contractual obligation which does not depend upon the purpose for which the funds received from the issue may be spent.

Abram Chayes, The Legal Adviser

(*Ibid.* at 106.)

JUDICIAL DECISIONS

BY COVEY OLIVER

Of the Board of Editors

Jurisdiction of Israel to try Eichmann—international law in relationship to the Israeli Nazi Collaborators (Punishment) Law

THE ATTORNEY-GENERAL OF THE GOVERNMENT OF ISRAEL *v.* EICHMANN.¹ Criminal Case No. 40/61. Mimeographed, unofficial translation prepared by the Israeli Government for the convenience of the public.

District Court of Jerusalem. Judgment of Dec. 11, 1961.

Adolf Eichmann was abducted from Argentina and brought to trial in Israel under the Nazi Collaborators (Punishment) Law, enacted after Israel became a state and after the events charged against Eichmann during the Nazi era in Germany. Section 1 (a) of the law provides:

A person who has committed one of the following offences—

- 1) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against the Jewish people;
 - 2) did, during the period of the Nazi regime, in a hostile country, an act constituting a crime against humanity;
 - 3) did, during the period of the Second World War, in a hostile country, an act constituting a war crime;
- is liable to the death penalty.

Counsel for Eichmann objected to the jurisdiction of the Court, *inter alia*, on grounds based on international law. [Excerpted opinion follows.]

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8. Learned Counsel does not ignore the fact that the Israel law applicable to the acts attributed to the accused vests in us the jurisdiction to try this case. His contention against the jurisdiction of the Court is not based on this law, but on international law. He contends—

(a) that the Israel law, by inflicting punishment for acts done outside the boundaries of the State and before its establishment, against persons who were not Israel citizens, and by a person who acted in the course of duty on behalf of a foreign country ("Act of State") conflicts with international law and exceeds the powers of the Israel legislator;

(b) that the prosecution of the accused in Israel upon his abduction from a foreign country conflicts with international law and exceeds the jurisdiction of the Court.

¹ Opinion excerpted by Covey Oliver as to the international law issues considered.

9. Before entering into an analysis of these two contentions and the legal questions therein involved we will clarify the relation between them. These two contentions are independent of each other. The first contention which negates the jurisdiction of the Court to try the accused for offences against the law in question is not bound up with or conditional upon the circumstances under which he was brought to Israel. Even had the accused come to the country of his own free will, say as a tourist under an assumed name, and had he been here arrested upon the verification of his true identity, the first contention of Counsel that the Israel Court has no jurisdiction to try him for any offences against the law in question would still stand. The second, additional, contention is that no matter what the jurisdiction of the Israel Court is to try offences attributed to the accused in usual circumstances, that jurisdiction is in any case negated by reason of the special circumstances connected with the abduction of the accused in a foreign country and his prosecution in Israel. We will therefore deal with the two questions *seriatim*.

10. The first contention of Counsel that Israel law is in conflict with international law and that therefore it cannot vest jurisdiction in this Court, raises the preliminary question as to the validity of international law in Israel and as to whether in the event of a clash between it and the laws of the land, it is to be preferred to the laws of the land. The law in force in Israel resembles that which is in force in England. See Oppenheim (-Lauterpacht), *International Law*, 8th Ed., 1955 § 21 a, p. 39:

"As regards Great Britain, the following points must be noted: (a) All such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country are *per se* part of the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in a striking passage, that the Law of Nations is part of the law of the land."

But on the other hand (p. 41):

"(c) English statutory law is absolutely binding upon English courts, even if in conflict with International Law, although in doubtful cases there is a presumption that an Act of Parliament did not intend to overrule International Law. The fact that International Law is part of the law of the land and is binding directly on courts and individuals does not mean that English law recognises in all circumstances the supremacy of International Law.

(Note 3) It is of importance not to confuse, as many do, the question of the supremacy of International Law and of the direct operation of its rules within the municipal sphere. It is possible to deny the former while fully affirming the latter."

See also—*Croft v. Dunphy* [1933] A.C. 156 (p. 164):

"Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of International Law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as *ultra vires* (*Mortensen v. Peters*)."

And also—*Polites v. Commonwealth of Australia* (1945) 70 C.L.R. 60 (Annual Digest, 1943–1945, Case No. 61):

“The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications. This is recognised as being the position in Great Britain. . . . The position is the same in the United States of America. . . . It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity.”

As regards Israel, the Deputy President Justice Cheshin said in *Criminal Appeal 174/54* (10 Piske Din, 5, p. 17):

“As regards the question of the adoption by the national law of the principles of international law, we may safely accept Blackstone’s view in his Commentaries on the Laws of England, (Book IV, Chap. 5):

‘In England . . . the law of nations . . . is . . . adopted in its full extent by the common law, and is held to be part of the law of the land . . . without which it must cease to be a part of the civilized world.’

And that is the case in other countries such as the U.S.A., France, Belgium, and Switzerland, where the usages of international law have been acknowledged as part of the law of the land . . .”

With respect to statutory law, President Olshan said in High Court Case 279/51 (6 Piske Din 945, p. 966):

“It is a well known rule that a local statutory law must be construed in accordance with the rules of public international law, if only its tenor does not postulate another construction.”

And in Criminal Appeal 5/51 (5 Piske Din 1061) Mr. Justice Sussman said (p. 1065):

“It is a well known rule that in interpreting the law, the Court shall endeavour, as far as possible, to avoid a clash between the national law and the rules of international law which are binding upon the State; but this rule is only one of the rules in interpretation. It holds good only where we are concerned with the common law. As regards statutory law, where the will of the legislator is clear from its wording, the will of the legislator must be enforced without regard to any contradiction between that statutory law and international law. . . . Moreover, the Courts of this country derive their jurisdiction not from the system of international law but from the laws of the land.”

Our jurisdiction to try this case is based on the Nazis and Nazi Collaborators (Punishment) Law, a statutory law the provisions of which are unequivocal. The Court has to give effect to the law of the Knesset, and we cannot entertain the contention that this law conflicts with the principles of international law. For this reason alone Counsel’s first contention must be rejected.

11. But we have also perused the sources of international law, including the numerous authorities mentioned by learned Counsel in his comprehensive written brief upon which he based his oral pleadings, and by the learned *Attorney-General* in his comprehensive oral pleadings, and failed to find any foundation for the contention that Israel law is in conflict with the principles of international law. On the contrary, we have reached the conclusion that the law in question conforms to the best traditions of the law of nations.

The power of the State of Israel to enact the law in question or Israel's "right to punish" is based, with respect to the offences in question, from the point of view of international law, on a dual foundation: The universal character of the crimes in question and their specific character as being designed to exterminate the Jewish people. In what follows we shall deal with each of these two aspects separately.

12. The abhorrent crimes defined in this law are crimes not under Israel law alone. These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("delicta juris gentium"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try crimes under international law are *universal*.

13. This universal authority, namely the authority of the "forum deprehensionis" (the Court of the country in which the accused is actually held in custody) was already mentioned in the *Corpus Juris Civilis* (see: C. 3, 15, "ubi de criminibus agi oportet") and the towns of northern Italy had already in the Middle Ages taken to trying specific types of dangerous criminals ("banniti, vagabundi, assassini") who happened to be within their area of jurisdiction without regard to the place in which the crimes in question were committed (see *Donnedieu de Vabres: Les Principes Modernes du Droit Pénal International*, 1928, p. 136). Maritime nations have also since time immemorial enforced the principle of universal jurisdiction in dealing with pirates, whose crime is known in English law "*piracy jure gentium*." See *Blackstone*, *Commentaries on the Laws of England*, Book IV, Chap. 5 "Of Offences against the Law of Nations", p. 68:

"The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds . . . 3. Piracy."

p. 71:

"Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke (3. Inst. 113) *hostis humani generis*. As, therefore, he has renounced all the benefits of society

and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property."

See also *In re Piracy Jure Gentium*, [1934] A.C. 586 (per Viscount Sankey L.C.):

"With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere."

14. *Hugo Grotius* had already raised in 1625 in his famous book "*De Jure Belli ac Pacis*" the basic question of the "right to punish" under international law, the very question learned Counsel submitted.

In Book Two, Chapter 20 "*De Poenis*" (on punishment) the author says *inter alia*:

"Qui punit, ut recte puniat, jus habere debet ad puniendum, quod jus ex delicto nocentis nascitur."

("In order that he who punishes may duly punish, he must possess the right to punish, a right deriving from the criminal's crime.")

In the writer's view, the object of punishment may be the good of the criminal, the good of the victim, or the good of the community. According to natural justice, the victim may take the law into his hand, and himself punish the criminal, and it is also permissible for an innocent man to inflict punishment upon the criminal; but all such natural rights have been limited and restrained by organised society and have been delegated to the Courts of Law. The learned author here adds the important words (*italics ours*):

"Sciendum quoque est reges, et qui par regibus jus obtinent, jus habere poenas poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quae ipsos peculiariter non tangunt, sed in quibusvis personis *jus naturae aut gentium immaniter violentibus*."

("It must also be known that kings and any who have rights equal to the rights of kings may demand that punishment be imposed not only for wrongs committed against them or their subjects but also for all such wrongs as do not specifically concern them, but *violate in extreme form*, in relation to any persons, *the law of nature or the law of nations*.")

And he goes on to explain:

"Nam libertas humanae societati per poenas consulendi, quae initio, ut diximus, penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates resedit, non proprie qua aliis imperant, sed qua nemini parent. Nam subjectio aliis id jus abstulit."

("For the liberty to serve the welfare of human society by imposing penalties which had at first been, as already stated, in the hands of the individuals, has been exercised since the constitution of states and courts, by those with the supreme authority, not because they dominate others, but because they are subject to no one. For subjection to government has taken this right away from others.")

It is therefore the moral duty of every sovereign state (of the "kings and any who have rights equal to the rights of kings") to enforce the natural right to punish, possessed by the victims of the crime whoever they may be, against criminals whose acts have "violated in extreme form the law of nature or the law of nations." By these pronouncements the father of international law laid the foundations for the future definition of the "crime against humanity" as a "crime under the law of nations" and to universal jurisdiction in such crimes.

15. *Vattel* says in his book "*Le Droit des Gens*" (1758) Book I, Chap. 19, paragraphs 232-233, *inter alia*:

"Car la Nature ne donne aux hommes et aux Nations le droit de punir, que pour leur défense et leur sûreté; d'où il suit que l'on ne peut punir que ceux par qui on a été lésé.

Mais cette raison même fait voir, que si la Justice de chaque Etat doit en général se borner à punir les crimes commis dans son territoire, il faut excepter de la règle ces scélérats, qui, par la qualité & la fréquence habituelle de leurs crimes, violent toute sûreté publique, & se déclarent les ennemis du Genre-humain. Les empoisonneurs, les assassins, les incendiaires de profession peuvent être exterminés partout où on les saisit; car ils attaquent & outragent toutes les Nations, en foulant aux pieds les fondemens de leur sûreté commune. C'est ainsi que les Pirates sont envoyés à la potence par les premiers entre les mains de qui ils tombent."

Wheaton says in his "*Elements of International Law*", 5th English Ed., 1916, p. 104 (italics ours):

"The judicial power of every independent state . . . extends . . . to the punishment of piracy *and other offences against the law of nations*, by whomsoever and wheresoever committed."

Hyde says in his "*International Law (Chiefly as Interpreted and Applied by the United States)*," Vol. 1, 2nd Ed. (1947) in paragraph 241 (p. 804):

"In order to justify the criminal prosecution by a State of an alien on account of an act committed and consummated by him in a place outside of its territory . . . it needs to be established that there is a close and definite connection between that act and the prosecutor, and on which is commonly acknowledged to excuse the exercise of jurisdiction. There are few situations where the requisite connection is deemed to exist . . . The connection is, however, apparent when the act of the individual is one which the law of nations itself renders

internationally illegal or regards as one which any member of the international society is free to oppose and thwart."

It must be added that the learned author, who (in keeping with the Anglosaxon tradition) is generally meticulous and rigid in his pronouncements on the question of criminal jurisdiction with respect to crimes committed by foreigners abroad (see also his further remarks *ibid* p. 805 and his supporting reference to the dissenting opinion of Justice Moore in the "Lotus" case), specifically favours an excess of jurisdiction with respect to "offences under the law of nations." See also *ibid.* para. 11(a) (p. 33):

"The commission of particular acts, regardless of the character of the actors, may be so detrimental to the welfare of the international society that its international law may either clothe a State with the privilege of punishing the offender, or impose upon it the obligation to endeavour to do so. . . . In both situations, it is not unscientific to declare that he is guilty of conduct which the law of nations itself brands as internationally illegal. For it is by virtue of that law that such sovereign acquires the right to punish and is also burdened with the duty to prevent or prosecute."

Glaser in "Infraction Internationale," 1957, defines each of the crimes dealt with here, especially the "crime against humanity" and the "genocide crime" as "infractions internationales" or "crime d'ordre international" (p. 69), and says (p. 31):

"Les infractions internationales sont soumises, aussi longtemps qu'une juridiction criminelle internationale n'existe pas, au régime de la répression ou de la compétence universelle. Dans ce régime, les auteurs de pareilles infractions peuvent être poursuivis et punis en quelque pays que ce soit, donc sans égard au lieu où l'infraction a été commise: *Ubi te invenero, ibi te judicabo.*"

Cowles, in "Universality of Jurisdiction over War Crimes", 33 California Law Review (1945), p. 177 *et seq.*, states in the following terms the reasons for the rule of law as to the "universality of jurisdiction over war crimes" which was adopted and determined by the United Nations War Crimes Commission (See: Law Reports of Trials of War Criminals, Vol. 1, p. 53):

"The general doctrine recently expounded and called 'universality of jurisdiction over war crimes', which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished."

Instances of the extensive use made by the Allied Military Tribunals of the principle of universality of jurisdiction of war crimes of all classes (including "crimes against humanity") will be found in Vols. 1-15 of the Law Reports of Trials of War Criminals.

16. We have said that the crimes dealt with in this case are not crimes under Israel law alone, but are in essence offences against the law of nations. Indeed, the crimes in question are not a figment of the imagination of the legislator who enacted the law for the punishment of Nazis and Nazi collaborators, but have been stated and defined in that law according to a precise pattern of international laws and conventions which define crimes under the law of nations. The "crime against the Jewish people" is defined on the pattern of the genocide crime defined in the "Convention for the prevention and punishment of genocide" which was adopted by the United Nations Assembly on 9.12.48. The "crime against humanity" and the "war crime" are defined on the pattern of crimes of identical designations defined in the Charter of the International Military Tribunal (which is the Statute of the Nuremberg Court) annexed to the Four-Power Agreement of 8.8.45 on the subject of the trial of the principal war criminals (the London Agreement), and also in Law No. 10 of the Control Council of Germany of 20.12.45. The offence of "membership of a hostile organisation" is defined by the pronouncement in the judgment of the Nuremberg Tribunal, according to its Charter, to declare the organisations in question as "criminal organisations", and is also patterned on the Council of Control Law No. 10. For purposes of comparison we shall set forth in what follows the parallel articles and clauses side by side. [Comparison omitted]. . . .

17. The crime of "genocide" was first defined by Raphael Lemkin in his book "Axis Rule in Occupied Europe" (1944) in view of the methodical extermination of peoples and populations, and primarily the Jewish people by the Nazis and their satellites (after the learned author had already moved, at the Madrid 1933 International Congress for the Consolidation of International Law, that the extermination of racial, religious or social groups be declared "a crime against international law"). On 11.12.46 after the International Military Tribunal pronounced its judgment against the principal German criminals, the United Nations Assembly, by its Resolution No. 96 (I), unanimously declared that "genocide" is a crime against the law of nations. That resolution said:

"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and to the spirit and aims of the United Nations.

"Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

"The punishment of the crime of genocide is a matter of international concern.

"THE GENERAL ASSEMBLY, THEREFORE,

"AFFIRMS that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials

or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable:

“INVITES the Member States to enact the necessary legislation for the prevention and punishment of this crime;

“RECOMMENDS that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,

“REQUESTS the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.”

On 9.12.48, the United Nations Assembly adopted unanimously the convention for the prevention and punishment of the crime of genocide. The preamble and the first Article of the convention follow:

“The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96(1) dated 11 December 1946 that Genocide is a crime under international law contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history Genocide has inflicted great losses on humanity; and

Being convinced that in order to liberate mankind from such an odious scourge international co-operation is required,

Hereby agree as hereinafter provided:

Article I

The contracting Parties Confirm

that genocide, whether committed in time of peace or in time of war is a crime under international law, which they undertake to prevent and to punish.

18. On 28.5.51, the International Court of Justice gave, at the request of the United Nations Assembly, an Advisory Opinion on the question of the reservations to that convention on the prevention and punishment of the crime of genocide. The Advisory Opinion said *inter alia* (p. 23):

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles [underlying the Convention are principles] which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation [of genocide and of the co-operation required] ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention). The Genocide Convention was therefore intended

by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States."

19. In the light of the recurrent affirmation by the United Nations in the 1946 Assembly resolution and in the 1948 convention, and in the light of the advisory opinion of the International Court of Justice, there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, and at that ex tunc; that is to say: the crimes of genocide which were committed against the Jewish people and other peoples were crimes under international law. It follows therefore, in the light of the acknowledged principles of international law, that the jurisdiction to try such crimes is universal.

20. This conclusion encounters a serious objection in the new light of Article 6 of the convention which provides that:

"Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Prima facie this provision might appear to yield support for an argumentum e contrario, the very contention voiced by the learned Counsel against the applicability of the principle of universal jurisdiction and even against any extraterritorial jurisdiction with respect to the crime in question: if the United Nations failed to give their support to universal jurisdiction by each country to try a crime of genocide committed outside its boundaries, but has expressly provided that, in the absence of an international criminal tribunal, those accused of this crime shall be tried by "a competent court of the country in whose territory the act was done" how may Israel try the accused for a crime that constitutes "genocide"?

21. To reply to that reservation we must direct attention to the distinction between the rules of customary and the rules of conventional international law, a distinction which also found expression in the Advisory Opinion of the International Court of Justice with respect to the convention in question. That convention fulfills two roles simultaneously: in the sphere of customary international law it re-affirms the deep conviction of all peoples that "genocide, whether [committed] in time of peace or in time of war, is a crime under international law" (Article 1). That confirmation which, as stressed in the Advisory Opinion of the International Court of Justice, was given "unanimously by fifty-six countries" is "of universal character," and purport of which is that "the principles inherent in the convention are acknowledged by the civilised nations as binding on the country *even without a conventional obligation*" (*ibid.*). "The principles inherent in the convention" are *inter alia*, the criminal character of the acts defined in Article 2 (that is, the article upon which the definition of "a crime against the Jewish people" in the Israel law has been patterned), the penal liability for any form of participation in this crime (Article 3),

the want of immunity from penal liability for rulers and public officials (Article 4), and the fact that for purposes of extradition no political "character" may be assigned to any such crime (Article 7). These principles are "recognised by civilised nations" according to the conclusion of the International Court of Justice, and are "binding on the countries even without a conventional obligation"; that is to say, they constitute part of the customary international law. The words "approve" in Article 1 of the convention and "recognise" in the Advisory Opinion indicate approval and recognition *ex tunc*, namely the recognition and confirmation that the above-mentioned principles had already been part of the customary international law at the time of the perpetration of the shocking crime which led to the United Nations' resolution and the drafting of the convention—crimes of genocide which were perpetrated by the Nazis. Thus far as to the first aspect of the convention (and the important one with respect to this judgment): the confirmation of certain principles as established rules of law in customary international law.

22. The second aspect of the convention, which is the practical object for which it was concluded, is: the determination of the conventional obligations between the contracting parties to the convention for the prevention of such crimes *in future* and the punishment therefor in the event of their being committed. Already in the UN resolution 96(I) there came, after the "confirmation" that the crime of genocide constitutes a crime under international law, an "invitation," as it were, to all States-Members of the United Nations "to enact the necessary legislation for the prevention and punishment of this crime," together with a recommendation to organise "international cooperation" between the countries with a view to facilitating the "prevention and swift punishment of the crime of genocide," and to this end the Social and Economic Council was charged with the preparation of the draft convention. Accordingly the "affirmation" that genocide, whether committed in time of peace or in time of war, constitutes a crime under international law is followed in Article 1 of the convention by the obligation assumed by the contracting parties who "undertake to prevent and punish it," and by Article 5 they "undertake to pass the necessary legislation to this end."

In the wake of these obligations of the contracting parties to prevent the perpetration of genocide by suitable legislation and enforce such legislation against future perpetrators of the crime, comes Article 6 which determines the Courts that will try those accused of this crime. It is clear that Article 6, like all other articles which determine the conventional obligations of the contracting parties, is intended for cases of genocide which will occur in future after the ratification of the treaty or adherence thereto by the country or countries concerned. It cannot be assumed, in the absence of an express provision in the convention itself, that any of the conventional obligations, including Article 6, will apply to crimes which had been perpetrated in the past. It is of the essence of conventional obligations, as distinct from the confirmation of existing principles, that unless another intention is implicit, their application shall

be *ex nunc* and not *ex tunc*. Article 6 of the convention is a purely pragmatic provision, and does not presume to confirm a subsisting principle. Therefore, we must draw a clear line of distinction between the provision in the first part of Article 1, which says that "the contracting parties confirm that genocide, whether [committed] in time of peace or in time of war, is a crime under international law," a general provision which confirms the principle of customary international law that "is binding on all countries even without conventional obligation," and the provision of Article 6 which is a special provision in which the contracting parties pledged themselves to the trial of crimes that may be committed in future. Whatever may be the purport of this obligation within the meaning of the convention, (and in the event of differences of opinion as to the interpretation thereof the contracting party may, under Article 9, appeal to the International Court of Justice) it is certain that it constitutes no part of the principles of customary international law which are also binding outside the conventional (contractual) application of the convention.

23. Moreover, even the conventional application of the convention, it cannot be assumed that Article 6 is designed to limit to the principle of territoriality the jurisdiction of countries to try genocide crimes. Without entering into the general question of the limits of municipal criminal jurisdiction, it may be said that all agree that customary international law does not enjoin to try its citizens for offences they committed abroad (and in the light of subsisting legislation in many countries against the extradition of their citizens the prevalence of such an authority is essential to prevent criminals from behaving in a "hit and run" manner by fleeing to their own country). Had Article 6 meant to provide that those accused of genocide shall be tried *only* by "a competent court of the country in whose territory the crime was committed" (or by an "international court" which has not been constituted), then that article would have foiled the very object of the convention "to prevent genocide and inflict punishment therefor." In the Sixth Commission the delegates of several countries have pointed to this case, as well as to other cases of acknowledged jurisdiction in many countries, such as the commission of crimes against the citizens of the country, and after a lengthy debate it was agreed to append the following statement to the report of the commission:

"The first part of Article VI contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State." (U.N. Doc. A/C.6/SR. 134, p. 5)

The words "in particular" are designed neither to negate nor to affirm jurisdiction in other cases.

N. Robinson, who refers to the resolution of the Sixth Commission, adds (p. 84) in his "The Genocide Convention, 1960":

"The legal validity of this statement is, however, open to question. It was the opinion of many delegations that 'Article VI was not

intended to solve questions of conflicting competence in regard to the trial of persons charged with Genocide; that would be a long process. Its purpose was merely to establish the obligations of the State in which an act of Genocide was committed' F (A/C.6/SR. 132, p. 9). However, as the chairman rightly pointed out, the report of the Sixth Committee could only state that a majority of the Committee placed a certain interpretation on the text; that interpretation could not be binding on the delegations which had opposed it. 'Interpretations of texts had only such value as might be accorded to them by the preponderance of opinion in their favor' F (A/C.6/SR. 132, p. 10). It is obvious that the Convention would be open to interpretation by the parties thereto; should disputes relating to the interpretation arise, the International Court of Justice would be called upon to decide what is the correct interpretation. In dealing with such problems, the Court could obviously use the history of the disputed article."

P. N. Drost, says in "The Crime of State," Vol. II: Genocide (1959) (pp. 101-102):

"In the discussions many delegations expressed the opinion that Article VI was not meant to solve questions of conflicting or concurrent criminal jurisdiction. Its purpose was merely to lay down the duty of punishment of the State in whose territory the act of genocide was committed. (U.N. Doc. A/C.6/SR. 132) . . . It seems clear that the Article does not forbid a Contracting Power to exercise jurisdiction in accordance with its national rules on the criminal competence of its domestic courts. General international law does not prohibit a state to punish aliens for acts committed abroad against nationals."

The learned author proceeds to say on p. 131:

"Also the courts of the country to which the criminals belong by reason of nationality, were expressly mentioned in the debates as being competent, if the *lex fori* so admits, to exercise penal jurisdiction in cases arising abroad. The *forum patriae rei* was recognized as equally competent under the domestic law applying in such case the principle of active personality. But then, many states apply in certain cases the principle of protective jurisdiction which authorizes the exercise of jurisdiction over aliens in respect of crimes committed abroad when the interests of the state are seriously involved. When the victim of physical crime is a national of the state which has arrested the culprit, the principle of passive personality may come the case.

"By way of exception—and the crime of genocide surely must be considered exceptional in this respect—the principle of universal repression is applied to crimes which have been committed neither by nor against nationals nor against public interests nor on the territory of the state whose courts are considered competent nevertheless to exercise criminal jurisdiction by reason of the international concern of the crime or the international interest of its repression. None of these forms of complementary competence additional to the territorial jurisdiction as basic competence of the domestic courts has been excluded under Article VI of the present Convention. There was no need to stipulate these jurisdictional powers which all states possess unless particular provisions of international law prohibit or limit the exercise."

24. This convention may be joined to the four Geneva conventions of 12.8.49:

(Geneva Conventions for 1) the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2) of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 3) Relative to the Treatment of Prisoners at War, 4) Relative to the Protection of Civilian Persons in Time of War).

These conventions provide that—

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches (of the Convention as defined in the following Article), and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

(Article 49 of convention No. 1, Article 50 of convention No. 2, Article 129 of convention No. 3 and Article 146 of convention No. 4). Here is established the principle of “universality of jurisdiction with respect to war crimes,” as compulsory jurisdiction of the High Contracting Parties, an obligation from which none of them may withdraw and which none of them may waive (as expressly stated in the above-mentioned convention). That obligation is binding not only on the belligerents, but also on the neutrals among them. See *British Manual of Military Law*, Part III (The Law of War on Land), 1958, para. 282, note 2. *M. Greenspan*, *The Modern Law of Land Warfare*, 1959, p. 503.

25. On the other hand, in the convention for the prevention and punishment of genocide States-Members of the United Nations have not reached quite so far-reaching an agreement, but have contented themselves with the determination of territorial jurisdiction as a *compulsory minimum*. It is the consensus of opinion that the absence from this convention of a provision establishing the principle of universality (and, with that, the failure to constitute an international criminal tribunal) is a grave defect in the convention which is likely to weaken the joint efforts for the prevention of the commission of this abhorrent crime and the punishment of its perpetrators, but there is nothing in this defect to make us deduce any tendency against the principle of the universality of jurisdiction with respect to the crime in question. It is clear that the specification in Article 6 of the territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive, and every sovereign State may exercise its existing powers within the limits of customary international law, and there is nothing in the adherence of a country to the convention to waive powers which are mentioned in Article 6. It is in conformity with this view that the law for the Prevention and Punishment of Genocide, 5710-1950, provided in Article 5 that “any person who did outside of Israel an act which is an offence under this law may be tried and punished in Israel as though he did the act in

Israel." This law does not apply with retroactive effect and does not therefore pertain to the offences dealt with in this case. Our view as to the universality of jurisdiction is not based on this law or on this interpretation of Article 6 of the convention, but derives from the basic nature of the crime of genocide as a crime of utmost gravity under international law. The significance and relevance of the treaty to this case is in the confirmation of the international nature of the crime, a confirmation which was unanimously given by the United Nations Assembly and to which also adhered, among other peoples, the German people (in 1954 the German Federal Republic adhered to the convention and enacted a law (BGBL II, 729) which gave effect to the convention in Germany, and added to the German criminal law Article 220A against genocide (Völkermord), a crime defined according to Article 2 of the convention). The "crime against the Jewish people" under section 1 of the Israel law constitutes a crime of "genocide" within the meaning of Article 2 of the convention, and inasmuch as it is a crime under the law of nations, Israel's legislative authority and judicial jurisdiction in this matter is based upon the law of nations.

26. As to the crimes defined in Article 6 of the Charter of the International Military Tribunal, that Tribunal said in its judgment on the "principal war criminals" (IMT Vol. 1, p. 218) *inter alia*:

"The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

As regards the crimes defined in the Control Council Law No. 10 which was taken as a basis, among other cases, for 12 important cases tried by the United States Military Tribunals in Nuremberg, it was stated in the judgment passed on the "Jurists" ("Justice Case", Trials of War Criminals, Vol. III, 954 ff) (p. 968):

"The IMT Charter, the IMT judgment, and Control Council Law 10 are merely 'great new cases in the book of international law.' . . . Surely C.C. Law 10, which was enacted by the authorised representatives of the four greatest Powers on earth, is entitled to judicial respect when it states, 'Each of the following acts is *recognized* as a crime.' Surely the requisite international approval and acquiescence is established when 23 states, including all of the great Powers, have approved the London Agreement and the IMT Charter without dissent from any state. Surely the IMT Charter must be deemed declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations."

The judgment then proceeds to quote from the resolution which was unanimously adopted on 11.12.46 by the United Nations Assembly the words—

"The General Assembly . . . affirms the principles of international law recognized by the Charter of the Nuernberg Tribunal and the judgment of the Tribunal."

Proceeding, the judgment draws a distinction between the substantive principles of international law which lay down that "war crimes" and "crimes against humanity" whenever and wherever they were committed, and the actual enforcement of these universal principles which may come up against barriers of national sovereignty.

"We are empowered to determine the guilt or innocence of persons accused of acts described as 'war crimes' and 'crimes against humanity' under rules of international law. At this point, in connection with cherished doctrines of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other. . . . As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the state into whose hands the perpetrators fall. These rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government whether within the territorial boundaries of the state or in occupied territory, has been unquestioned. (*Ex parte Quirin*, 317 U.S. 1; *In re: Yamashita*, 327 U.S. 1, 90 L. Ed.) However, enforcement of international law has been traditionally subject to practical limitation. Within the territorial boundaries of a state having a recognized, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that state. The law is universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. . . . Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. . . . Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers."

It is clear from these pronouncements that the contention that the Nuremberg International Military Tribunal and the tribunals which were established in Germany by virtue of the Control Council Law No. 10 derive their jurisdiction from the capitulation and lack of sovereignty of Germany at that time, is true only with respect to the direct exercise of criminal territorial jurisdiction in Germany, such as was exercised by the above-mentioned tribunals, but she has adopted for herself substantive rules of universal validity in the law under discussion, the rules of international law on the subject of "war crime" and "crime against humanity." The judgment proceeds to say (p. 983):

"Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."

It is hardly necessary to add that the "crime against the Jewish people," which constitutes the crime of "genocide" is nothing but the gravest type of "crime against humanity" (and all the more so because both under Israel law and under the convention a special intention is requisite for its commission, an intention that is not required for the commission of a "crime against humanity"). Therefore, all that has been said in the Nuremberg principles on the "crime against humanity" applies *a fortiori* to the "crime against the Jewish people." If authority is needed for this, we find it in the same judgment, which says:

"As the prime illustration of a crime against humanity under C.C. Law 10, which by reason of its magnitude and its international repercussions has been recognized as a violation of common international law, we cite 'genocide' . . ."

It is not necessary to recapitulate in Jerusalem, 15 years after Nuremberg, the grounds for the legal rule on the "crime against humanity," for these terms are written in blood, in the torrents of the blood of the Jewish people which was shed. "That law," said Aroneanu in 1948, "was born in the crematoria, and woe to him who will try to stifle it."

("Cette loi est née dans les fours crématoires; et malheur à celui qui tenterait de l'étouffer.")

(Quoted by Boissarie in his introduction to *Eugène Aroneanu, Le Crime contre l'Humanité*, 1961.)

The judgment against the Operation Groups of 10.4.48, (Einsatzgruppen Case), TWC IV, 411 ff. (p. 498) says on the same subject:

"Although the Nuernberg trials represent the first time that international tribunals have adjudicated crimes against humanity as an international offense, this does not, as already indicated, mean that a new offense has been added to the list of transgressions of man. Nuernberg has only demonstrated how humanity can be defended in court, and it is inconceivable that with this precedent extant, the law of humanity should ever lack for a tribunal.

"Where law exists a court will rise. Thus, the court of humanity, if it may be so termed, will never adjourn."

27. We have already dealt with the 'principle of legality' that postulates "Nullum crimen sine lege, nulla poena sine lege," and what has been stated above with respect to the municipal law is also applicable to international law. In the Judgment against the "Major War Criminals" it is stated (p. 219):

"In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but it is in general a principle of justice."

That is to say, the penal jurisdiction of a State with respect to crimes committed by 'foreign offenders' insofar as it does not conflict on other grounds with the principles of international law, is not limited by the prohibition of retroactive effect.

It is indeed difficult to find a more convincing instance of a just retroactive legislation than the legislation providing for the punishment of war criminals and criminals against humanity and against the Jewish people, and all the reasons justifying the Nuremberg judgments justify *eo ipso* the retroactive legislation of the Israel legislator. We have already referred to the decisive ground of the existence of a "criminal intent" (*mens rea*), and this ground recurs in all the Nuremberg judgments. The accused in this case is charged with the implementation of the plan for the "final solution of the problem of the Jews." Can any one in his reason doubt the absolute criminality of such acts? As stated in the Judgment in the case of "Operation Groups" (p. 459):

"... There is (not) any taint of ex-post-facto-ism in the law of murder."

The Netherlands law of 10.7.47 which amends the preceding law (of 22.10.43) may serve as an example of *municipal retroactive legislation*, in that it added Article 27(A) which provides:

"He who during the time of the present war and while in the forces of service of the enemy State is guilty of a war crime or any crime against humanity as defined in Art. 6 under (b) or (c) of the Charter belonging to the London Agreement of 8th August, 1945 . . . shall, if such crime contains at the same time the elements of an act punishable according to Netherlands law, receive the punishment laid down for such act."

On the strength of such retroactive adoption of the definition of crimes according to the Nuremberg Charter the Senior Commander of the S.S. and Police in Holland, *Rauter*, was sentenced to death by a Special Tribunal, and his appeal was dismissed by the Special Court of Cassation (see LRTWC XIV, pp. 89 ff.). The double contention "nullum crimen, nulla poena sine lege" was dismissed by the Court of Cassation on the ground that the Netherlands legislator had abrogated this rule (which is expressly laid down in sec. 1 of the Netherlands Criminal Law) with respect to crimes of this kind, and that indeed that rule was not adequate for these crimes. On p. 120 (*ibid.*) it is stated:

"From what appears above it follows that neither Art. 27(A) of the Extraordinary Penal Law Decree nor Art. 6 of the Charter of London to which the said Netherlands provision of law refers, had, as the result of an altered conception with regard to the unlawfulness thereof, declared after the event to be a crime an act thus far permitted; . . . these provisions have only further defined the jurisdiction as well as the limits of penal liability and the imposition of punishment in respect of acts which already before (their commission) were not permitted by international law and were regarded as crimes . . ."

"In so far as the appellant considers punishment unlawful because his actions, although illegal and criminal, lacked a legal sanction provided against them precisely outlined and previously prescribed, his objection also fails.

"The principle that no act is punishable except in virtue of a legal penal provision which had preceded it, has as its object the creation of a guarantee of legal security and individual liberty, which legal interests would be endangered if acts about which doubts could exist as to their deserving punishment were to be considered punishable after the event.

"This principle, however, bears no absolute character, in the sense that its operation may be affected by that of other principles with the recognition of which equally important interests of justice are concerned.

"These latter interests do not tolerate that extremely serious violations of the generally accepted principles of international law, the criminal . . . character of which was already established beyond doubt at the time they were committed, should not be considered punishable on the sole ground that a previous threat of punishment was lacking. It is for this reason that neither the London Charter of 1945 nor the judgment of the International Military Tribunal (at Nuremberg) in the case of the Major German War Criminals have accepted this plea which is contrary to the international concept of justice, and which has since been also rejected by the Netherlands legislator, as appears from Art. 27(A) of the Extraordinary Penal Law Decree."

The courts in Germany, too, have rejected the contention that the crimes of the Nazis were not prohibited at the time, and that their perpetrators did not have the requisite criminal intent. It is stated in the judgment of the Supreme Federal Tribunal 1 St/R 563/51 that the expulsions of the Jews the object of which was the death of the deportees were a continuous crime committed by the principal planners and executants, something of which all other executants should have been conscious, for it cannot be admitted that they were not aware of the basic principles on which human society is based, and which are the common legacy of all civilised nations.

See also BGH 1 St.R 404/60 (NJW 1961, 276), a judgment of 6.12.60 which deals with the murder of mentally deranged persons on Hitler's orders. The judgment says *inter alia* (pp. 277, 278) that in 1940, at the latest, it was clear to any person who was not too naive, certainly to any who were part of the leadership machinery, that the Nazi regime does [did] not shrink from the commission of crimes, and that he who took part in these crimes could not contend that he had mistakenly assumed that a forbidden act was permissible, seeing that these crimes violated basic principles of a rule of law.

The Hebrew rule "No one may be punished unless he was forewarned," which corresponds to the principle of legality according to the Roman rule, hints at the importance of warning that a certain action is prohibited. During the World War Allied governments gave the Nazi criminals recurrent warnings that they would be punished, but these were of no avail.

Henry Stimson was right when he said, as cited in the Judgment on "The Jurists" (p. 976):

"It was the Nazi confidence that we would never chase and catch them, and not a misunderstanding of our opinion of them, that led them to commit their crimes. Our offense was thus that of the man who passed by on the other side. That we have finally recognized our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear."

28. Learned Counsel seeks to negate the jurisdiction of the State by contending that the crimes attributed to the accused in counts 1-12 had been committed, according to the Charge Sheet itself, in the course of duty, and constitute "acts of State," acts for which, according to his contention, only the German State is responsible. In this contention Counsel bases himself mainly on the theory of Kelsen, as explained in his works:

"Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals" (1943), 33 California Law Review 530 ff;
 "Peace through Law" (1944) p. 71 ff;
 "Principles of International Law" (1952), p. 235 ff.

Learned Counsel bases himself on the rule "*par in parem non habet imperium*," that is to say—a sovereign State does not dominate, and does not sit in judgment against, another sovereign State, and deduces therefrom that a State may not try a person for a criminal act that constitutes an "act of State" of another State, without the consent of such other State to that person's trial. In the view of Kelsen only the State in whose behalf the "organ" (ruler or official) had acted is responsible for the violation, through such act, of international law, [for] which the perpetrator himself is not responsible (with the two exceptions of espionage and war treason).

The theory of "Act of State" was repudiated by the International Military Tribunal at Nuremberg, when it said (pp. 222-223):

"It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of *Ex Parte Quirin* (1942), 317 U.S. 1, before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court said:

'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals.'

He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. . . . The principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

'The official position of defendants, whether as heads of States, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.'

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."

It is clear from the context that the last sentence was not meant, as Counsel contends, to limit the rule of the "violation of the laws of war" alone. The Court expressly said, as quoted above, that "the principle of international law [which] under certain circumstances protects the representatives of a State cannot be applied to acts which are condemned as criminal by international law."

Indeed, the theory of Kelsen and his disciples (See Counsel's written brief pp. 14-35), and also the 'limited' theories referred to by Learned Counsel (*ibid.*) are inadmissible. The precedents adduced as authorities for this theory *e.g.* *Schooner Exchange v. McFaddon* (1812) 7 Cranch 116, the memorandum of the American Secretary of State on the subject of the "Caroline," *i.e.* *People v. McLeod* (See Moore, Digest of International Law II, para. 175), and other precedents, do not fit the realities in Nazi Germany. A State that plans and implements a "final solution" cannot be treated as "Par in parem," but only as a gang of criminals. In the judgment on "The Jurists" it is said (p. 984):

"The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge."

Drost says in his "The Crime of State (Humanicide)" pp. 310-311 (under the caption—"State Crime as Act of State"):

"Any state officer irrespective of his rank or function, would necessarily go unpunished if his acts of state were considered internationally as the sovereign acts of a legal person. The person who really acted on behalf of the state, would be twice removed from penal justice since the entity whom he represented, by its very nature would be doubly immune from punishment, once physically and once legally. The natural person escapes scotfree between the legal loopholes of state personality and state sovereignty. But then, this reasoning in respect of these too much laboured juristic conceptions should not be carried into the province of penal law.

"Immunity for acts of state constitutes the negation of international criminal law which indeed derives the necessity of its existence exactly from the very fact that acts of state often have a criminal character for which the morally responsible officer of state should be made penally liable."

The contention of Learned Counsel that it is not the accused but the State in whose behalf he had acted, that is responsible for his criminal acts is only true in its second part. It is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own "Acts of State," including the crimes attributed to the accused. But that responsibility does not detract one iota from the personal responsibility of the accused for his acts. See Oppenheim-Lauterpacht, § 156 b:

"The responsibility of States is not limited to restitution or to damages of a penal character. The State, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilised countries. Thus if the Government of a State were to order the wholesale massacre of aliens resident within its territory the responsibility of the State and of the individuals responsible for the ordering and the execution of the outrage would be of a criminal character."

"... It is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation. Moreover, the extreme drastic consequences of criminal responsibility of States are capable of modification in the sense that such responsibility is additional to and not exclusive of the international criminal liability of the individuals guilty of crimes committed in violation of International Law."

See also *ibid.* § 153a (p. 341):

"... No innovation was implied in the Charter annexed to the Agreement of August 8, 1945, for the punishment of the Major War Criminals of the European Axis inasmuch as it decreed individual responsibility for war crimes proper and for what it described as crimes against humanity. For the laws of humanity which are not de-

pendent upon positive enactment, are binding, by their very nature, upon human beings as such."

The repudiation of the contention as to an 'act of State' is one of the principles of international law that were acknowledged by the Charter and Judgment of the Nuremberg Tribunal, and were unanimously affirmed by the United Nations Assembly in its Resolution of 11.12.46. In the formulation (on the directions of the Assembly in its resolution No. II 177) by the International Law Commission of the United Nations, of these acknowledged principles, this principle appears as Principle No. 3:

"The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."

In resolution No. 96(I) of 11.12.46, too, in which the UN Assembly unanimously affirmed that 'genocide' is a 'crime under international law' it is stated that "principal offenders and associates, whether private individuals, public officials or statesmen" must be punished for the commission of this crime, while the Convention for the Prevention and Punishment of Genocide expressly provides in Art. IV:

"Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

This article affirms a principle acknowledged by all civilised nations, in the words of the International Court of Justice in its Advisory Opinion referred to, and inasmuch as Germany too has adhered to this Convention, it is possible that even according to Kelsen, who requires an international convention or the consent of the State concerned, there is no longer any cause for pleading 'an Act of State.' But the rejection of this plea does not depend on the affirmation of this principle by Germany, for the plea had already been invalidated by the law of nations.

For these reasons we dismiss the contention as to 'Act of State.'

29. In his written brief (pp. 48-50) Learned Counsel has based himself on the exclusive interpretation of the term 'a crime against humanity' given by the Nuremberg International Tribunal according to Art. 6(1) of the Charter, which excludes from its jurisdiction many crimes of this kind which had been committed by Germany before the outbreak of the war. In its Judgment on the Major War Criminals the Tribunal said (p. 254):

"To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter."

It is our view that no conclusion may be drawn from this interpretation of the Charter, for it is based on an express proviso to Art. 6(c) of the Charter, which does not appear in the definition of "crime against humanity" in Art. II 1(c) of the Control Council Law No. 10. The last words in the extract cited above: "crimes against humanity *within the meaning of the Charter*" indicate that but for the special proviso to Art. 6(c) the Tribunal would have deemed these crimes "crimes against humanity." It is true that notwithstanding the conspicuous omission of this proviso from the Control Council Law No. 10 two of the American Military Tribunals have decided in subsequent cases (the 'Flick Case' and the 'Ministries Case') to apply the above-mentioned proviso to the last-mentioned law; but two other Tribunals have expressed a contrary opinion (in the 'Operation Groups' and the 'Jurists' cases), and we think that their opinion, which conforms to the letter of the law, is correct. See also the reasons—to us convincing—advanced by the Chief American Prosecutor General Taylor in his argument in the 'Jurists' case. It must be noted that judgments under the Control Council Law No. 10 applied the definition of "crime against humanity" to all crimes of this order which were committed during the period of the Nazi regime, *i.e.* from 30.1.33. See *H. Meyerowitz*, "La répression par les Tribunaux Allemands des Crimes contre l'Humanité," 1960, 233.

No practical importance attaches to this question for the purpose of this case, seeing that most of the crimes attributed to the accused were committed during the war or in connection with it (according to the Nuremberg Judgment Hitler's invasions of Austria and Czechoslovakia constitute "crimes within the jurisdiction of the Tribunal," within the meaning of the proviso to Art. 6(3), see *ibid.* Vol. 22, pp. 643, 662). At all events it seems to us, in the light of the general definition in the Control Council Law No. 10, of "a crime against humanity" that the proviso to Art. 6(3) of the Charter does not limit the substantive nature of a "crime against humanity" under international law, but has only limited the jurisdiction of the Nuremberg Tribunal to try crimes of this kind which are bound up with "war crimes" or "crimes against peace." See also *Oppenheim-Lauterpacht* (7th ed.) II, para. 257, p. 579, note (5) and authorities there cited.

30. We have discussed at length the international character of the crimes in question because this offers the broadest possible, though not the only, basis for Israel's jurisdiction according to the law of nations. No less important from the point of view of international law is the special connection the State of Israel has with such crimes, seeing that the people of Israel (Am Israel)—the Jewish people (Ha'am Ha'yehudi—to use the term in the Israel legislation)—constituted the target and the victim of most of the crimes in question. The State of Israel's "right to punish" the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault their existence.

This second foundation of penal jurisdiction conforms, according to the acknowledged terminology, to the protective principle or the *compétence réelle*. In England, which, until a short time ago, was considered a country that does not rely on such jurisdiction (see again Harvard Research in International Law, Jurisdiction with Respect to Crime, 1935, AJIL, Vol. 29 (Suppl.) 544) it was said in *Joyce v. D.P.P.* [1946] A.C. 347 (p. 372):

"The second point of appeal . . . was that in any case no English Court has jurisdiction to try an alien for a crime committed abroad. . . . There is, I think, a short answer to this point. The statute in question deals with the crime of treason committed within or . . . without the realm. . . . No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws."

Oppenheim-Lauterpacht I § 147, p. 333 says that the penal jurisdiction of the State includes

"crimes injuring its subjects or serious crimes against its own safety."

Most European countries go much farther than this (See Harvard Research, *ibid.*, p. 546 *et seq.*).

31. *Dahm* says in his "Zur Problematik des Voelkerstrafrechts," 1956 p. 28, that the protective principle is not confined to foreign offences that threaten the "vital interests" of the State, and goes on to explain (pp. 38-39) in his reference to "immanent limitations" of the jurisdiction of the State that a departure therefrom would constitute an "abuse" of its sovereignty. He says:

"Penal jurisdiction is not a matter for everyone to exercise. There must be a "linking point," a legal connection that links the punisher with the punished. The State may, insofar as international law does not contain rules contradicting this, punish only persons and acts *which concern it more than they concern other States*" (italics by author).

Learned Counsel has summed up his pleadings against the jurisdiction of the Israel legislator by stressing (Session 5, pp. 17-20) that under international law there must be a connection between the State and the person who committed the crime, and that in the absence of an "acknowledged linking point" it was ultra vires the State to inflict punishment for foreign offences.

The doctrine of the "Linking point" is not new. *Dahm* (*ibid.*) bases himself on *Mendelssohn-Bartholdy*, *Vergleichende Darstellung des deutschen und auslaendischen Strafrechts*, Allg. Teil VI (1908) 111 ff. And *Mendelssohn-Bartholdy* himself (*ibid.*) quotes *Rolin-Jaequemyns* as having said in 1874:

"Tout le monde est d'accord sur ce point qu'il faut un lien de droit entre celui qui punit et celui qui subit le châtement."

32. We have already stated above the view of Grotius on "the right to punish," a view which is also based on a "linking point" between the criminal and his victim: Grotius holds that the very commission of the crime creates a legal connection between the offender and the victim, and one that vests in the victim the right to punish the offender or demand his punishment. According to natural justice the victim may himself punish the offender, but the organisation of society has delegated that natural right to the sovereign State. One of the main objects of the punishment is—continues the author of "The Law of Peace and War" (Book 2, chapter 20)—to ensure that "the victim shall not in future suffer a similar infliction at the hands of the same person or at the hands of others" ("ne post hac tale quid patiatur aut ab eodem aut ab aliis").

Grotius also quotes an ancient authority who said that the punishment is necessary to "defend the honour or the authority of him who was hurt by the offence so that the failure to punish may not cause his degradation";

("dignitas auctoritasve ejus in quem est peccatum tuenda est, ne praetermissa animadversio contemptum ejus pariat et honorem levet"),

and he adds that all that has been said of the jurisdiction applies to the infringement of all his rights. And again:

"Ne ab aliis laedatur qui laesus est punitione non quavis, sed aperta atque conspicua quae ad exemplum pertinet obtinetur."

("In order that the victim may not be hurt by others, there must be no mere punishment but a public and striking punishment that will serve as an example.")

Not all jurists use the term "linking point" in an equal connotation. Thus Mendelssohn-Bartholdy holds the opinion that the sovereignty of a country in determining its penal jurisdiction is unlimited, and he resorts to the "linking point" doctrine solely as a scientific device for the classification of the offences specified in positive law: "The number of linking points is as large as the number of offences" (*ibid.*, p. 112). On the other hand, Hyde (*ibid.*, p. 804) demands, as already mentioned,

"a close and definite connection between that act and the prosecutor, and one which is commonly acknowledged to excuse the exercise of jurisdiction. There are few situations where the requisite connection is deemed to exist . . . The connection . . . is . . . apparent when the act complained of is to be fairly regarded as directed against the safety of the prosecuting State."

Between these two extreme views is the view of Dahm (*ibid.*).

Notwithstanding the difference of opinion as to the closeness of the requisite link, the very term "connection" or "linking point" is useful for the elucidation of the problem before us. The question is: What is the special connection between the State of Israel and the offences attributed to the accused, and whether this connection is sufficiently close to form a foundation for Israel's right of punishment as against the accused. This is no merely technical question but a wide and universal one; for the

principles of international law are wide and universal principles and no articles in an express code.

33. When the question is presented in its widest form, as stated above, it seems to us that there can be no doubt as to what the answer will be. The "linking point" between Israel and the accused (and for that matter between Israel and any person accused of a crime against the Jewish people under this Law) is striking and glaring in a "crime manifest against the Jewish people," a crime that postulates an intention to exterminate the Jewish people in whole or in part. Indeed, even without such specific definition—and it must be noted that the draft law had only defined "crimes against humanity" and "war crimes" (Bills of Law of the year 5710 No. 36, p. 119)—there was a subsisting "linking point," seeing that most of the Nazi crimes of this kind were perpetrated against the Jewish people; but viewed in the light of the definition of "crime against the Jewish people," the legal position is clearer. The "crime against the Jewish people," as defined in the Law, constitutes in effect an attempt to exterminate the Jewish people, or a partial extermination of the Jewish people. If there is an effective link (and not necessarily an identity) between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has a very striking connection with the State of Israel.

34. The connection between the State of Israel and the Jewish people needs no explanation. The State of Israel was established and recognised as the State of the Jews. The proclamation of Iyar 5, 5705 (14.5.48) (Official Gazette No. 1) opens with the words: "It was in the Land of Israel that the Jewish people was born," dwells on the history of the Jewish people from ancient times until the Second World War, refers to the Resolution of the United Nations Assembly of 29.11.47 which demands the establishment of a Jewish State in Eretz Israel, determines the "natural right of the Jewish people to be, like every other people, self-governing, in its sovereign State." It would appear that there is hardly need for any further proof of the very obvious connection between the Jewish people and the State of Israel: this is the sovereign State of the Jewish people.

Moreover, the proclamation of the establishment of the State of Israel makes mention of the very special tragic link between the Nazi crimes, which form the theme of the law in question, and the establishment of the State:

"The recent holocaust which consumed millions of Jews in Europe, provides fresh and unmistakable proof of the necessity of solving the problem of the homelessness and lack of independence of the Jewish people by re-establishing the Jewish State which would fling open the gates of the fatherland to every Jew and would endow the Jewish people with equality of status within the family of nations.

"The remnants of the disastrous slaughter of the Nazis in Europe together with Jews from other lands persisted in making their way to the Land of Israel in defiance of all difficulties, obstacles and dangers. They have not ceased to claim their right to a life of dignity, freedom and honest toil in their ancestral home.

"In the Second World War the Jewish people in Palestine made its full contribution to the struggle of the freedom and peace-loving nations against the Nazi forces of evil. Its war effort and the blood of its soldiers entitled it to rank with the peoples that made the covenant of the United Nations."

These words are no mere rhetoric, but historical facts, which international law does not ignore.

In the light of the recognition by the United Nations of the right of the Jewish people to establish their State, and in the light of the recognition of the established Jewish State by the family of nations, the connection between the Jewish people and the State of Israel constitutes an integral part of the law of nations. . . .

36. Counsel contended that the protective principle cannot apply to this case because that principle is designed to protect only an existing State, its security and its interests, while the State of Israel had not existed at the time of the commission of the crime. He further submitted that the same contention was effective with respect to the principle of the "passive personality" which stemmed from the protective principle, and of which some States have made use for the protection of their citizens abroad through their penal legislation. Counsel pointed out that in view of the absence of a sovereign Jewish State at the time of the catastrophe the victims of the Nazis were not, at the time they were murdered, citizens of the State of Israel.

In our view Learned Counsel errs when he examines the protective principle in this retroactive law according to the time of the commission of the crimes, as is the case in an ordinary law. This law was enacted in 1950 with a view to its application during a specified period which had terminated five years before its enactment. The protected interest of the State recognised by the protective principle is in this case the interest existing at the time of the enactment of the law, and we have already dwelt on the importance of the moral and protective task which this law is designed to perform in the State of Israel.

37. The retroactive application of the law to a period precedent to the establishment of the State of Israel does not in itself constitute in respect to the accused (and for that matter, to any accused under this law) a problem on which we have already dwelt above. *Goodhart* says in his "The Legality of the Nurnberg Trial," *Juridical Review*, April 1946, (p. 8), *inter alia*:

"Many of the national courts now functioning in the liberated countries have been established recently, but no one has argued that they are not competent to try the cases that arose before their establishment. . . . No defendant can complain that he is being tried by a Court which did not exist when he committed the act."

What is here said of a court which did not exist at the time of the commission of the crime is also valid with respect to a State which was not sovereign at the time of the commission of the crime. The whole political landscape of the Continent of occupied Europe has changed after

the war; there, too, boundaries have changed as has also changed the very identity of States that had existed before, but all this does not concern the accused.

38. All this is said in relation to the accused; but may a new State, at all, try crimes that were committed before it was established? The reply to this question was given in *Katz-Cohen v. Attorney-General*, C.A. 3/48 (Pesakim II, p. 225) wherein it was decided that the Israel courts have full jurisdiction to try offences committed before the establishment of the State, and that "in spite of the changes in sovereignty there subsisted a continuity of law." "I cannot see," said President Smoira, "why that community in the country against whom the crime was committed should not demand the punishment of the offender solely because that community is now governed by the Government of Israel instead of by the Mandatory Power." This was said with respect to a crime committed in the country, but there is no reason to assume that the law would be different with respect to foreign offences. Had the Mandatory legislator enacted at the time an extraterritorial law for the punishment of war criminals (as, to give one example, the Australian legislator had done in the War Criminals Act, 1945, see Section 12) it is clear that the Israel Court would have been competent to try under such law offences which were committed abroad prior to the establishment of the State. The principle of continuity also applies to the power to legislate: the Israel legislator is empowered to amend or supplement the mandatory legislation retroactively, by enacting laws applicable to criminal acts which were committed prior to the establishment of the State.

Indeed, this retroactive law is designed to supplement a gap in the laws of Mandatory Palestine, and the interests protected by this law had existed also during the period of the Jewish National Home. The Balfour Declaration and the Palestine Mandate given by the League of Nations to Great Britain constituted an international recognition of the Jewish people, (see *N. Feinberg*, "The Recognition of the Jewish People in International Law," *Jewish Yearbook of International Law* 1948, p. 15, and authorities there cited), the historical link of the Jewish people with Eretz Israel and their right to re-establish their National Home in that country. The Jewish people has actually made use of that right, and the National Home has grown and developed until it reached a sovereign status. During the period preceding the establishment of the sovereign State the Jewish National Home may be seen as reflecting the rule "*nasciturus pro jam nato habetur*" (see Feinberg *ibid.*). The Jewish "Yishuv" in Palestine constituted during that period a "State-on-the-way," as it were, which reached in due time a sovereign status. The want of sovereignty made it impossible for the Jewish "Yishuv" in the country to enact a criminal law against the Nazi crimes at the time of the commission thereof, but these crimes were also directed against that "Yishuv" who constituted an integral part of the Jewish people, and the enactment with retroactive application of the law in question by the State of Israel filled the need which had already existed previously.

The historical facts explain the background of the legislation in question; but it seems to us that from a legal point of view the power of the new State to enact retroactive legislation does not depend on that background alone, and is not conditioned by the continuity of law between Palestine and the State of Israel. Let us take an extreme example and assume that the Gypsy survivors, an ethnic group or a nation who were also, like the Jewish people, victims of the "crime of genocide," would have gathered after the War and established a sovereign State in any part of the world. It seems to us that no principle of international law could have denied the new State the natural power to put on trial all those killers of their people who fell into their hands. The right of the 'hurt' group to punish offenders derives directly, as Grotius explained (see *supra*), from the crime committed against them by the offender, and it was only want of sovereignty that denied them the power to try and punish the offender. If the hurt group or people thereafter reaches political sovereignty in any territory, it may make use of such sovereignty for the enforcement of its natural right to punish the offender who hurt them.

All this holds good in respect to the crime of genocide (including the crime against the Jewish people) which, it is true, is committed by the killing of the individuals, but is intended to exterminate the nation as a group. According to Hitler's murderous racialism the Nazis singled out Jews from all other citizens in all the countries of their domination, and carried the Jews to their death solely because of their racial origin. Even as the Jewish people constituted the object against which the crime was directed, so it is now the competent subject to place on trial those who assailed their existence. The fact that that people has become after the catastrophe a subject, where it had hitherto been an object, and has turned from the victim of a racial crime to the wielder of authority to punish the criminals is a great historic right that cannot be dismissed. The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed their sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the principles of the law of nations in force. For all these reasons we have dismissed the first contention of Counsel against the jurisdiction of the Court.

39. We should add that the well-known judgment of the International Court of Justice at The Hague in the "Lotus Case" has ruled that the principle of territoriality does not limit the power of the State to try crimes and, moreover, any argument against such power must point to a specific rule in international law which negates the power. We have not guided ourselves by this which devolves, so to speak, the "onus of proof" upon him who contends against such power, but have preferred to base ourselves on positive reasons which establish the jurisdiction of the State of Israel.

40. The second contention of Learned Counsel was that the trial in Israel of the accused following upon his capture in a foreign land is in conflict with international law, and takes away the jurisdiction of the Court. Counsel pleaded that the accused, who had resided in Argentina under an assumed name, was kidnapped on 11.5.60 by the agents of the State of Israel, and was forcibly brought to Israel. He prayed that two witnesses be heard in proof of his contention that the kidnappers of the accused acted on orders they received from the Government of Israel or its representatives, a contention to which Learned Counsel attached considerable importance in an effort to prove that he was brought to Israel's area of jurisdiction in violation of International Law. He summed up his contentions by submitting that the Court ought not to lend its support to an illegal act of the State, and that in these circumstances the Court has no jurisdiction to try the accused.

On the other hand, the Learned Attorney-General pleaded that the jurisdiction of the Court was based upon the Nazis and Nazi Collaborators (Punishment) Law which applied to the accused and to the acts attributed to him in the Charge Sheet; that it is the duty of the Court to do no other than try such crimes; and that in accordance with established judicial precedents in England, the United States and Israel, the Court is not to enter into the circumstances of the arrest of the accused and of his transference to the area of jurisdiction of the State, these questions having no bearing on the jurisdiction of the Court to try the accused for the offences for which he is being prosecuted, but only on the foreign relations of the State. The Attorney-General added that with reference to the circumstances of the arrest of the accused and his transference to Israel, the Republic of Argentina had lodged a complaint with the Security Council of the United Nations, which resolved on 23.6.60, as follows (document S/4349) (exhibit T/1) [omitted] . . .

Pursuant to the above-mentioned Resolution the two Governments reached an agreement on the settlement of the dispute between them . . .

By our Ruling No. 3 of 17.4.61 (Session 6), we dismissed Counsel's objections to the jurisdiction of the Court, and ruled that there is no need to hear the witnesses summoned with reference to his second contention. The following are the reasons for our ruling:

41. It is an established rule of law that a person standing trial for an offence against the laws of the land may not oppose his being tried by reason of the illegality of his arrest or of the means whereby he was brought to the area of jurisdiction of the country. The courts in England, the United States and Israel have ruled continuously that the circumstances of the arrest and the mode of bringing of the accused into the area of the State have no relevance to his trial, and they consistently refused in all cases to enter into the examination of these circumstances . . . [Analysis of authorities omitted.]

47. An analysis of these judgments reveals that the doctrine is not confined to the infringement of municipal laws, as distinct from international laws, but the principle is general and comprehensive, as was

summed up in Moore (*ibid.*) and adopted in Criminal Appeal 14/42 *supra*, or as summed up in 35 *Corpus Juris Secundum* § 47 (p. 374):

"Even though a person has been brought into the country by force or stratagem, and without reference to an extradition treaty, he is within the jurisdiction of domestic courts so as to be liable to trial on a regular indictment and imprisonment under a valid judgment and sentence."

Vide also Hackworth, Digest of International Law (Department of State Publication), (1942) IV § 345, pp. 224-228.

Hyde, International Law (1947), II, 1032:

"Whatever be the right of the State from which he has been withdrawn, the prisoner is not entitled to his release from custody merely by reason of the irregular process by which he was brought into the State of prosecution."

In *United States v. Unverzagt* (1924), 299 Fed. 1015 (1017), the accused pleaded that he was abducted from British Columbia by American officials. The District Court dismissed his application for habeas corpus, stating (p. 1017):

"The defendant states he is a citizen of the United States. He is now before the courts of the United States. Canada is not making any application to this court in his behalf or its behalf, because of any unlawful acts charged, and if Canada or British Columbia desire to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels. The defendant cannot before the court invoke the right of asylum in British Columbia."

In *Ex parte Lopez* (1934) 6 F. Supp. 342 the Court heard the application for habeas corpus by a man who was abducted from Mexico to the United States and there charged with an offence under United States laws. The government of Mexico interfered in the judicial proceedings on the ground that Mexico's sovereignty was violated through the abduction, and asked that the applicant be surrendered to them with a view to their holding him in custody in Mexico pending the hearing of the application for extradition (if any) under the extradition treaty between the two countries. The District Court, basing itself on *Ker v. Illinois* and subsequent resultant precedents dismissed the applicant's application and also, by reference to *State v. Brewster* (*supra*) rejected Mexico's intervention, saying:

"The intervention of the government of Mexico raises serious questions, involving the claimed violation of its sovereignty, which may well be presented to the Executive Department of the United States, but of which this court has no jurisdiction. *State v. Brewster*, 7 Vt. 121."

See also *United States v. Insull* (1934) 8 Federal Suppl. 310 (313).

48. The Anglo-Saxon doctrine was accepted by continental jurists as well. We have already referred above to the views of *Travers*. See also

Dahm, Voelkerrecht (1958), who says, basing himself on *Ex parte Elliott*, *Ex parte Lopez*, *U. S. v. Insull*, and *Afuneh v. A.G.* (Criminal 14/42), that "even if . . . the accused arrived in the area of jurisdiction by irregular means such as kidnapping or mistake, it is not he, the accused, but only the country wronged which can invoke irregularities of this type, and this does not concern his trial" (p. 280, note 26).

So far as we have been able to examine legal literature, we found only one conflicting precedent, namely *In re Jolis* (Annual Digest 1933-34, Case No. 77), a judgment given by a French Criminal Court of First Instance (tribunal correctionnel) of 1933. The accused, a Belgian citizen, visited a café in a French village and following upon his visit cash was missing from the till. The owner of the café suspected the accused and called in two village constables, and together with them pursued the accused until they apprehended him across the border. *The Belgian Government lodged an official protest with the French Government* against the arrest which was effected in Belgium by French policemen and *demanding the return of the accused*. The Court of Avesnes decided to release the accused on the ground that—

"The arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was completely null and void. This nullity being of a public nature, the judge must take judicial notice thereof. The information leading to the proceedings of arrest . . . and all that followed thereon must therefore be annulled."

49. Criticism of British and American judgments from the point of view of international law was levelled by

Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 *American Journal of International Law* (1934), 231,
and *Morgenstern*, "Jurisdiction in Seizures Effected in Violation of International Law," 29 *British Yearbook of International Law* (1952), 265.

See also *Lauterpacht* in 64 *Law Quarterly Review* (1948), p. 100, note (14). It is not for us to enter into this controversy between international jurists, but we would draw attention to two important points in this case: (1) The critics admit that the established political rule is as summed up above; (2) In the case before us it is immaterial how that controversy is to be determined.

In his above-mentioned important essay, Professor Dickinson proposes that the ruling in *Ker v. Illinois* be set aside and the ruling in *U. S. v. Rauscher* be pronounced applicable to cases of seizure in violation of international law, and states his view (p. 239) that—

"In principle, in the international cases, there should be no jurisdiction to prosecute one who has been arrested abroad in violation of treaty or international law."

In conformity with that view the learned author proposes the following provision (p. 653, italics ours) in the *Harvard Research* for which he is

responsible as part of the "Draft Convention on Jurisdiction with Respect to Crime":

"Article 16. Apprehension in Violation of International Law.

"In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention *without first obtaining the consent of the State or States whose rights have been violated by such measures.*"

In his observations on that article the author says (p. 624)—

"... It is frankly conceded that the present article is in part of the nature of legislation,"

and adds (p. 628):

"In Great Britain, the United States, and perhaps elsewhere, the national law is not in accord with this article in cases in which a person has been brought within the State or a place subject to its authority by recourse to measures in violation of customary international law."

He proposes this article *de lege ferenda* to ensure "an additional and highly desirable sanction for international law" (p. 624).

It transpires from the learned author's exposition that the proposed "sanction" of the limitation on the jurisdictional power of the State forms no part of positive customary international law. What is more, it is worthy of note that even under the proposed Article 16 the jurisdictional power would not be limited by the right or for the benefit of the accused, but only by the right and for the benefit of the injured state; for after receiving the consent of the country "the rights of which have been violated by the above-mentioned measures," the country within whose limits the accused is found will have jurisdiction under this proposal too, to try the accused. The "sanction" is thus designed to lead to direct negotiations between the two countries concerned at the proper international level, to the end of making good the violation of the sovereignty of the one and the regularisation of the jurisdiction of the other by mutual consent—and the results of the negotiations between the two countries are binding upon the accused. Indeed, it is stated in the explanatory notes (p. 624, italics ours):

"And if, peradventure, the custody of a fugitive has been obtained by unlawful methods, the present article indicates an appropriate procedure for correcting what has been done *and removing the bar to prosecution and punishment.*"

This proposal in the Harvard Research proves, in our view, that even he who subjects the rule in force to criticism and proposes changes in judicial decisions or by legislation does not negate the basic view that, in substance, the violation by one country of the sovereignty of the other is susceptible of redress as between the two countries and cannot vest in the accused rights of his own.

50. Indeed there can be no escaping the conclusion that the violation of international law through the mode of the bringing of the accused into the territory of the country pertains to the international level, namely the relations between the two countries concerned only, and must find its solution at such level. The violation of the international law of this order constitutes an international tort to which the usual rules of current international law apply. The two important rules in this matter are (see Schwarzenberger, *Manual of International Law*, 1960, I, 162)—

- (a) "The commission of an international tort involves the duty to make reparations;"
- (b) "By consent or acquiescence, an international claim in tort may be waived and, in this way, the breach of any international obligation be healed."

Through the joint decision of the Governments of Argentina and Israel of 3.8.60 "to view as settled the incident which was caused through the action of citizens of Israel that has violated the basic rights of the State of Argentina," the country the sovereignty of which was violated, has waived its claims, including the claim for the return of the accused, and any violation of international law which might have been linked with the incident in question has been "cured." Therefore, according to the principles of international law no doubt can be cast on the jurisdiction of Israel to bring the accused to trial after 3.8.60. After that date no cause remains on the score of a violation of international law which could have been adduced by him in support of any contention against his trial in Israel.

We have said above that, in our view, so far as this case is concerned, it is immaterial how this controversy is to be determined, and we might add that even the slight doubt as to the import of English judicial precedent which was raised by O'Higgins has no practical relevance to this case. The accused was brought to trial after the "violation of international law," upon which the Learned Counsel bases his pleadings, had been made the subject of negotiations between the two countries concerned, and had been settled by their mutual consent. Therefore Counsel had not in effect any foundation in international law for his contention, even if the premise be true that the accused was abducted by the agents of the State of Israel. Insofar as Argentina's sovereignty has been impaired "the incident has been settled," and thereupon the episode of the kidnapping of the accused descended from the level of international law onto the level of municipal law (in the sense of the distinction between the two advanced by Morgenstern, Dickinson, and O'Higgins). Following upon the settlement of the incident between the two countries prior to the bringing of the accused to trial, the judgment may be based without hesitation on the whole range of British, Palestinian and American continuous judicial precedent beginning from *Ex parte Scott* on to *Frisbie v. Collins et seq.* If the violation of Argentina's sovereignty is excluded from consideration, then the abduction of the accused is no different from any unlawful abduction, whether it constituted a contravention of Ar-

gentine law or Israeli law or both. Thus after the enactment of the Federal Kidnaping Act the United States Supreme Court ruled unanimously in *Frisbie v. Collins* (1952) 342 U.S. 512 (96 L. Ed. 541), (p. 545):

"This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

"Despite our prior decisions, the Court of Appeals, relying on the Federal Kidnaping Act, held that respondent was entitled to the writ if he could prove the facts he alleged. The Court thought that to hold otherwise after the passage of the Kidnaping Act 'would in practical effect lend encouragement to the commission of criminal acts by those sworn to enforce the law.' In considering whether the law of our prior cases has been changed by the Federal Kidnaping Act, we assume, without intimating that it is so, that the Michigan officers would have violated it if the facts are as alleged.

"This Act prescribes in some detail the severe sanctions Congress wanted it to have. Persons who have violated it can be imprisoned for a term of years or for life; under some circumstances violators can be given the death sentence. We think the Act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction. We cannot."

On the solid ground of municipal law the accused can have no argument against the jurisdiction of the Court, while his contention based on the "violation of international law" is untenable because such ground did not exist, at all events at the time of his prosecution.

51. The fact that the accused had no immunity, following upon Argentina's assent to view the incident as settled, may also be deduced from *United States ex rel. Donnelly v. Mulligan*, (1935) 76 F. (2d) 511. The appellant was extradited from France to the United States, and before the thirty day period of immunity, prescribed in the extradition treaty between the two countries, had elapsed, the appellant was arrested anew for extradition to Canada. In their first decision (74 F. (2d) 220) the Court of Appeals decided to release the appellant pursuant to the ruling in *U. S. v. Rauscher*. Subsequently to that decision the President of the French Republic issued an order authorising the United States to surrender the appellant to Canada. When the case came to be reheard, the Court of Appeals decided that the new order of France had deprived the appellant of his immunity under the above-mentioned extradition treaty. Stating its reasons for the judgment the Court said *inter alia* (p. 512):

"The appellant cannot complain if France acted under the treaty, nor can he complain if it acted independent of the treaty as an act of international comity. The French decree consents to his re-extradition; moreover, it may be regarded as a consent given independently of the treaty and as an act of international comity. If under the treaty, it is conclusive upon the appellant. France had the right to give or withhold the asylum accorded him as it saw fit. And it has withheld asylum for the purpose of re-extradition to Canada. The appellant cannot question this action on the part of France."

p. 513:

"Extradition treaties are for the benefit of the contracting parties and are a means of providing for their social security and protection against criminal acts, and it is for this reason that rights of asylum and immunity belong to the state of refuge and not to the criminal."

If the immunity of that appellant which was assured by the extradition treaty whereby France surrendered him to the United States was taken away through France's assent and the withdrawal of her protection of him, there is all the less reason for the present accused who was never protected by the principle of *U. S. v. Rauscher* to claim personal immunity (for this is what his contention against jurisdiction really amounts to), by reason of the violation of the sovereignty of a country that has waived all her claims with reference to such violation and has not extended any protection to the accused. (See also statements made in *Ker v. Illinois* (above) on the difference between the right of a sovereign country to offer an offender asylum within its territory and the demand of the offender for the grant of such asylum.) In the words of the summing up in *U. S. v. Mulligan*, "the rights of asylum and immunity belong to the land of the asylum and not to the offender."

The above-mentioned precedent which is also cited by *Hyde* (*ibid.*) p. 1035 and Oppenheim (-Lauterpacht) (*ibid.*) p. 702 conforms to the principles of current international law. See *Moore*, Extradition (1891) Vol. 1, p. 251:

"... The immunity of the extradited person . . . rests upon a contract between the two governments . . . His immunity is within the control of the surrendering government, and he could not be permitted to set it up, if that government should waive it."

(279) "The character of a fugitive from justice cannot confer upon him any immunities."

See also Harvard Research in International Law, Draft Convention on Extradition, 29 AJIL (Suppl.) 1935, p. 213 (*italics ours*):

"Part V: Limitations upon the Requesting State

Article 23. Trial, Punishment and Surrender of Extradited Person.

(1) A state to which a person has been extradited shall not, *without the consent of the State which extradited such person:*

- (a) Prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited;
- (b) Surrender such person to another State for prosecution or punishment . . ."

Also section 24 of the Extradition Law 5714-1954:

"Where a person is extradited to Israel by a foreign country, such person shall not be held in custody or prosecuted for any other offence he committed prior to his extradition, nor be extradited to another country for an offence committed prior to his extradition *unless such foreign country gave its consent in writing to such action*, or if such person failed to leave Israel within sixty days after having been enabled, upon his extradition, so to do, or if he left Israel upon his extradition and returned thereto of his own free will."

Kelsen was right, therefore, when he said in his *General Theory of Law and State* (1949) p. 237, that:

"Extradition treaties establish duties and rights of the contracting States only."

and so was Schwarzenberger when he said in *3 Current Legal Problems* (1950) (p. 272):

"It would be . . . a travesty of the real situation to imagine that States intended an extradition treaty to be the *Magna Carta* of the criminal profession, or to be based on any principles of international law which prisoners are 'entitled to invoke in their own right.'"

The words "entitled to invoke in their own right" are aimed against the views of *Lauterpacht*, in *64 Law Quarterly Review* (1948) p. 100. There is no doubt that Schwarzenberger represents the dominant view and the rule of law in force on this issue. It is also acknowledged on the continent of Europe, including Germany: *vide Dahm (ibid.)*, pp. 279-280, and is in actual usage and application in the judicial decisions of most countries (*vide ibid.*, note 26).

52. On the subject of the want of immunity of a fugitive offender by his own right, as distinct from an immunity ensuing from a contractual commitment between sovereign countries, we find some interesting observations in *Chandler v. United States* (1949) 171 F. 2d 921, where it is said (p. 935):

"Nor was Chandler's arrest in Germany a violation of any 'right of asylum' conferred by international law. In the absence of treaty a State may, without violating any recognized international obligation, decline to surrender to a demanding State a fugitive offender against the laws of the latter. . . . Particularly as regards fugitive political offenders—including, presumably, persons charged with treason . . . —it has long been the general practice of States to give asylum. But the right is that of the State voluntarily to offer asylum, not that of the fugitive to insist upon it. An asylum State might, for reasons of policy, surrender a fugitive political offender—for example, a State might choose to turn over to a wartime ally a traitor who had given aid and comfort to their common enemy—in such a case we

think that the accused would have no immunity from prosecution in the courts of the demanding State, and we know of no authority indicating the contrary. . . . One can appreciate the considerations which ordinarily would make a State reluctant to give affirmative assistance to a sister State in the apprehension and prosecution of a fugitive charged with a political offence. But these considerations are inapplicable to the wronged State, which naturally would have no qualm or scruple against bringing a fugitive traitor to trial if it could lay hands on him without breaking faith with the asylum State."

It is hardly necessary to state, with reference to the above, that the accused is not at all a "political" criminal; the reverse is the case: The crimes which are attributed to the accused have been condemned by all nations as "abhorrent crimes" whose perpetrators do not deserve any asylum, "political" or other. We have already referred above to Article 7 of the International Convention for the Prevention and Punishment of Genocide which lays down the principle that the "extermination of a people and other acts set out . . . will not be deemed political crimes for the purpose of extradition." What is more, the United Nations Assembly enjoined in recurrent Resolutions (Resolutions of 12-13.2.46 and 31.10.47) of all states, whether or not States-Members of the United Nations, to arrest the war criminals and the perpetrators of crimes against humanity wherever they may hide and to surrender them, even without resort to extradition, with a view to their expeditious prosecution. (See History of War Crimes Commission, pp. 411-414). There is considerable foundation for the view that the grant by any country of asylum to a person accused of a major crime of this type and the prevention of his prosecution constitute an abuse of the sovereignty of the country contrary to its obligation under international law (see *Oppenheim-Lauterpacht*, (*ibid.*) Vol. 2 p. 588). See also the Resolution passed in Mexico City in March 1945 by the "Inter-American Conference on the Problem of War and Peace," also article by H. Silving, "In Re Eichmann: A Dilemma of Law and Morality," in 55 AJIL (1961) 307, p. 324.

In the Note addressed on 8.6.60 by Argentina to Israel, which was published by the Security Council in "Security Council Official Records, Suppl. for April, May and June 1960, p. 24" document S/4334, the Argentinian nation expressed—

"its most emphatic condemnation of the mass crimes committed by the agents of Hitlerism, crimes which cost the lives of millions of innocent beings belonging to the Jewish people and many other peoples of Europe,"

and proceeded to say:

"The fact that one of the aforesaid agents, precisely the one who is accused of having conceived and directed the cold-blooded execution of a vast plan of extermination, should have entered and settled in Argentine territory under a false name and false documents, in obviously irregular circumstances in no way covered by the conditions for territorial asylum or refuge, does not justify the gratuitous assertion that many Nazis live in Argentina."

The question as to whether or not other Nazis reside in Argentina has no relevance to this case, and if we cite from the above-mentioned Note, it is only to show that the position taken by the Government of Argentina is that Argentina has not given asylum or refuge to the accused who entered her territory and settled therein "under a false name and false documents," in "obviously irregular" circumstances which do not in any way tally with "conditions for territorial asylum or refuge." That position conforms to the principles of international law and the Resolution of the Inter-American Conference referred to above. The accused is not a "political" criminal and Argentina has given him no right of "refuge" in her territory, and all that has been said in our precedents on the subject of the want of the right of refuge of a "political criminal" applies to the accused *a fortiori*.

See also *Criminal Appeal 2/41 Youssef Sa'id Abou Durrah v. Attorney-General* (PLR Vol. 8, p. 43) in which the appellant was extradited by Transjordan to Palestine under the Extradition Agreement of 1934 between the two Governments, was charged with murder and sentenced to death by the Court of Criminal Assizes in Jerusalem. Counsel for appellant pleaded (a) that the extradition was effected contrary to the provisions of the Extradition Agreement; (b) that the offence was "political" (and therefore not "extraditable"). The Supreme Court decided (pp. 44-45):

"It is argued, in the first place, that the extradition proceedings were improper and that therefore the Assize Court had no jurisdiction to try the man. . . . If the Government concerned is satisfied that the provisions of Articles 4, 5 and 6 have been carried out, that, we think, must be the end of the matter, except that possibly the Courts of this country are not entitled to try the man for an offence different from that on which his extradition was obtained.

"Finally it is said that this is a political offence. Under the law of this country, murder is murder pure and simple, whatever the motives may be which inspired it. We know of nothing in the criminal law of this country or of England that creates a special offence called political murder. In any case, even supposing it were a political murder, nothing prevents the man, if he is within the jurisdiction of this country, from being tried for it."

To sum up, the contention of the accused against the jurisdiction of the Court by reason of his abduction from Argentina is in essence nothing but a plea for immunity by a fugitive offender on the strength of the refuge given him by a sovereign State. That contention does not avail the accused for two reasons: (a) According to the established rule of law there is no immunity for a fugitive offender save in the one and only case where he has been extradited by the country of asylum to the country applying for extradition by reason of a specific offence, which is not the offence tried in his case. The accused was not surrendered to Israel by Argentina and the State of Israel is not bound by any agreement with Argentina to try the accused for any other specific offence, or not to try him for the offence with which the Court is concerned in this case.

(b) The rights of asylum and immunity belong to the country of asylum and not to the offender, and the accused cannot compel a foreign sovereign country to give him protection against its will. The accused was a wanted war criminal when he escaped to Argentina by concealing his true identity. It was only after he was captured and brought to Israel that his identity has been revealed, and after negotiations between the two Governments, the Government of Argentina waived its demand for his return and declared that it viewed the incident as settled. The Government of Argentina thereby refused definitely to give the accused any sort of protection. The accused has been brought to trial before a Court of a State which accuses him of grave offences against its laws. The accused has no immunity against this trial, and must stand his trial in accordance with the Charge Sheet.

For all the above-mentioned reasons we have dismissed the second contention of Counsel and his prayer to hear witnesses on this point . . .

NOTES

Naturalization—petition for—testimony of government witness as to petitioner's attendance at Communist Party meeting in 1935—effect in false denial by petitioner

The trial court was directed to rehear the petition for naturalization, denied on the ground that the petitioner had shown bad moral character in denying, in order to facilitate his naturalization, testimony that many years ago he had attended a Communist Party meeting in Canada. The trial judge had overruled a motion for a new hearing based upon an affidavit disputing the testimony of the government witnesses that petitioner had attended the meeting, but the appellate court's action was taken on the basis of an assumption that the petitioner had made a false denial at his hearing. The court found the "... prior history of appellant's relationship with the INS [Immigration and Naturalization Service] illuminating." It included: (1) full disclosure by the applicant of his early involvement with the Communist Party of Canada prior to filing for naturalization in 1946, and an assurance by the Central Office of the Immigration and Naturalization Service that his prior membership would not disqualify him; (2) deportation proceedings in 1947 and disregard of a court ruling that he was entitled to a hearing; (3) requirement of weekly reporting for interrogation over a period of eight and one-half years; (4) six weeks' detention "... for no apparent reason ..." at Ellis Island without bail; (5) and, eventually, an administrative finding that as applicant had been a person of good moral character he might depart voluntarily, rather than be deported. "Without more, these misstatements, if misstatements they were, concerning these olden affairs do not evince a lack of good moral character required by the statute. . . ." *Klig v. U. S.*, 296 F.2d 343 (U. S. Ct. A., 2d Cir., Nov. 16, 1961).

Restitution under military occupation order—restoration of pension rights to former German national—taxable income in United States

Petitioner contended that the sum of DM. 45,000, received in 1955 from his former German employer who had been forced to discharge him without pension rights under the racist laws of Nazi Germany, was reparation for personal injuries under British Military Government Law No. 59, and hence not taxable income. Further, petitioner claimed that an interpretation of Internal Revenue Code § 911 that denied the benefit of the exemption for income from sources without the United States to a person who, at the same time the income arose, did not have any connection with the United States (and hence no responsibility for reporting his income to the United States) discriminated against naturalized citizens. The assessment of tax liability was upheld. *Stanford v. C. I. R.*, 297 F.2d 298 (U. S. Ct. A., 9th Cir., Oct. 28, 1961).

International trade—dutiable rate—effect of Presidential increase of rate after Tariff Commission had recommended an absolute quota

Under the Trade Agreements Extension Act of 1951, 19 U. S. C. § 1364, the Tariff Commission found that the peril point had been reached with respect to imported spring clothespins, and recommended that the President set a quota. Instead, the President suspended the old rate of duty and imposed a higher rate, which the importer protests. The protest was sustained; the President has the authority to accept or reject the Tariff Commission's recommendation, but not to attempt to limit imports by a different device than the one recommended by the Commission. *Falcon Sales Co. v. U. S.*, 199 F. Supp. 97 (U. S. Customs Ct., 1st Div., Oct. 18, 1961).

Human rights—U. N. Charter not self-executing—Treaty of Paris—power of New York State over Puerto Rican

Plaintiff is an American citizen of Puerto Rican birth, now residing in New York. He challenges the application to him of the State literacy test as a pre-requisite to voting on the grounds, *inter alia*, that the test violates his human right to vote, protected by the Charter and the Declaration on Human Rights and exceeds the powers of a State of the Union under Article 9 of the Treaty of Paris, 30 Stat. 1759, providing that the status of the natives of territories ceded by Spain should "... be determined by the Congress." The court explained that the Declaration is not a statement of law and that Article 55 of the Charter is not self-executing. The Treaty of Paris was not intended to give persons born in Puerto Rico an immunity against the otherwise valid laws of a State of the Union to which they might move from Puerto Rico. *Camacho v. Rogers*, 199 F.Supp. 155 (U. S. Dist. Ct., S. D. N. Y., Oct. 19, 1961).

International claims—repudiation by National Bank of Hungary of its obligation to pay Hungarian exporters' debts in dollars—effect of internal law of Hungary

The plaintiff sought to establish a claim, pursuant to the International Claims Settlement Act, 22 U.S.C. 1631, *et seq.*, against certain property sequestered in the United States by the Attorney General. The claims arose out of the failure of the National Bank to convert into dollars and transmit payments to it by claimant's Hungarian debtors, who were obligated by their contracts to pay in dollars. The Attorney General resisted the claim on the ground that the National Bank did not wrong plaintiff by willful breach, but acted under Hungarian laws restricting or prohibiting certain foreign exchange transactions. The court held for the claimant, finding that the Attorney General had failed to plead and prove the Hungarian law upon which he relied, and that the Hungarian National Bank had not relied upon such law, but rather upon "... a change in economic conditions. . . ." The court then added, in what would appear to be rather loosely coupled dictum:

In this connection it may be observed that the purpose of seizing enemy property is not confiscation. Even in an era of total war, confiscation of enemy property is not sanctioned either by international law or practice. The principal purpose of such seizures is to sequester the property in order to make it impossible for the enemy to use it against this country in time of war. A secondary objective is to secure payment of claims of the United States and its nationals arising against the foreign Government or against the original owners of seized property.

Consequently no reason is perceived for being astute to find justification for a denial of claims of American nationals against such funds. Plaintiffs' claims are valid not only as a matter of law, but as a matter of morals as well. There is no doubt that the group of American banks extended credits to Hungarian exporters; that the National Bank of Hungary undertook to receive repayments and in turn to transmit them to the New York Trust Company; that in large part it failed to do so; and the American banks sustained large losses as a result of this repudiation.

Chemical Bank New York Trust Co. v. Kennedy, 199 F. Supp. 256 (U. S. Dist. Ct., D. C., Nov. 27, 1961).

Rupture of diplomatic relations—effect on standing of foreign government to claim immunity for vessel—suspension of action

The holding, reported in 55 A. J. I. L. 749 (July, 1961) on the basis of a mimeographed copy of the opinion, that rupture of diplomatic relations suspends litigation on the issue of the immunity of a vessel owned by a foreign state, is now carried in print. *Dade Drydock Corp. v. M/T Mar Caribe*, 199 F. Supp. 871 (U. S. Dist. Ct., S. D. Texas, Jan. 27, 1961).

*Private international law—arbitration provision in Indian contract—
enforced*

A Federal court sitting in diversity of citizenship jurisdiction applied the State rule (Pennsylvania) where it sat as to the proper choice of law on the effect of an arbitration provision in a contract made in India to be performed there. The court found that Pennsylvania would have applied the law of India and that the Indian Arbitration Act of 1940 provides for the enforcement of arbitration provisions by a stay of judicial proceedings pending arbitration. The court ruled that the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.*, was without application, as the contract containing the agreement to arbitrate did not relate to a maritime transaction or involve interstate or foreign commerce. *Cook v. Kuljian Corp.*, 201 F. Supp. 531 (U. S. Dist. Ct., E. D. Penna., Jan. 29, 1962).

*Immunity of a foreign state—assets of nationalized Czechoslovakian
company—suggestion of immunity does not preclude adjudication
of title to assets in custody of court*

The defendant is a banking corporation organized in Prague in 1869. It was licensed to do business in New York in 1948, some months prior to its merger into a new state-owned banking corporation in Czechoslovakia by an order of the Czechoslovak Government putting into effect a 1945 decree providing for the nationalization of banks. Plaintiff is a substantial creditor of the bank as a result of transactions with it prior to 1939, when he was still a Czechoslovak national. In 1952 a temporary receiver was appointed in New York for defendant, and certain depositaries restrained from transferring property localized in New York to defendant's state-owned successor. The Czechoslovak Government claimed immunity for the latter, and there followed a series of communications from the Department of State on the issue of immunity. The Department also referred to a nationalization claims settlement under negotiation between the United States and Czechoslovakia.

Affirming the decision below dismissing the claim of immunity from the receivership proceeding, 55 A. J. I. L. 748 (July, 1961), the court said:

. . . It would not seem that the pendency of negotiations between the Department of State and the Czechoslovak Government with reference to claims of American citizens . . . is to be equated with a compact or treaty overriding the public policy of the State of New York . . . Moreover, the suggestion of immunity disclaims any interest on the part of the United States.

The adjudication of rights to property in the custody of the court and within its jurisdiction is a judicial function. . . . In this action defendant has been dealt with as a corporate jural entity, separate and distinct from the Republic of Czechoslovakia. . . . The suggestion of immunity from execution of the property to the Republic of Czechoslovakia does not avail the defendant and has no application to its property. . . . We find the suggestion of immunity does not preclude

judicial determination of title to the assets of the defendant in the custody of the court allegedly transferred in fraud of defendant's creditors to . . . the Republic of Czechoslovakia . . .

Stevens, J., dissented in part. *Stephen v. Zivnostenska Banka, Nat'l Corp.*, 222 N.Y.S. 2d 128 (N. Y. Sup. Ct., App. Div., 1st Dept., Dec. 12, 1961).

Immunity of a foreign state—commercial activities—attachment of debts for exports owing to Cuban state for failure to perform contract

In a suit against Cuba for damages for alleged breach of contract to supply frozen shrimp, plaintiff applied for attachment against debts owed to Cuba, arising of sales of various commodities (sugar, shrimp, tobacco, and cigars) by the Cuban Government to importers in the United States. The court ruled that the attachment warrant should issue because the "new doctrine" of the Department of State (i.e., the "Tate Letter," 26 *Dept. of State Bulletin* 984 (1952)) ". . . applies precisely to Cuba which has taken over many former commercial activities. . . . If Cuba is to be permitted to collect dollars on its commercial activities it must respond in our courts on its commercial contracts." The court went on to say, however, ". . . attachment is usually used to obtain jurisdiction and the defendant can then raise the question of sovereign immunity by appropriate subsequent proceedings." *Three Stars Trading Co. v. Republic of Cuba*, 222 N. Y. S. 2d 675 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., Pt. II, Nov. 24, 1961).

Nationalization—Cuba—corporation organized in Cuba—proper counsel to defend corporation in stockholder's action for appointment of receiver

The case at the stage reported involves a dispute as to whether counsel appointed by the president of a Cuban corporation or by the intervener installed by the Castro government should represent the corporation in a proceeding brought by a stockholder for the appointment of a permanent receiver for the assets localized in New York under § 977-b of the Civil Practice Act. 56 A. J. I. L. 217 (January, 1962) reported the appointment of a referee to take evidence and make findings as to the relevant Cuban laws, decrees, and related matters. The present decision confirms the referee's conclusion that the "Act of State doctrine" does not require extraterritorial recognition of the Cuban appointment as to assets localized in New York and as to ". . . contracts whose 'center of gravity' " is within New York. The court noted that the Cuban Government could intervene in the main proceeding pursuant to § 193-b, subdiv. 1, New York Civil Practice Act. *Mann v. Cia. Petrolera Trans-Cuba, S.A.*, 223 N.Y. S.2d 900 (N. Y. Sup. Ct., Spec. Term, N. Y. Co., Pt. I, Jan. 2, 1962).

United Nations Headquarters—jurisdiction of New York as to crime

Defendant, an American citizen, was a payroll clerk in the employ of the United Nations. Following his arrest outside the U.N. Headquarters, he was charged with grand larceny allegedly committed within the Headquarters. The defense contention that the State of New York was without jurisdiction with respect to a crime committed within the Headquarters area by an employee of the United Nations was rejected, because (1) the defendant did not come within any of the categories of persons having immunity from process under the Headquarters Agreement, 22 U.S.C. 287, 61 Stat. 756, and New York Penal Law, § 25; (2) the offense charged was within the legislative, criminal jurisdiction of the State of New York, unaffected by the Headquarters Agreement in view of Article III, §§ 7(b) and 8 thereof. The defendant's further contention that the consent given by the United Nations to his prosecution came too late (after indictment) was also rejected. *People v. Coumatos*, 224 N.Y.S. 2d 507 (Ct. of Gen. Sessions, N. Y. Co., Jan. 19, 1962).

BOOK REVIEWS AND NOTES

The International Rule of Law. A Report to the Committee on Research for Peace. Program of Research No. 3. By Arthur Larson. New York: The Institute for International Order, 1961. pp. 111. \$1.00.*

In this work, Mr. Larson has done something which does not appear previously to have been attempted in international legal literature. He has prepared a *catalogue raisonné* of subjects which call for research and restatement. He has, moreover, brought within the scope of his Program a number of questions which, though they lie on the margins of international law, are nevertheless important for a fuller understanding of the whole field. Mention may be made, in particular, of Part VII generally on "World Law and Communism," such Projects in Part VIII as "The Use of the Partnership Principle between Private Investors and Local Governments or Other Interests as a Device to Encourage and Protect Investment," and the whole of Part IX on "Mutual Understanding Necessary to World Law." Certainly there will be meat here for the economists, the political scientists and the sociologists, as well as the international lawyers. However, this is not a work which it is possible to review simply by means of a description of its contents. One can only give some indication of its scope and effect by accepting the invitation, which Mr. Larson tenders in his Introduction, to make criticisms and suggest additions. In doing so, this reviewer can only hope that the detailed observations which follow will not be regarded as excessively insular, traditional or academic.

Perhaps a start may be made by saying that there will probably be general agreement with Mr. Larson's view that there is urgent need for some public analysis of what requires to be done in international law. A great deal of money and effort is now being directed into the field, and it is important that as little as possible of it should be frittered away on unnecessary, repetitive or superficial work. On the positive side, too, it is essential that large gaps in available materials and treatment of substantive topics should be filled. Most readers will, as does the reviewer, also share the opinion, implicit in all that Mr. Larson has done, that the existence of an identifiable, substantively comprehensive and reasonably certain body of international law is an essential element in the maintenance of international peace and security. It may, therefore, perhaps not matter that some might have stated their objects, or justified them, in more qualified terms than does Mr. Larson; or that others might have been inclined to approach in a different way the formal setting-out of the projects or, indeed, have chosen or omitted other topics.

* Republished as *Design for Research in International Rule of Law* (Duke University, World Rule of Law Center, 1961).

The author begins his "Introduction" by saying that

The purpose of this *Design* is to provide in one place a summary of the research jobs and studies that should be undertaken if a major break-through toward rule of law among nations is to be achieved.

In that he is, perhaps, too optimistic. But a more serious comment is this: Mr. Larson thus tends to place upon the international lawyer a category of responsibility which is not his to bear. If every project in the *Design* were implemented tomorrow, together with others which can be suggested, it is doubtful if, by itself, that achievement would bring us materially closer towards a "major break-through towards the rule of law among nations." That is a political problem which can only be solved at a political level. No doubt, international lawyers can with their technical knowledge assist in the identification and, to some extent, in the solution of such difficulties. But the unhappy state of the world today is not due to the gaps in international law; and we should invite disappointment by giving ourselves or others the impression that there is a causal connection, direct or exclusive, between the flaws in an essentially technical subject and our present political discontents. No doubt, those who, like this reviewer, examine Mr. Larson's *Design*, are devoted to international law and will wish to think that they are encouraged in their work by a sense of purpose arising out of the realization of what international law, properly developed and applied, can do; but they must all nevertheless recognize the political limitations of the subject. This reviewer's excuse for taking issue with the very first sentence of Mr. Larson's work is that what is said there affects all that follows. It is, one can imagine, because Mr. Larson sees the remedying of the defects in international law as an element in the cure of international ills that he tends to assess the gaps in international law by reference in many cases to the present range of international political and economic problems.

Two results follow in relation to the nine parts into which the substance of the *Design* is divided.¹ First, these nine parts do not appear to follow one upon another in any identifiable logical sequence, with the result that the subject, namely, "international law," to which the *Design* relates, is denied the integrity of structure which it ought to, and does, possess. Secondly, this approach leads to a treatment of some heads (*e.g.*, the machinery of international justice and the problem of compliance with international decisions—33 projects in 26 pages) which is disproportionate, by reference to substantive content and importance, to the treatment given to other heads (*e.g.*, "The Body of World Law"—29 projects in 29 pages). The latter refers to the whole of the substantive law of peace, which covers 1556 out of the 1678 pages in the first two volumes of Hyde's classic three-volume work on *International Law Chiefly as Interpreted*

¹ The nine parts are entitled: Introduction; Over-all Projects on the Law Structure of Peace; The Body of World Law; The Machinery of International Justice; Compliance with International Decisions; Acceptance of World Legal System; World Law and Communism; The Role of Law in International Economic Development; and Mutual Understanding Necessary to World Law.

and *Applied by the United States*; while the former relates essentially to the final 120 pages out of the above-mentioned 1678.

If a positive suggestion may be made to remedy these two defects, it would be that a system of classification should be adopted which more closely parallels that generally in use among international lawyers, and that topics selected for consideration should be woven into such a framework. This seems a feasible approach and one which is likely to be more readily assimilated by a wide range of interested lawyers, professional as well as academic. Following this line of approach, we can now turn to a more constructive and detailed assessment of the substantive topics which have been selected. For this purpose it will be convenient to use the traditional subject-headings of international law as a check-list.

Sources.—"Sources" are dealt with under the head of "Marshalling Existing Materials." Quite rightly, Mr. Larson places emphasis on the need to make readily available the reports of important judicial decisions. For reasons which will be readily understood, this reviewer fully shares Mr. Larson's assessment of the rôle which is being, and could in the future be, played by the *International Law Reports*. The problem here is largely one of money. But judicial decisions, whether international or municipal, are only one element in the sources of international law. Another, of almost equally great importance, is state practice. Project 8 (Pilot project on evidence of international law) relates to this. But what it does not do is make the essential, specific and feasible suggestion that digests of state practice should be prepared in the various states of the world on both a historical and a current basis. There is here an enormous field of work for researchers in all countries—the collection and analytical presentation (preferably according to a uniform system) of the attitudes and actions of states adopted in relation to the various problems of substantive international law. And if it is necessary to justify the substantive merits of this type of program by relating them to current politics, one has only to consider how valuable it would be if there existed today in English a systematic survey (quite easily prepared on the basis of published diplomatic correspondence, treaties and statements in international organizations) of the attitude (not always fully consistent) of the Soviet Union and other Communist states on points of international law and procedure.

Recognition.—Questions of recognition are nowhere mentioned in the *Design*; yet some of them are of considerably more than academic importance. One of them is the relationship between recognition and representation in international organizations, a problem which has arisen not only in the context of the representation of China, but of that of the Congo as well. There may also be room for some consideration of whether the function of "recognition" in relations between states has been adequately understood and, if not, whether a clearer appreciation of the legal character of recognition might assist in the reduction of such tensions as exist, for example, in relations with the Communist Government of China or the German Democratic Republic.

State Succession.—Although some aspects of state succession would no doubt be covered by some of the projects on acquired rights, the latter is only one aspect of the wide range of problems which have been arising in this field recently. A technical problem of major importance at the present time is that of succession in relation to treaties. A more general problem, with the widest jurisprudential and political implications, is that of the extent to which new states are bound by customary international law. Perusal of recent debates in the Sixth Committee of the General Assembly, and even in the Security Council (*e.g.*, over Goa), shows how troublesome this question is. It might, of course, be fitted into the scheme of Part VI (Acceptance of World Legal System), but it does not appear there as a specific project.

Jurisdiction.—Problems of jurisdiction are amongst the most difficult with which international lawyers have to deal. Project 103 (Anti-Trust Laws and Foreign Investment) is the only one in the *Design* which approaches this range of difficulties. Otherwise, the work makes no reference to such other fundamental issues as the extent to which one state is obliged to recognize or give effect to the actions of another (the so-called "Act of State" doctrine). Nor is any mention made at all of the wide range of immunity problems: state, diplomatic and consular. One could do worse than encourage the preparation of an up-to-date book on diplomatic immunity in the form of a commentary upon, and expansion of, the 1961 Vienna Convention.

Territory and Associated Problems.—The "territorial" range of problems is fairly fully covered by the projects on Antarctica (31), Space (28) and Air (30), although the last two should really be broken down into a number of lesser items, each of which calls for detailed study. But no reference is made to more technical problems, such as boundaries, or to the major problems with political implications, such as the status and future treatment of dependent territories. In the light of the so-called "Colonialism" debates in the United Nations in 1960 and 1961, the significance of these questions has greatly increased, and there is urgent need to assess the impact of the relevant General Assembly resolutions on the fabric of international law.

High Seas, Territorial Waters and Other International Waters.—Project 29 deals with the law of the sea. On this, one may observe that the statement of the "end product" fails to focus attention on what really needs to be done in this field. The *Design* says: "the end products towards which present efforts are working are agreed conventions on the law of the sea and related topics." But with the exception of the régime of national waters and the problem of the width of territorial waters, conventions have in fact now been drawn up on this subject. True, there is plenty of scope for bilateral fishery agreements. But what is really called for by way of work of scholarship in this area is a fresh and comprehensive treatise containing full explanations of, and commentaries upon, the four conventions adopted at Geneva in 1958. Apart from the law of the sea, the recognition of the importance of the problem of international rivers is helpful, though the fact that it is dealt with in three

projects (15, 25 and 100) may strike some as placing disproportionate emphasis on the subject.

Individuals.—Project 32 on “The Law of Human Rights” is the only item which deals with the law relating to individuals. No mention is made of the need for work on extradition or asylum, or on the problems of nationality and statelessness (though admittedly these last two have been well covered in recent years). But even in the context of human rights, no specific attention is given to a central problem which has deep political connotations: the problem of self-determination. That is something to which thorough scrutiny should be directed. There appears to be little immediate need for another general run over the whole field.

State Responsibility.—Most of the important problems in the law of state responsibility are dealt with in projects 22 (general principles of law bearing on protection of acquired rights), 24 (duty to consult before affecting other’s rights), 25 (general principles of law bearing on rights of riparians in international law), 26 (responsibility for illegal harm), 27 (illegal propaganda), 33 (atomic energy) and 95 (legal protection of private international investment). Nevertheless, no reference is made to the problem of exhaustion of local remedies, which is of continuous importance, especially now in relation to the European Convention on Human Rights; nor to the question of nationality of claims, in connection with which many difficult questions now arise, especially in relation to the protection of corporations and of shareholders. Another matter which calls for investigation is the extent to which states may be responsible for so-called “discrimination.” Although a reference to “discrimination” is included in project 22 (in the context of expropriation), the reader’s attention is not drawn to the fact that this controversial and possibly not particularly meaningful element in the law is of wider relevance.

Treaties.—The suggestion made in project 21, for the investigation of general principles of law bearing on the obligation, interpretation and termination of treaties, is a very useful one. Two comments may be made on it. The first is that the general principles relevant in this connection will also be directly relevant to the area of law, sometimes called “transnational law,” which seeks, in part, to apply general principles to non-treaty contractual relations between states and aliens. The second comment is that, by laying emphasis on general principles, the project is left without any reference to the work of international tribunals in relation to treaties.

There is another aspect of the study of treaties which is of great and growing importance, namely, the examination and comparison of uniform or similar treaties and the elaboration of general standards and approaches. There is room for a topic-by-topic analysis of different classes of treaties—establishment, commerce, transit, double taxation, social security, consular, et cetera—for the purpose of providing future draftsmen with materials for the elaboration of new agreements.

Settlement of Disputes.—Depending on how one views the matter, the Program contains between 20 and 33 projects related to the settlement of disputes. To some, that may appear to be excessive and to create an im-

balance in the *Design* looked at as a whole. Some of the projects certainly seem to be of relatively little importance and they tend by their number occasionally to obscure the importance of others, such as projects 48 and 49, which open up the way to an investigation of the potentialities of the use of third-party decisions as a mode of changing the content of legal obligations.

But if reference may again be made to omissions, one finds that two types of technical problems of real practical importance are not dealt with. (1) Foreign ministries and practitioners are constantly having to ascertain whether a prospective defendant state is bound by any link of compulsory jurisdiction to a prospective plaintiff state. It is not easy to find the answer, for it is not sufficient to look in the *Yearbook* of the International Court of Justice. It would be really helpful if a comprehensive index of jurisdiction could be prepared on a country by country basis. (2) There are certain aspects of the Statute and Rules of the International Court of Justice which could bear fuller examination. An important one is the procedure of "intervention" contemplated in Articles 62 and 63 of the Statute of the International Court. If State A invokes a specific jurisdictional link to bring State B before the International Court in respect of a breach of customary international law, is State C, if injured by the same breach, entitled to intervene, even if no jurisdictional link otherwise exists between it and State B? Other technical problems arise in connection with the indication of "interim measures of protection."

Relations of Hostility.—There seems to be nothing in the program which deals with the law of, say, hostile relations (let us not use the ugly word "war"!). But is there not room for studies of the law relating to the hostilities, falling short of formal war, with which the world is plagued today?

International Organization.—Last, but by no means least, in the list of omissions is that of any reference to the law of international organizations. It is true that the suggestion is made in project 12 of a "compilation of decisions and regulations of international organizations." But the reader is left asking what is the technical purpose of making "available in convenient form the decisions and regulations of intergovernmental organizations other than the United Nations"? Is the aim to provide a commentary upon the constitutions of such organizations? (The texts of the constitutions themselves can be found in the two volumes of Peaslee's *International Governmental Organizations*, an invaluable work of which no mention is made.) Or is the aim to provide some indication of the impact which the work of these organizations can have upon the fabric of international law generally? The two ends are quite distinct. The specific exclusion of the United Nations on the ground of the existence of the *Repertory of Practice of United Nations Organs* suggests that it is the former object which is contemplated. But the latter is no less important, and whether it is pursued under the head of "International Organization" or even more appropriately perhaps under the head of "Sources," it should be done. Few people seem to know of Schiffer's admirable *Repertoire of*

Questions of General International Law before the League of Nations, 1920-1940. What is needed is a new Schiffer, covering all organizations and their work since 1945. There, if one wants one, is a massive project!

Projects 35, 36 and 37 deal with three special aspects of the work or powers of international organizations. Pursuit of them should not, however, be allowed to obscure the need for the preparation of a general work on the law of international organizations looked at as a whole. This is one of the extraordinary gaps in the contemporary literature of international law.

Mr. Larson will, one may be sure, forgive this reviewer for going on at such length about the Program. This is the consequence, not so much of what the *Design* is, but of what it sets out to be. This reviewer is not at all sure that he agrees with a number of the assumptions which are inherent in the Introduction, but which can very easily pass into, and be regarded as acceptable in, the infrastructure of international legal thinking. Perhaps the most dangerous of these assumptions is that an attempt is the same thing as an achievement. Closely coupled with it is the idea that research is something which can lightly be undertaken by "thousands of professors, graduate students, professional people, and other experts, in hundreds of colleges, universities, research centers and governments who have both the ability and the desire to make a contribution to the building of peace through law" (Introduction, p. 12). This is simply not true. One might wish the position were otherwise, but there is no evidence (if one scans the lists of new books and the issues of the principal legal periodicals) of the existence of these "thousands." Constructive research work which actually adds to the subject is something which can be done only after the achievement of a respectable basic level of technical knowledge covering the whole field of international law. Even then it can be done only in a restricted number of places where there is access to adequate source material. Anything else is not research, although that does not mean that it does not play a valuable part in the education of the person concerned. It scarcely adds to knowledge; it merely multiplies the places where one can find what there is. It may be that some may regard this as the ultimate and desirable aim. To some extent this reviewer does too, though only as subsidiary to the realization that the best way of advancing the cause of international law is to develop its technical content to the highest possible level. If what we are trying to do is to "popularize" international law, then let us say so. If we are trying to make technical international lawyers understand the nature and degree of the impact on their subject of political forces, then let us say so. But let us do nothing to encourage the identification of repetition with achievement.

These observations assume practical significance when related to a paragraph which appears on page 13 of Mr. Larson's Introduction:

It is hoped, then, that this *Design* can be put to practical everyday use in a number of ways. Whenever a department or a research center or an individual scholar interested in the broad field of peace and law asks himself "What should my next research job be?" it is hoped that this list will be checked for ideas. Similarly, when a grad-

uate student comes to his superior asking for suggestions on a research thesis subject for a Ph.D. or LL.M. or J.D. degree, this list may be a possible source of topics. Again, when foundations or individuals or businesses with funds to apply to projects in the field of international affairs face the difficult question of selecting projects that will make a significant contribution, this catalog may suggest an item that will fit both their purses and their purposes. There are projects here whose cost would run from a few thousand to many millions of dollars. The list is also intended for use by publishers, government departments, and individuals interested in either supporting or doing research in this field. Perhaps this broad and detailed view of needed research may also encourage the creation of additional research programs and centers, and the devotion of more existing legal research facilities to this crucial objective.

To the last sentence, this reviewer would wholeheartedly subscribe. From much of the rest, he begs to dissent. In particular, he wonders how members of the academic and professional world will react to the suggestion—implicit in the fourth and sixth sentences—that this list is to be a guide to the things on which it is worthwhile spending money in international law. They might not mind if the list had been more comprehensive and if the omissions had not been on the scale which has been indicated in detail above. But one ought not, perhaps, to disregard the possibility that they may be disturbed by the feeling that their future fate as the recipients of philanthropic bounty could be influenced by the credit-rating of their topic in the Program. If this is to be the consequence of this sort of assessment, then there is something to be said for sharing the responsibility for the selection and for associating with the preparation of the *Program* a representative group of well-known academic and professional names.

It is to be hoped that Mr. Larson will not feel that in making these comments this reviewer has trespassed beyond the correct bounds of the open invitation to criticize. If more space has been devoted to pointing out the defects in the volume than in identifying its merits, this is not because merit is absent. Indeed, the reverse is true. But the value of a volume such as this, as Mr. Larson himself appreciates, lies in its comprehensiveness. It seems more sensible therefore, if one is to be constructive, to draw the attention of Mr. Larson—and of those who will use the volume—to some points which might otherwise be overlooked.

This stated, it only remains to say that Mr. Larson deserves our thanks for reminding us so forcefully of the need to align the content of international law to the demands which the international community places upon it.

E. LAUTERPACHT

Völkerrecht. Vols. II and III. By Georg Dahm. Stuttgart: W. Kohlhammer, 1961. Vol. II: pp. xvi, 785; Vol. III: pp. viii, 393. Indices. Vols. I-III, DM. 185.

The two volumes under review, which bring Dahm's treatise on *International Law* to an end, fully confirm the favorable impression which this

writer voiced in his review of the first volume (in this JOURNAL, Vol. 53 (1959), pp. 976-978). The first volume dealt with the sovereign state and hence with the problems of the "classic" law of nations. The second volume presents, so to speak, the "modern" international law of international and supra-national organizations. The third volume is dedicated to international contractual relations and international delinquencies as concerning both states and international organizations. This very brief survey of contents shows a new attempt by the author to solve the systematic problem, that is, the problem of establishing a new systematic framework within which present-day international law can be scientifically presented in its totality. The *jus in bello* and the law of neutrality are not included, but a remark by the author in the preface to the third volume encourages us to hope that it will be included later.

The *jus ad bellum*, a fundamental problem of international law, is of course fully treated. The middle part of Volume II ("International Order of Peace," pp. 327-577) investigates the "right to go to war"; a historical exposé of the development under the League of Nations and a full analysis of the law actually in force under the U. N. Charter. Then follows the study of the different methods and procedures of the peaceful settlement of international conflicts and a very detailed analysis of international arbitration and judicial procedure. The first and third parts of Volume II belong together. The author first gives an excellent general theory of international organizations (pp. 1-125), followed by a complete investigation of the United Nations. The third part, under the title, "International Social and Economic Order" (pp. 579-785), is dedicated to the non-political international and supra-national organizations in the fields of trade, finance, agriculture, labor, communications, hygiene, aerial transportation, international cultural relations and international atomic law. The presentation of the general theory of international organizations is particularly important. Not only are their constitutions fully studied, but also the further developments, be it by formal amendments or under the influence of practice. The detailed investigations on the different regional European international and supra-national organizations are excellent. The third volume contains in its first part (pp. 1-176) a complete theory and practice of international treaties. The second part (pp. 177-321) is dedicated to a detailed study of the problem of the international responsibility of states and international organizations. The new attempt at an international criminal law applicable to states is duly treated with considerable skepticism. But extensive study is given to international criminal law as applied to individuals.

It is not possible with a work of these dimensions to go into details within the framework of a book review, although it would be tempting to do so. Nor is it possible to voice here the reviewer's critical remarks. Let us state, as an example, that this writer does not favor the author's double use of the word "supra-national," speaking of single organs not of organizations, namely, on the one hand, as being composed of individuals who do not represent their states, on the other hand, of organs, however composed, which have direct authority toward individuals. Neither the

League of Nations Mandate Commission, nor the European Danube Commission, to give examples for the two meanings of the author, were supra-national organs. It seems to us awkward to say, *e.g.*, that the Secretariat General is "the only supra-national" organ of the United Nations.

The whole work, as it is now before us, is a broad design, treating each and every problem exhaustively and in great detail. While the focus is on the legal analysis of the law actually in force, the theory and history of the different legal problems are by no means neglected. It makes use of a rich literature in the principal languages, a wealth of treaties, an abundant number of municipal and international court decisions. It is written in clear and easily readable language. To enhance the value of the book as a work of reference, there is, at the beginning of the second volume, a complete list of abbreviations used. At the end of the third volume (pp. 323-393) there is an index of 23 closely printed pages giving the list of court decisions quoted, followed by an index of all the articles used of the constitutions and statutes of international organizations and a general index.

While speaking primarily *de lege lata*, the author also gives, where appropriate, a critique from the point of view of politics or of justice. Such critique is always well balanced. Thus, his exposé of the law of diplomatic protection of citizens abroad is followed by critical remarks upon the unsatisfactory character of that law in certain respects. Although the very great importance of international organization is strongly underlined, their weaknesses, duplications and other shortcomings are not overlooked. Whereas the far-reaching prohibition of the use of force by states is correctly analyzed, the author shows critically the difficulties arising from this law, where collective security does not function, where there are no general collective sanctions and no international legislature to bring about peaceful change. The history, exposé and critique of international criminal law with respect to individuals is handled excellently.

The author is neither a "wishful thinker" nor a gloomy pessimist. He never forgets that he is writing on international law in a period of transition, where the task is to move away from situations of anarchy at a time when a real and true world order has not yet arrived.

JOSEF L. KUNZ

Annuaire Suisse de Droit International. Vol. XVI, 1959. Zurich: Editions Polygraphiques, 1961. pp. 359. Sw. Fr. 34.

The present volume of the *Swiss Yearbook of International Law* is concerned with public international law, except for one article on private international law (by Professor Johannes Offerhaus, on the Hague Conferences on Private International Law) and the usual survey of the Swiss practice in the same field (by Professor Pierre A. Lalive, for the years 1958 to 1960).

Professor Paul Guggenheim warmly and highly evaluates the personality and achievements of his famous compatriot, the late Max Huber, Swiss

statesman, professor of international law, Judge and President of the Permanent Court of International Justice, honorary member of the Institute of International Law and of the American Society of International Law, and President of the International Red Cross. Professor Max Hagemann, in an article on state sovereignty and international order, rightly concludes that the European Economic Community constitutes a "mécanisme interétatique," despite some federal state elements. He considers it doubtful that the Community will develop into a European federal state.

More than one third of the volume is devoted to a thorough study of the 1959 Judgment of the International Court of Justice in the *Interhandel* Case (Preliminary Objections) by Professor Georges Perrin (who, in the preceding volume of the *Yearbook*, had discussed the Order of 1957 on Interim Measures of Protection in the same case). In the first part of his study the author presents the theses held by the two parties in the case, the reasoning of the Court, and the individual and dissenting opinions. The second part deals in detail with the problems involved in the four (actually five) preliminary objections raised by the United States, *i.e.*, definition and arising of an international dispute, reciprocity of reservations to declarations of acceptance of the Court's jurisdiction, domestic jurisdiction under international law, the so-called automatic domestic jurisdiction reservation (Connally Amendment), and exhaustion of local remedies. He agrees with the Court on the rejection of the first, second and fourth, part (b), preliminary objections, but rightly criticizes the Court for having upheld the third preliminary objection concerning local remedies and for not having taken a position with regard to the problem of the "automatic" reservation raised by part (a) of the fourth preliminary objection.

The documentary part of the *Yearbook* again contains, *inter alia*, a very valuable report by Professor Paul Guggenheim on Swiss practice of international law in 1958, primarily the position taken by the executive branch of government, and a repertory by Dr. Emanuel Diez of the treaties concluded by Switzerland which entered into force in 1959. This "means for making the evidence of international law more readily available" deserves emulation, as far as other countries are concerned. The editor of the *Yearbook*, Professor Henri Thévenaz, again contributes comprehensive bibliographical notes (1959-1960). The periods covered by the various reports of the documentary part differ, as does the time lag between those periods and the year of publication; but this, probably, cannot be helped for technical reasons.

SALO ENGEL

Organisations Internationales et Souveraineté des Etats Membres. By Marc-Stanislas Korowicz. Paris: Editions A. Pedone, 1961. pp. 349. Index.

Every effort to codify the law of nations, every scheme for greater organized collaboration between states, from Henry IV's *Grand Dessein*

to the Common Market, involves crucial problems of national sovereignty. The Abbé de St. Pierre in 1713, no less than Jean Monnet after World War II, encountered stubborn resistance from states jealous of their freedom of action, in either the national or the international sphere. The subject occupies a prominent place, expressly or implicitly, in every treatise on the law of nations. Its importance is reflected in the large number of lectures at the Academy of International Law at the Hague devoted to this subject, one of the most recent of which being a brilliant essay by Van Kleffens.¹ Few authorities, however, have given more intensive study to this problem than Professor Korowicz in the book here under review. He has undertaken, and with obvious success, the ambitious project of examining all the great international organizations of modern times, in order to elucidate the rôle played by sovereignty in both their charters and in their actual operation through the years. This treatment is preceded by a brief historical sketch of the origins and evolution of the concept from antiquity down to the present time.

The main portion of the book is devoted to the League of Nations and the United Nations, including the two World Courts, the International Labor Organization and UNESCO. The author then studies the regional organizations (Arab League, Organization of American States, the European Coal and Steel Community, the European Economic Community, and Euratom). In a final chapter he analyzes the doctrine of sovereignty in summary, with an essay on the dominant doctrine of sovereignty today.

Since in each of these international organizations sovereignty constitutes the major obstacle to reform in the direction of greater effectiveness, the reader of this scholarly monograph is given at one and the same time an admirable understanding of the several theories of sovereignty, with their many complexities, and a view of the most critical problems facing all students of international organization. Thus both the specialist in international law and the student of world organization can find here, as an indispensable synthesis, a real contribution to the already enormous literature on the subject.

While the author has thrown considerable light on basic problems of world politics, some of his conclusions may be the subject of controversy. Not all students, for example, will agree with his view that the principle of the balance of power "has become a customary institution of international law." (p. 27.) With reference to the League of Nations, the sweeping assertion that "there is nothing in the Covenant which would frankly violate the principle of the sovereignty of the members" is hardly consistent with the statement that Article 8 (6) of the League of Nations Covenant was "a very hardy proposition and sensibly limited sovereignty in its traditional concept" (p. 96), nor with the view that by Article 12 "the exercise of sovereignty is considerably limited." (p. 98.) Also, few authorities on the peaceful settlement of international disputes would accept, as a solution for the vexing problem of the definition of the "re-

¹ E. N. Van Kleffens, "Sovereignty in International Law," 82 Hague Academy Recueil des Cours 5-131 (1954).

served domain," the suggestion that the members of the World Court be called on to accept in treaty form an enumeration of the questions which positive international law leaves to the exclusive competence of the states (p. 108). This, the author maintains, is "the most reasonable way toward a progressive solution of this thorny problem." (p. 212.)

Furthermore, few perhaps would agree with the author's strong denunciation of the projected Declaration of the Rights and Duties of States on the ground that "the project constitutes a dangerous retrogression," as it "would be contrary to the general principles of the law of nations universally recognized today in relations between states." (p. 328.) Finally, the author, in listing the well-known failures of the League of Nations to protect its Members from outside aggression (p. 133), fails to mention one of its most regrettable and most costly failures, the one described by the late Paul Mantoux in a brilliant monograph,² namely, its inaction when Vilna was illegally taken over by Poland.

Whether we agree with all the views of the author or not on these controversial matters, he has undoubtedly made a notable contribution, and his treatment of the following matters is particularly interesting: (1) the place of sovereignty in the rulings of both World Courts; (2) the Soviet attitude toward sovereignty and international law; and (3) that familiar and extremely difficult question—at just what point the state, by accepting more and more limitations on its sovereignty, ceases to have the status of a state.

JOHN B. WHITTON

La Notion du Caractère Ennemi des Biens Privés dans la Guerre sur Terre.

By Christian Dominicé. Geneva: Librairie E. Droz; Paris: Librairie Minard, 1961. pp. 255.

The extraction of principles of international law from various national assertions of power in time of war to sequester and ultimately to seize enemy property presents formidable difficulties for the scholar. Dr. Dominicé has worked out a synthesis, on a comparative basis, of the definitions of the enemy character of natural and juristic persons in the national legislation and case law of Great Britain, the United States, France, and Germany, as well as in the treaties of peace following the first and second World Wars. He properly draws attention to the difference between the power of a belligerent, as a defensive measure, to sequester the property of enemy nationals and of designated categories of neutral persons while the war is in progress and the more limited authority of that belligerent to effect a definitive seizure of property of enemy nationals and of a certain few neutral nationals at the conclusion of the war. The assets of juridical persons having the national character of neutral states but controlled by enemy nationals may lawfully be sequestered and seized,

² Paul Mantoux, "A Contribution to the History of the Lost Opportunities of the League of Nations," in *The World Crisis* (by the Professors of the Graduate Institute of International Studies) 3-35 (Geneva, 1938).

but the notion of "enemy taint" developed in the law of the United States is treated with reserve.

The rule that the property of enemy nationals may be sequestered and seized is viewed as an exception to the general principle that the property of aliens may not be taken without compensation. The fundamental character of the latter principle requires that the state asserting the right to sequester or seize property of neutral nationals carry the burden of establishing the legality of that conduct. In analyzing the creation of detailed rules of international law, Dr. Dominicié finds that national courts and legislatures act under *opinio juris* and, accordingly, that acceptance by other nations of their assertions of power leads to the creation of norms of customary international law. However, the author does not provide any real evidence of the reactions of foreign states, and the question whether major Powers engaged in a war of global dimensions may create law valid *erga omnes* is not met squarely.

The undoubted value of the volume as a work of analysis and of reference is unhappily marred by a number of typographical errors.

R. R. BAXTER

Pieniądz na terytorium okupowanym [*Money in Occupied Territory*]. By Krzysztof Skubiszewski. Poznań: Instytut Zachodni, 1960. pp. 407. Index. Zł. 75.

This is an adventure into uncharted seas. At the moment when the rules of war among civilized nations were being codified, their governments were not yet wholly familiar with all the techniques of interventionism and management of social and economic affairs which for modern regimes constitute the ABC of government. World War I was an eye-opener in this respect, and the interwar years, which have produced totalitarian forms of government both in their socialist and Fascist formations, have resulted in a new attitude of the public authority to the social and economic matters in their national aspects. Currency and monetary policies became one of the prime instruments of social change and economic adjustment, a tool to stimulate production, consumption, investment and saving, exclusive of human preferences and the conditions of the market.

As a result, as our author discovered, there is precious little to be found in the texts of the international agreements pertaining to the powers and duties of the occupying Powers, whether those concluded in the early years of our age, or those which were concluded after World War II in order to modernize the rules of warfare on specific points, which would define the monetary regime in occupied territory. Thus, the author's attention was perforce turned to international practice and the study of the policies of various states, whose armed forces, owing to the course of war, obtained control of enemy territory. Under the Hague Conventions, such states have rights and assumed duties to maintain an order of things in the territory which continues to be legally a part of the enemy state. How-

ever, new techniques of government have profoundly affected the situation. Occupation now means something more. It also provided an opportunity to the occupying government to deny the assets, raw materials, manpower, which constitute an economic war potential of the occupied territory, to the enemy. Likewise the occupying Power now has the opportunity to exploit these assets to support its own war effort.

In his quest for information Professor Skubiszewski has examined the modern practice of occupying states since the beginning of the present century, starting with the Russo-Japanese conflict. World War I was the first source of massive, fairly well-documented information. Most of his material, however, comes from World War II, which supplied illustrations of modern attitudes and practices of governments, which Professor Skubiszewski finds generally contrary to the rules (or rather postulates) of international law and order. Here, quite naturally, the policies of the Axis Powers, and in particular those of the German Government vis-à-vis occupied Europe, called for his special attention. Among those territories, Polish provinces, which were a victim of most drastic measures in this respect, figure highly in the author's accounts. The practice of the Allied Powers in Germany as regards management of currency is also a source of information which supplied Professor Skubiszewski with valuable data.

Significant is an almost total omission of materials concerning the monetary policies of the Soviet occupation authorities in Eastern occupied Europe. First in Eastern Poland, then in Hungary and Bulgaria, the practice of Soviet authorities would have provided the author with the most powerful argument in his plea for the strict determination of the occupying Power's rights as regards monetary policies in the occupied territory. The case of Hungary is particularly in point, although other occupied states and even allied nations which came under the military administration of the Red Army also have been subject to measures which were designed to drain their economic resources. In the Hungarian case the unrestricted printing of Hungarian money by the Soviet military administration ruined the country's currency and brought a financial crisis.

In spite of these omissions, the author's book is an important study, both in terms of a systematic presentation of the situation in an obscure area of international law and as a formulation of valid postulates calling for implementation in the form of international legislation. Its value for a non-Polish reader is enhanced by an extensive English summary, which includes a review of international practice and of the author's suggestions. A valuable feature of the book is an extensive bibliography concerning the subject.

Professor Skubiszewski wrote his book with great objectivity and feeling for the fundamentals of international law and order, and his work deserves a place in any international law library.

KAZIMIERZ GRZYBOWSKI

Das Arbeitsrecht als Gegenstand Internationaler Rechtsetzung. By Gerhard Schnorr. Vol. 10, Schriften des Instituts für Wirtschaftsrecht an der Universität Köln. Munich and Berlin: C. H. Beck, 1960. pp. xiv, 342. DM. 30.

This study is based on the assumption that labor law is increasingly "determined by and linked to" regulations of an international law character (*völkerrechtliche Regelungen*). As the author's very thorough investigation shows, the assumption is not unqualifiedly true, but the influence which international institutions, and especially the International Labor Organization, the European Economic Community, the European Coal and Steel Community and, until recently, OEEC, have exercised on the labor law in the member states *without* infringing upon their sovereignty—and how the substance of sovereignty has changed by the constitutional powers of sovereign nations (as, *e.g.*, in The Netherlands)—is, indeed, an interesting subject.

More than two thirds of the book is devoted to an analysis of the impact of the International Labor Organization and, in particular, the concept of "social progress" (*die soziale Idee*) on the contents of material norms, the institutional character of the I.L.O., and the functional relation between municipal law and I.L.O. conventions. The remainder of the work discusses the regulation of industrial and employer-employee relations within the framework of regional arrangements in Europe, especially the European Economic Community.

Some American readers will be surprised by the author's insistence that under Article VI, paragraph 2, in conjunction with Article II, section 2, paragraph 2, of the U. S. Constitution, the President could, pursuant to the doctrine of *Missouri v. Holland* (1920), 252 U. S. 416, if he only wished, use his treaty-making power to ratify I.L.O. conventions even on matters reserved to the States (pp. 187–189, 195). Disquieting is his conclusion that the Basic Law (Constitution) of the Federal Republic of Germany not only rejects the self-execution of treaties to which Germany is a party, but even fails to provide for their transformation into municipal West German law (pp. 194–195). In fact, he goes as far as to deny the need for either monistic or dualistic theories of *law*, since, he claims, every sovereign state is free to issue rules violating its international obligations, and it is then a *political* question as to whether the international community and its organs will exercise enough pressure (as he hopes) to make that country retract (pp. 176–177).

Regrettably, the author uses a great deal of space for theoretical disquisitions which will not offer much that is new to the expert but will confuse the general reader; a broader treatment of the inroads which the new regional institutions are making into the socio-economic structure of the Common Market countries would have been preferable. Of Schnorr's interesting propositions, three may be mentioned: Parties to collective bargaining and collective labor contracts—private citizens all—have become executory agents of supra-national regulations (p. 237); on the

other hand, labor law has been little institutionalized in the Rome Treaty and the ECSC treaty, which increases the co-ordinating function of I.L.O. conventions for the Common Market countries (pp. 276-277). The hotly debated question whether their municipal legislation overrules contrary regulations based on the Rome treaty or E.C.S.C. treaty, Schnorr answers unequivocally in the negative (pp. 285 ff., 297).

JOHN H. E. FRIED

European Organizations and Foreign Relations of States: A Comparative Analysis of Decision-Making. By F. A. M. Alting von Geusau. Leiden: A. W. Sijthoff, 1962. pp. 290. Index.

Despite its non-committal title, this short but incisive work is an important contribution to comparative, national and international law. The author sets out to trace the impact of the manner of representation and deliberation in NATO, O.E.E.C., Western European Union, the Council of Europe and the European Economic Community on the legal rules governing the conduct of foreign relations in the United States, Great Britain, France, West Germany, and The Netherlands. In doing so he combines historical and constitutional commentary with a careful study of the actual practices of these organizations in terms of their impact on the five member governments selected for study.

Appropriately, the study begins with a description of the constitutional provisions regarding the conduct of foreign relations, tracing the evolution of law and practice from the *ancien régime* until 1945. The author explains the tug-of-war between legislatures and executives, documents the short-lived victory of parliaments, and then goes on to expose the undermining of that victory through the influence of contemporary regional organizations.

The author is to be congratulated for presenting the legal and administrative rules which now govern the participation of member governments in these organizations, not only in terms of the written law, but also in the context of the actual modes of deliberation which characterize these organizations. Modes of action peculiar to each are scrutinized and related to the pattern of national participation and reaction. The legal character of the decisions, recommendations and conventions produced by each organization is examined and interpreted in terms of the law and practice of the five member states. Finally, this enables the author to establish a scale of organizational influence exercised by this increasingly complex *mélange* of national and regional legislation over such aspects of national competence as remain technically "sovereign." He demonstrates a number of legal incongruities arising from the fact that the national constitutional rules simply are not in accord with reality, and closes with a plea for their adaptation to the actual regional structure.

Alting proves, if proof were needed, that sophisticated legal and political analysis can and should be handled by the same mind.

ERNST B. HAAS

The Movement for International Copyright in Nineteenth Century America. By Aubert J. Clark. Washington, D. C.: The Catholic University of America Press, 1960. pp. ix, 215. Index. \$3.50.

In the present dissertation, Father Clark carries the story of the American movement for "international copyright"—that is, the recognition in this country of the rights of foreign authors—from the famous Address of British Authors, presented to Congress in 1837 by Senator Henry Clay, through the passage of the Chace Act of 1891. Father Clark's sometimes tedious account brings out the strenuous activities carried on over the years by such worthies as George Palmer Putnam and George Haven Putnam (father and son), Richard Rogers Bowker, and James Russell Lowell. It describes the furious spate of lobbying, disguised and undisguised, which finally put the Chace Act across, after the pirates themselves had begun to see some merit in applying rules to the game. The legislation was only a partial victory for the Commandment "Thou shalt not steal," for it was marred by a lamentable sellout to the American printing trade. Copyright was extended by the Act to the works of nationals of any foreign country which accorded copyright to Americans substantially as it did to its own citizens, but this was on the onerous condition, in the case of books and certain other works, that copies circulated in this country be manufactured here. Even today we have not entirely rid ourselves of the incubus of the "manufacturing clause."

Father Clark speculates on the possible connection between American copyright policy during the nineteenth century and the quality and quantity of literary production by Americans. Is it probable that a Mark Twain would have emerged earlier in our history if prime English works had not been available for republication by American publishers free of any copyright toll? Such questions are worth asking, even though they are quite unanswerable.

Despite the legal-sounding title of his dissertation, the author decided not to deal with legal matters "except where absolutely necessary." (p. ix.) Perhaps as a result of this principle of exclusion, the reader never gets a clear statement of the basis of Anglo-American copyright relations, such as they were, prior to the Chace Act. He is likely to wander in some confusion from praise for Britain on page 27 for its having "made provision [for] international protection of authors' rights," to the revelation on page 50 that there was uninhibited copying of American works by British publishers during most of the century: piracy was by no means confined to the American side. The fact is that British legislation early offered protection on a basis of reciprocity to the works of nationals of foreign countries; this offer the United States did not attempt to take up until 1891. The picture, however, was much complicated during a long interval of time by the dubious assumption that an American author could secure protection in Britain if he assimilated his position to that of a British author by publishing his work while physically present on British soil (*cf.* pp. 52, 167). This explains the hopeful hegiras of some established American authors to Canada (*cf.* p. 140) and other exotic places.

(Lesser lights might not have the carfare, as Brander Matthews once ruefully pointed out.) Besides eliding legal propositions, Father Clark occasionally misstates them. The statement that "from 1607 until the American Revolution, copyright in colonial America was regulated according to English laws" (p. 1) is wrong, even if we give our author the benefit of the fact that English copyright law up to the Statute of Anne was a dark vale of mystery. The characterization of Justice Holmes' "concept of author's rights," expressed in his opinion in *White-Smith Music Pub. Co. v. Apollo Co.*,¹ as "weird" (p. 26), is not supported by any reasoned explanation.

BENJAMIN KAPLAN

The St. Lawrence Waterway. A Study in Politics and Diplomacy. By William R. Willoughby. Madison: University of Wisconsin Press, 1961. pp. xvi, 381. Index. \$6.00.

The opening of the St. Lawrence Seaway in 1959 will long remain an example of Canadian-American co-operation and an object of North American pride. Consequently it is not surprising that it has been the subject of several popular books; Professor Willoughby's scholarly study is a superior volume and should become a standard work on the subject. Aptly subtitled "a study in politics and diplomacy," it offers an instructive study of those international and domestic problems and events which for so long impeded construction of the seaway, and those which eventually made its construction inevitable. Although the student of international law is perhaps more attracted by the international aspects of the seaway, he will find that the author's analysis of the national and international events is thorough and enlightening. An extensive bibliography, several photographs, and a map of the seaway contribute to the volume's usefulness.

Using a chronological approach, the author devotes approximately one third of the volume to pre-1920 developments. Although this historical background of navigation progress on the Great Lakes and St. Lawrence is instructive, serving to place subsequent developments in proper perspective, this reviewer appreciated the more contemporary developments, beginning with the negotiation of the ill-fated 1932 Waterway Treaty. With material obtained from the files of the Department of State, private papers, and numerous Canadian and American official documents, the author maintains a balanced appraisal of his subject, devoting necessary attention to events on both side of the boundary. The conflicts between Prime Minister Mackenzie King and Premier Mitchell Hepburn of Ontario, as well as those between regional and economic groups and public and private power interests in the United States, are appraised. Although the author's primary concern is with the development of the seaway's navigation facilities, he recognizes that it is impossible to discuss this phase of the project without discussing the concomitant power projects.

¹ 209 U.S. 1, 18 (1908).

Admitting the complexity of the engineering tasks, the reviewer is still surprised by the variety and complexity of the domestic interests affected (either favorably or unfavorably) by the waterway.

Surveying four decades of discussion and planning that preceded the completion of the seaway, the author concludes that the primary factor leading to the many delays and setbacks, particularly in the 1930's and 1940's, was the "... bitter tug of war between powerful sectional and economic groups in the United States" (p. 284). It is to be hoped that this will not be the case in Canada with the Columbia River project.

The profession is indebted to Professor Willoughby for his solid and penetrating study of a significant example of North American co-operation and development.

DON C. PIPER

Foreign Relations of the United States. Diplomatic Papers. The Conference of Berlin (Potsdam), 1945. 2 vols. Washington: Government Printing Office, 1960. Vol. I: pp. cxxviii, 1088. Index. \$6.00; Vol. II: pp. clxxvi, 1645. \$6.50.

This oversized collection of papers relating to the haphazard proceedings of the Heads-of-Government meetings which determined the pattern of policy for the postwar period is well edited. But even with all the relevant data set forth in widely scattered texts, the net result was indecisive. A signed *Communiqué* entitled *Report on the Tripartite Conference of Berlin, August 2, 1945*, in 14 sections was published at the time in London, Moscow and Washington; an agreed *Protocol of Proceedings* covered by a signed sheet of even date in 21 sections, with two appendices, was then published as a press release in Washington, as Cmd. 7087 (Misc. No. 6) in 1947 at London, and with the *Communiqué* in the Soviet treaty collection in 1955. It is not difficult to conclude from this diverse treatment of the Berlin decisions that they constituted only concerts of policy involving some commitments on subjects such as the Peace Treaties with Bulgaria, Hungary, Italy and Rumania, later brought into being. The results from the United States point of view on the 44 items discussed were summarized in a memorandum by the Executive Secretary (Vol. II, p. 602), which cites the *Communiqué* more often than the *Protocol*.

Whether the results of the Berlin Conference are "decisions" and "agreements" as the *communiqué* says, or "conclusions" as the *Protocol* avers, their common texts can certainly be accepted as the tripartite point of departure as of August, 1945, for the subsequent evolution of policy in the settlement of questions of the Second World War. The value of this compilation, therefore, is that it collects the entire record from United States files on the subjects the Heads-of-Government chose to discuss, and presents the material in orderly form in relation to the deliberations of the chiefs.

The Heads-of-Government met in 13 plenary meetings between July 17 and August 2, 1945, supplemented by 13 meetings of the Foreign Ministers aided by subcommittees, 7 meetings of the Joint Chiefs of Staff, 9 of the

Combined Chiefs of Staff and 1 of the Tripartite Military Group. All recorded minutes are by United States staff members, except those of the Combined Chiefs of Staff (British-American). There was no formal agenda, though the United States had a "position paper" (Vol. I, No. 214) that more or less served that purpose. It can be seen that a heads-of-government conference is a casual affair which leaves such traces as can be salvaged by the professional delegations.

For this conference the Department of State (principal editor, Richardson Dougall) has done a herculean job of resurrecting a turning point in international relations. Every subject touched upon in the conference meetings is given documentary attention, by printing the drafts, revisions and final forms of telegrams, despatches, memoranda and position papers in preparation for the conference, and the same extensive presentation of the papers produced during the conference along with current developments in the various areas, all supplemented by data from memoirs and other published works. The editorial net brought in 1433 documents in addition to some 600 pages of minutes of meetings and records of conversations, dinner discussions and such contacts. The background and preparatory documents fill 800 pages in the first volume, and the conference documents and supplementary papers a similar space in the second volume; both groups are arranged by subject, which facilitates following an item from its initial form through the conference discussion to the form in which it was left by the conference.

The Berlin Conference in the *Communiqué* and *Protocol* defined the status of world problems as they stood at the time. Policy with respect to German political, economic and reparation matters was made explicit for the four occupying Powers; the status of Poland was noted; the Council of Foreign Ministers was established to carry on with respect to peace settlements of numerous kinds; various questions such as those of Tangier and the Turkish Straits were mentioned for subsequent attention. Alongside the conference the United Kingdom, United States and China called for the surrender of Japan, and the Soviet Union confirmed its intention to accede to the Anglo-American request to enter that phase of the war (*cf.* Report, Combined Chiefs of Staff, No. 1381). The first explosion of an atomic bomb on July 16, 1945, was documented for the conference. The whole is a chapter in a continued story of "high politics."

DENYS P. MYERS

Principles, Politics, and Fundamental Law. Selected Essays. By Herbert Wechsler. Cambridge: Harvard University Press, 1961. pp. xvi, 171. Index. \$4.25.

Professor Wechsler, who was one of the advisers of the American judge during the Nuremberg trial, brings together in this volume three essays on American Constitutional Law—"Toward Neutral Principles of Constitutional Law" (1959), "The Political Safeguards to Federalism" (1954), and "Mr. Justice Stone and the Constitution" (1946)—and an essay on

"The Issues of the Nuremberg Trial" read to the American Historical Society in December, 1946.

All of these essays are full of suggestions for the international lawyer. Wechsler is interested in the difference in criteria and methods of the judicial process and the political process. The participants in the latter are partisans working for a decision that will satisfy their interests in the immediate situation, while a court seeks a decision which will maximize satisfaction of all interests not only in the immediate situation but in all similar situations which may arise within the jural order. Both judges and their critics should treat the facts *sub species aeternitas et universitas*, seeking, according to the Kantian categorical imperative, to make a decision which can be applied as a universal rule.

The author does not deny the importance of utilizing the formal sources of positive law, but he emphasizes that they should be interpreted, especially when they are such fundamental documents as the Constitution, in the light of reason as he interprets this word. This discussion, although directed toward American Constitutional interpretation, may help international jurists and statesmen to appreciate the nature of the task set for them by the Preamble of the United Nations Charter—"to establish conditions under which justice and respect for the obligations arising under treaties and other sources of international law can be maintained." Is it possible to decide such problems as Berlin, Cuba, Laos and Kuwait according to the criteria of "neutrality and generality" which Professor Wechsler thinks ought to guide, and usually have guided, the Supreme Court of the United States in dealing with major problems of American history?

The author supports the recognition by the Supreme Court itself of certain questions as "political," but, in his opinion, they are so only because the Constitution explicitly or implicitly has left them to a political organ of the Government (pp. 11 ff). The principle that Constitutional questions are legal ones to be decided by the Court is in contrast to the principle of international law that all questions are to be decided by diplomacy or political organs of the United Nations unless the parties have conferred jurisdiction on the International Court of Justice, or a political organ of the United Nations has requested an advisory opinion. As a result, it is more difficult to establish the rule of law in international relations.

In dealing with the Nuremberg trial, Professor Wechsler applies his criteria for the judicial process and finds that, while a trial by victors of their late enemies is subject to criticism, such a trial was much better than "a program of summary execution," the alternative proposed by most critics (p. 154). In fact, under the limitations of its Charter, the Nuremberg Tribunal, in his opinion, administered justice. Its judgment "was mainly a judgment of limitation, its principal operation more significantly that of protecting innocence than that of declaring and punishing guilt. When I speak of 'innocence', I mean not only a technical freedom from responsibility under the rules laid down; I mean, more deeply, the

exculpation of those who could not justly be declared to be guilty under rules of liability that we would be prepared to apply to ourselves." (p. 155.) He, however, emphasizes that

Nuremberg, far more than San Francisco, was the assumption of an irrevocable obligation—to build a world of just law that shall apply to all, with institutions strong enough to carry it into effect. . . . If we succeed in that great venture—and no nation can succeed alone—Nuremberg will stand as a corner stone in the house of peace. If we fail, we shall hear from the German ruins an attack on the Nuremberg judgments as the second single "diktat" of Versailles and notwithstanding the goodness of our intentions, we may have no sufficient answer. (p. 157.)

Ending with this sapient prediction which, it is to be feared, has had a measure of confirmation in the fifteen years since he wrote it, Professor Wechsler provides much for the observer of the contemporary international scene to think about. There are many analogies between American Constitutional experience and international relations, and an examination of the fundamentals of law will help to understand both.

QUINCY WRIGHT

Traité Pratique de Droit Civil Français. By Marcel Planiol and Georges Ripert. Tome IX: *Les Régimes Matrimoniaux*. Part 2. 2nd ed. by Jean Boulanger. Paris: Librairie Générale de Droit et de Jurisprudence, 1960. pp. viii, 731. Index.

The treatise of Planiol and Ripert on *French Civil Law* has long been recognized as the leading and most comprehensive work in its field. Planiol's contributions to French legal science and thinking have been praised within and outside France, among students and judges alike, ever since the publication of his *Traité Élémentaire* in 1899. Its masterful treatment has ensured re-editions by competent collaborators, of whom the best known is Georges Ripert, whose additions to the original text have identified his name with the treatise for over twenty years.

Until Planiol's work appeared, the civil law had been little more than a study of the Code as an extraction of principles by a classical interpretation of the will of the legislator, combined with a conception of the judicial rôle as merely one of giving application to the law. All that changed with what, to contemporary students, was Planiol's dazzling new departure, an approach which abruptly discarded accepted theories, creating a new awareness that the civil law, in the words of Ripert, was

all of life, the conflict of private interests, the slow formation of civil institutions, the perfecting of rules of conduct through practice, yesterday's struggles resolved by the triumph of a rule, today's struggles pursued before the courts, the ceaseless intervention of the legislator, the inter-action of judicial practice.¹

¹ Marcel Planiol, *Traité Élémentaire de Droit Civil*, 4th ed. by Georges Ripert, Tome 1, p. ix (Paris, Librairie Générale de Droit et de Jurisprudence, 1948). Translation supplied.

To those conditioned by the penetrating commentaries of Holmes and Cardozo on the common law, the theme is no strange one.

At the outset, one must caution that the *Traité Pratique* is not to be confused with Planiol's *Traité Élémentaire de Droit Civil*, a less specialized and exhaustive, though more pedagogic, tool in three volumes (in whose later editions Ripert also collaborated), of which the 1938 and 1939 editions were translated for the benefit of Anglo-American lawyers by the Louisiana State Law Institute.² The fourteen volumes of the *Traité Pratique* were produced by Ripert and others (in realization of a grandiose project conceived by the master) between 1925 and 1934. The volume here reviewed contains the second half (itself divided into three parts) of the *Traité's* compilation of the ensemble of rules governing the material and pecuniary interests of the marital partners (their community of interests), during the life of the marriage. Those rules, whether superimposed by operation of law, or pursuant to a special contractual relationship of the parties, constitute the complicated matrimonial "regimes."

Title V, the first major heading of the volume, deals with the dissolution of the marriage community. Chapters I and II discuss the causes of dissolution (death, divorce, annulment, judicial separation and desertion) and its consequences (including the option available to the wife or her heirs to accept or repudiate the community). Under Title VI (settlement of the dissolved community) the author has grouped chapters relating to the settlement of accounts necessitated in detaching the separate property of each spouse from the community mass, liquidation and division of the community, effects of a renunciation and the legal nature of such advantages as accrue to one or the other of the spouses in the community. Under the rubric "*Régimes Séparatistes*," Part Three of the volume examines the different conditions under which the rules of the Code pertaining to the separation of goods apply, together with the general character and effects of the regime of separation and its administration. This is followed by an exhaustive survey of the principles governing the *régime dotal*, still another form of separation of goods, in which the dowry brought to a husband by the wife to assist in meeting household expenses, is protected by special rules against seizure and alienation. The historical background which introduces this fascinating topic shows the author at his best. In the fourth and final division of the volume, brief (40 pages) but adequate treatment is given to a regime which enjoys a special position in French law, the so-called "*biens réservés*," i.e., property acquired by the wife from engaging in separate professional endeavor.

So extensive is the grasp of this volume that one can hardly do justice to its coverage within the limitations of a review. Its presentation adheres closely to that of Marcel Nast's first edition. It is no mere theoretical dissertation, but a practical treatise and guide to French jurisprudence, prepared with thoroughness and care. Each *régime* is introduced with an historical *précis* which sets a proper framework for the law's development. However, no attempt is made to deal with the

² Planiol, *Civil Law Treatise* (6 vols., West Publishing Company, 1959).

comparative law aspects of the problem, which appear to fall outside the author's objective.

In the opinion of this reviewer, Boulanger's edition is superior to anything yet appearing in French legal literature on this branch of the law, and should remain the standard work for years to come. The author can take a just pride in what is truly a lawyer's contribution to a lawyer's subject.

ALWYN V. FREEMAN

BRIEFER NOTICES

The British Year Book of International Law, 1960. Vol. 36. (London, New York, Toronto: Oxford University Press, 1961. pp. viii, 483. Index 84 s.) With this 36th volume of the *British Year Book of International Law*, Professor R. Y. Jennings, Whewell Professor of International Law at Cambridge, joins Sir Humphrey Waldock, Chichele Professor of Public International Law at Oxford, as Co-Editor. Appropriately, the first article is a perceptive appraisal of "Hersch Lauterpacht—The Scholar as Prophet," by C. Wilfred Jenks. Shabtai Rosenne contributes, in "The International Law Commission, 1949-59," an acute and comprehensive study of the organization and operation of the Commission to which he has since been elected as a member. J. Higham, of the United Nations Library in Geneva, has prepared a useful guide to the documents of the International Law Commission from 1949 to 1959. A. H. Robertson discusses the *Lawless Case*, decided by the European Court of Human Rights.

Other articles include "The Jurisdiction of the Court of Justice of the European Communities to Annul Executive Action," by D. G. Valentine; "Nuclear Liability: The General Principles of Law and Further Proposals," by M. J. L. Hardy; "The Question of the Composition of the Trusteeship Council," by T. Meron; "Unlawful Seizure and Irregular Extradition," by P. O'Higgins; and "The Place of Law in an International Organization," by J. E. S. Fawcett.

Notes, decisions of British courts involving questions of public or private international law and book reviews complete another volume of this outstanding *Year Book*.

H.W.B.

The International Status of the Suez Canal. By Joseph A. Obieta, S.J. Foreword by Richard R. Baxter. (The Hague: Martinus Nijhoff, 1960. pp. xii, 137. Index. Gld. 13.85; \$3.70.) This study by Father Obieta, Professor of International Law at the University of Deusto (Bilbao), is a welcome contribution to a subject which has been discussed with more heat than light in much recent writing. The approach is objective, the analysis in general well reasoned, the conclusions original and stimulating, even to those who may at some points disagree.

In the author's view, the Suez Canal is subject to a "regime of internationality" based on Article 14 of the 1856 Canal Concession, which operated to proclaim to the world a right of unrestricted passage for merchant ships of all nations in time of peace. Through tacit world acceptance, this became and remains a binding international commitment. The Constantinople Convention of 1888, often regarded as the cornerstone of the Canal's international position, extended the right to all ships in both peace and war; but the author holds this to be binding only on the

parties, and even as to them he finds that practice has been permitted to modify its terms, particularly with regard to the use and defense of the Canal in time of war.

As to the Suez Canal Company, its nationalization in 1956 is viewed as having been within the power of Egypt, provided that international standards of compensation were met, since the company was Egyptian and was not in itself an essential element in the regime of internationality. Nevertheless, since the taking might have had an adverse effect on this regime, in the form of higher tolls or other impediments, it should have been preceded by an understanding with the international community. The failure to do this made the whole taking illegal. The subsequent Egyptian Declaration of April 24, 1957, affirming Egypt's respect for the 1888 Convention, is also described as "illegal" in that it, too, sought to do unilaterally what should have been done bilaterally. This seems difficult to accept: unilateral reaffirmation of an intent to observe a treaty may be redundant or perhaps even pompous, but it surely is not wrong. Despite this claimed illegality, the author admits that from the international standpoint Egypt is bound by the Declaration, by the terms of which "the international regime of navigation in the Canal is sufficiently assured" (p. 109).

RICHARD YOUNG

Der Internationale Fernmeldeverein. (Dokumente, Vol. 34.) By Gunter B. Krause. (Berlin and Frankfurt: Alfred Metzner Verlag, 1960. pp. 184. DM. 32.) This volume contains a collection of German translations of the more important international conventions dealing with the International Telecommunication Union (ITU) and its predecessors, from the Treaty of St. Petersburg (1875) to the Telecommunication Conference of Buenos Aires in 1952, German laws concerning the ITU and its work, and a fifty-page introductory essay. There is also an excellent bibliography.

As far as the official ITU documents are concerned, they are important primarily for the German scholar, and for others whose mother tongue is German, inasmuch as German is not an official language of the ITU. The general student of international law and organization will find more use for the assembled German law and for the excellent, but all too brief, introductory essay. In this latter, the author sketches the development of international telecommunication law, the legal position of the ITU in international and Swiss law, the organization of the ITU, and the legal relations of Germany to the ITU. He also provides an excellent analysis of some of the major problems that the ITU is currently facing, especially those created by the universal character of radio waves. Incidentally, some of the questions he raises were treated, but not necessarily solved, by the ITU's 1959 Geneva Conference, which occurred after the research was completed. The reviewer's only criticism, other than that of the brevity of the excellent expository material, is the lack of a more detailed treatment of German relations to the ITU in the period immediately following World War II, when Germany was excluded from participation in the work of the ITU.

The reviewer regrets that there does not exist in the United States a series comparable to *Dokumente*, the one in which this volume appears, treating various important international organizations.

GEORGE A. CODDING, JR.

Eighth Conference of the International Bar Association, Salzburg, Austria, July 4-8, 1960. (The Hague: Martinus Nijhoff, 1961. pp. xviii, 626. Gld. 28.50.) This volume contains the papers discussed during the most recent session of the International Bar Association, a federation of national

bar associations from thirty-eight countries. Eight topics were considered, and a resolution on the inapplicability of immunity in instances in which a state is involved in *acta jure gestionis*, was adopted. Sixteen essays are devoted to the "Function of a Bar Association in Providing Services to the Profession and the Public."

Panel discussions and papers were also presented on what may be termed "Doing Business Abroad." These centered on three major aspects: policies involved in the flow of foreign investment, convertibility of currency and the incidence of taxation and trade barriers. Those interested in international legal problems of a commercial nature will find these reports informative, especially if employed in conjunction with Professor Friedmann's study on *Legal Aspects of Foreign Investment* and the *World Tax Series* of the *Harvard Law School*. And the collecting of numerous laws and administrative measures on monopolies and restrictive trade practices, a procedure commenced by the International Bar Association at the Seventh Conference, is again continued. Thus fresh and supplementary data are presented by means of summary reports. The document on the "Procedure for the Protection of Investments Abroad"—another of the subjects analyzed—favors the establishment of a permanent international court of arbitration accessible to individuals and competent to deal not only with clear cases of expropriation but all other types of interference with foreign private property, and capable of determining the reasonable amount of compensation.

The final two essays deal with "Legal Problems of Atomic Energy" and "International Judicial Co-operation." The latter item has been considered since the 1952 Madrid session and is one with which the Commission on International Rules of Judicial Procedure created in 1958 by Act of the United States Congress is specifically concerned.

The majority of the reports are written in English, although some are presented in French, German and Spanish. On an over-all basis, the volume may be regarded as a useful source of information.

GUENTER WEISSBERG

Internationale Gesellschaft für Urheberrecht E.V. Schriftenreihe, Vols. 14-17, 19. (Berlin und Frankfurt a.M.: Verlag Franz Vahlen GMBH, 1959, 1960. Vol. 14: *Plagiat*. By Schulze, Petzl, Schwenn, Neumeister, Becker, Schneider, Riedel. pp. 86. DM. 6.50; Vol. 15: *Europarat und Urheberrecht*. By Erich Schulze. pp. 54. D.M. 5; Vol. 16: *Stellungnahme zu den Entwürfen des Bundesjustizministeriums zur Urheberrechtsreform*. pp. 350. DM. 31; Vol. 17: *Eingriffe des Staates in die Verwaltung und Verwertung von Urheberrechtlichen Befugnissen*. By Alois Troller. pp. 129. DM. 12; Vol. 19: *The Performer and the Technique (Protection of the Performer's Contribution of Service)*. By Erich Schulze. pp. 77.) In Volume 14 of this series of monographs, published by the International Society for Copyright, seven authors discuss the subject of plagiarism from various angles. The contributors are lawyers and literary writers, thus making this a unique volume on a subject which has long defied legal definition and on which there exists hardly any monographic treatment. Schneider's article on plagiarism in international law (pp. 51-72) deserves special mention in this JOURNAL.

In Volume 15 Dr. Schulze deals briefly with legal problems arising in connection with the Convention on Exchange of Television Programs, adopted by the Council of Europe in 1958, and with the jurisdiction of

the Council in copyright matters generally. He concludes that the convention has so many defects that he advises the German Government not to sign it. He has also serious objections to the draft of a Convention for the Protection of Television Programs which was prepared by the same committee of experts as the first-mentioned convention. The two texts are reproduced in German translation, together with the text of the Charter of the Council of Europe.

Volume 16 is devoted to a discussion of the 1959 draft prepared by the German Ministry of Justice for a new German Copyright Law. In addition to a series of proposals of a basic nature (pp. 9-23) the bulk of the volume consists in a synoptical presentation of the 1959 draft, an earlier draft of 1954, a draft by Erich Schulze, a draft published in 1959 by the Ministry of Culture in East Berlin, and the present Copyright Law (pp. 25-271). In the Annexes there are reproduced the texts of the two Ministry drafts and the West German draft of new provisions of the Civil Code for the protection of the "right of personality" and individual honor.

Volume 17 is a comparative study of "government interference in the administration and exploitation of copyrights" by a Swiss expert in the field. The author's thesis is that copyright is a purely private right in which the state should not interfere. The fact that performing right societies and similar organizations act as intermediaries between the author and the consumer should not make any difference. The government should merely see to it that the organizations representing the authors do not misuse their position of trust or power. "Government supervision of performing right societies makes sense only and should be contemplated in a state respecting the liberty of citizens only where it helps to fend off undesirable foreign influences which cannot be kept out in any other way." (p. 108.) The comparative survey of legal provisions in 37 countries, including the United States, deserves special mention (pp. 26-99).

In Volume 19 Dr. Schulze tackles the controversial subject of the rights of the performing artist and the record industry. While he recognizes these rights, he consigns their protection to the field of contract law and labor law, because in his view they do not lend themselves to coverage by copyright notions.

M. MAGDALENA SCHOCH

Traité des Territoires Dépendants. Tome I: Le Système de Tutelle d'après la Charte de San Francisco. By Nicolas Veïcopoulos. (Brussels: Maison Ferdinand Larcier, S.A., 1960. pp. 521. Index. B. Fr. 450.) Though it is not clearly indicated by the author, this presumably is the first volume of a more comprehensive study which will be followed by a volume devoted to the regime for non-self-governing territories under Chapter XI of the Charter. In the present work, the author undertakes a brief historical account of the development of the trusteeship system and a detailed legal analysis of its theory, structure and functioning with frequent comparisons of the United Nations and League regimes. The study suffers from having been completed some time in advance of publication and from having been made with little apparent interest in the actual conditions under which the trusteeship system was established and has functioned. No attempt is made to evaluate or explain the success of the trusteeship system. The comparison which the author makes of the mandate and trusteeship systems in his conclusions is largely based on the provisions of their basic instruments and not on the way they have actually functioned. No use is made of the Brookings *History*

of the *United Nations Charter* in tracing the historical development of the trusteeship system. As a legal analysis of the trusteeship system the study has some value, though the author advances some questionable legal opinions, as, for example, that the Court alone is competent to interpret certain Charter provisions (p. 145). For one interested in knowing how the trusteeship system really works and what its success has been, it has little usefulness.

La Capacité de l'Organisation des Nations Unies de Conclure des Traités. By Badr Kasme. (Paris: Librairie Générale de Droit et de Jurisprudence, 1960. pp. ii, 214. N. Fr. 20.) This monograph was prepared by Mr. Kasme, a member of the staff of the United Nations Library in Geneva, as a doctoral dissertation, under the supervision of Professor Paul Guggenheim. It is a thoroughly workmanlike and scholarly piece of work, well organized and documented, and accompanied by a useful bibliography. It is a valuable contribution to an understanding of the United Nations.

The author starts with an examination of the concept of international personality as a source of rights and comes to the sensible and sound conclusion that personality should be considered, not as the point of departure, but as the point of destination, not as the basis, but as the consequence of the existence of a right (p. 30). He then reviews the Charter provisions as they bear on the capacity of the Organization to conclude treaties and discusses at some length the question of constitutionality of such treaties. He examines the nature of treaties concluded and considers their possible classification. The one he finds most helpful rests on a distinction between agreements *stricto sensu* and agreements *lato sensu*. Finally he considers the United Nations procedure of concluding agreements.

Mr. Kasme appears to be most concerned over possible doubts which may arise over the constitutionality of United Nations treaties, and proposes Charter amendments which would clarify the competence of the Organization and its organs. From a strictly legal point of view there is a great deal to be said for this suggestion. Some believe, however, that in this respect, as in others, it will be better to let the ambiguities of the Charter be clarified by practice rather than raise more problems in an effort to achieve better Charter phraseology.

LELAND M. GOODRICH

Homogénéité et Diversité des Régimes Politiques au sein des Organisations Internationales. By Georges Ténékidès. (Athens: Imprimerie A. Klissiounis, 1961. pp. 29.) This essay, based on a lecture delivered by Professor Ténékidès at the Graduate School of Advanced International Studies in Geneva, shows with a great wealth of historical illustrations that there is a tendency toward uniformity or homogeneity of political regimes among the members of international organizations. This tendency can be explained by what the author calls structural reasons (the willingness of members to co-operate depends largely on political homogeneity) as well as by legal causes and by psychological motives. Mr. Ténékidès concludes by showing to what extent present international law reflects democratic principles.

It is a learned essay, but it is also one that raises far more questions than the author can discuss in so little space. He does not distinguish sufficiently homogeneity as a *prerequisite* for, and homogeneity as the *product* of, a successful international organization. What he describes as a legal cause—the fact that legal norms regulating the relations among states cannot be drafted if the states have incompatible regimes—can hardly be considered as a reason working toward homogeneity. The

amount of homogeneity of regimes found in successful international organizations varies to a considerable extent with each international system. The case of the United Nations is not touched upon. It would be highly interesting if Professor Ténékidès developed at much greater lengths and in a fashion both more systematic and less formalistic the stimulating thoughts compressed in this essay.

STANLEY HOFFMANN

International Organizations in the Social Sciences. UNESCO Reports and Papers in the Social Sciences, No. 13. (New York: Columbia University Press, 1961. pp. 145.) This is a revised and enlarged edition of an earlier survey published in the same series. It covers eighteen agencies selected from among the large number of international non-governmental organizations which both devote their activities to the social sciences and have been approved for consultative relationship with UNESCO. For each there is a separate chapter giving a short account of its administrative structure, details of activities and personnel, and texts of constitutions and by-laws. The International Association of Legal Science and the International Law Association are covered. Of special interest is an introductory chapter by Professor Jean Meynaud on "International Co-operation in the Field of the Social Sciences," in which he points out that co-operation between national non-governmental organizations in this field encounters many of the same problems as co-operation between governments, due to inequalities of development, available trained personnel and financial resources. On balance he concludes, however, that such co-operation is productive of positive results.

LELAND M. GOODRICH

Human Rights and International Labour Standards. By C. Wilfred Jenks. (London: Stevens & Sons; New York: Praeger, 1960. pp. xvi, 159. Index. \$5.50.) This closely reasoned essay deals with various aspects and ramifications of one of Mr. Jenks' favorite topics, the complementary character of human rights and the improvement of labor standards through international efforts. He analyzes with his usual lucidity the interplay between "present arrangements for the international protection of human rights" on the one hand, and "the promotion of [fair] international labour standards" on the other (p. 5).

It has become customary to divide "human rights" into two large sectors—legally enforceable political rights or civil liberties, and economic and social rights viewed as essentially non-enforceable programmatic declarations. But Mr. Jenks focuses here on three areas in the economic and social fields which are "most closely related to civil liberties and partake in substantial measure of their essential character, namely, freedom from forced labour, freedom of association for trade union purposes, and freedom from discrimination in respect to employment and occupation" (p. 8). They stand between clear-cut legal obligations, such as, for example, freedom from arbitrary arrest, and policy pronouncements.

In surveying the Conventions and ancillary Recommendations on Forced Labor, Freedom of Association, and Discrimination (including equal remuneration for equal work of men and women) the author shows their different degrees of precision (the instruments on discrimination are the least precise) and discusses the elaborate I.L.O. procedures to supervise the application of the Forced Labor and Freedom of Association Conventions, while emphasizing that deliberately no analogous machinery has been set up regarding the Equal Remuneration Convention of 1951. At

the same time, full abolition of the internationally disapproved forms of forced labor and discrimination would still represent essentially negative aspects in the grand design for larger freedom envisaged in the I.L.O. Constitution, the U.N. Charter, and the Universal Declaration of Human Rights. "The 'right to social security' and the 'right to work' represent the positive side of 'freedom from want.'" (p. 115.)

The International Labor Organization, of which the author is Assistant Director General, has become remarkably versatile and sophisticated in promoting its aims, so that international labor conventions are no longer its principal vehicle. But the author rightly concludes with a discussion of the basic issue, namely, "how far the relations between the state and its own citizens can properly be made the subject of treaty obligations." (p. 141.) This leads him to the special problems of federal states, in the United States and elsewhere; and he cautiously suggests, *e.g.*, that U. S. ratification of the Equal Remuneration Convention of 1951 (which is essentially still a "policy and promotion" rather than a strict obligation convention, but which the U. S. Government counseled Congress not to approve) might actually have been welcomed by some states.

JOHN H. E. FRIED

Bibliographie des Écrits sur Hugo Grotius Imprimés au XVIIe Siècle. By Jacob ter Meulen and P. J. J. Diermanse. (The Hague: Martinus Nijhoff, 1961. pp. xx, 224. Index. Fl. 16.) The compilers of the well-known bibliography of writings by Grotius published in 1950 have now prepared a briefer list (almost 500 items) of writings *about* Grotius printed in the seventeenth century (in which he lived). To keep the work within manageable limits, items are included only when Grotius is referred to in the title, or special mention of Grotius or one of his writings is made in the text. Since publication of the correspondence of Grotius is being continued by other editors, epistolary material is ordinarily excluded. The assistance of almost seventy libraries in many lands (including several in East Germany) has been drawn upon. The material is divided into categories dealing with bibliographical and biographical notices of Grotius, natural law and international law, history, Roman and Dutch law, politics, religion, and theology. Mention in courses of study at universities and in the *Index librorum prohibitorum* of the Roman Catholic Church is separately listed.

The book will be gratefully received and diligently utilized by all students of the life and works of Grotius.

EDWARD DUMBAULD

Conduct of American Diplomacy. 2d ed. By Elmer Plischke. (New York: D. Van Nostrand Co., 1961. pp. xv, 660. Index. \$8.50.) The original edition of this text, published in 1950, was designed to provide material helpful in understanding the governmental structure and organization in which the foreign policy process operates. The present edition updates some of the material and adds chapters on "The New Diplomacy" and "Executive Organization for the Conduct of Foreign Relations." The work, which is primarily descriptive rather than evaluative, does not purport to discuss specific issues, although some issues, such as the late unlamented Bricker movement, are judiciously touched upon. Nor does the work provide insights into the actual process of decision-making. It is intended rather as an elementary text in which a high premium is placed on conveying basic information. In light of its purpose it would be captious to criticize it for failing to probe more deeply

into some of the problems of particular interest to international lawyers, e.g., the treaty power, the Connally Reservation, the relation between the Executive and the courts, et cetera. While not ignored, these matters are given only surface treatment. More legitimate, perhaps, is a criticism of *genre* applicable to most descriptively oriented texts in that they usually fail to distinguish between processes that are operationally important and those that are quite trivial. In this text this is revealed, in this reviewer's opinion, by the relatively slight attention paid to the relation between diplomacy and military considerations and between diplomacy and some of the deeper tension-creating problems confronting decision-makers and their attempt institutionally to grapple with them. The rôle of the Department of Defense and the significance of NATO are, it is believed, treated too summarily. Nevertheless the work, which is well written, contains much interesting information including a usefully selected bibliography.

HARDY C. DILLARD

Socialism in One Country 1924-1926. 2 vols. By Edward Hallett Carr. (New York: Macmillan Co., 1958, 1960. Vol. I: pp. x, 557; Vol. II: pp. viii, 493. Indices. \$7.50 each.) E. H. Carr, in these fifth and sixth volumes of his monumental history of the Russian Revolution, describes the economic and political events that led to Stalin's assumption of personal dictatorship and to his espousal of socialism in one country. For students of international politics and law these volumes are prologue to what they await from Carr's pen on Soviet foreign policy during the years 1924-1926. Carr has so much to say that it has been his custom to treat economic and then political events in two volumes for a period before embarking upon foreign policy, and he is moving in the same direction again. The years treated here were those when the Russian peasantry was causing untold trouble to the Communists in their effort to create a new non-capitalist society, and they were also years of crisis in the leadership as Lenin's colleagues were pushed from the scene after his death, leaving Stalin triumphant over all. The resulting discord created a situation dictating relaxation on the international front, and rationalization of the retreat from the concept of world revolution in the slogan "socialism in one country."

International lawyers will be tempted to push this meaty material aside, especially the ponderous volume on economic policy, but Carr is right that the foreign policy cannot be comprehended without appreciation of the factors that conditioned it, or, at least, mitigated the drive that had been undertaken in the first flush of revolutionary propagation of the Marxist idea. There is a lesson for today, for the desire to push forward with 1917 goals is always dependent upon domestic tranquillity and firm leadership, and analysis of Soviet capabilities and intentions must always go hand in hand.

JOHN N. HAZARD

British Honduras. A Historical and Contemporary Survey. By D. A. G. Waddell. (London, New York, Toronto: Oxford University Press, 1961. pp. viii, 151. Index. \$2.90; 18 s.) Anyone interested in the legal problems of underdeveloped countries will find this a valuable book, for it constitutes a case history of them. The general reader who wants a single volume to orient him on the past and present of much-disputed British Honduras will find it here. The work's notable limitation lies in its British viewpoint and in the degree to which it relies on works sharing that viewpoint. Still, the colony discussed is British, and it may be argued

that the real issues of statecraft can be revealed only by those with a real interest in them. Further, opposing viewpoints are discussed frequently and dispassionately. The author's view emphasizes that, regardless of the record of the past, in which he finds Great Britain's record to be essentially good, all that counts now are the possibilities for the future. He indicates that Great Britain will be ready to grant independence to this profitless colony as soon as it is able to support and govern itself, and that the Guatemalan claim to the colony is not valid, indeed that it is not even relevant to the question of independence except as a source of confusion. Thus, "Britain's main concern is to discharge what she considers to be her political responsibility towards British Honduras."

Written with precision, this book has no padding. The first three of its four chapters are well-wrought syntheses, but the outstanding feature is its concluding political analysis of contemporary British Honduras. In all, it demonstrates with restraint the problem of a naïve and disparate society which aspires to sophisticated self-determination.

WAYNE M. CLEGERN

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DISARMAMENT

OUTLINE OF BASIC PROVISIONS OF A TREATY ON GENERAL AND COMPLETE DISARMAMENT IN A PEACEFUL WORLD ¹

*Submitted by the United States Delegation to the U. N. Committee on
Disarmament, Geneva, April 18, 1962*

In order to assist in the preparation of a treaty on general and complete disarmament in a peaceful world, the United States submits the following outline of basic provisions of such a treaty.

A. Objectives

1. To ensure that (a) disarmament is general and complete and war is no longer an instrument for settling international problems, and (b) general and complete disarmament is accompanied by the establishment of reliable procedures for the settlement of disputes and by effective arrangements for the maintenance of peace in accordance with the principles of the Charter of the United Nations.

2. Taking into account paragraphs 3 and 4 below, to provide, with respect to the military establishment of every nation, for:

(a) Disbanding of armed forces, dismantling of military establishments, including bases, cessation of the production of armaments as well as their liquidation or conversion to peaceful uses;

(b) Elimination of all stockpiles of nuclear, chemical, biological, and other weapons of mass destruction and cessation of the production of such weapons;

(c) Elimination of all means of delivery of weapons of mass destruction;

(d) Abolition of the organizations and institutions designed to organize the military efforts of states, cessation of military training, and closing of all military training institutions;

(e) Discontinuance of military expenditures.

3. To ensure that, at the completion of the program for general and complete disarmament, states would have at their disposal only those non-nuclear armaments, forces, facilities and establishments as are agreed to be necessary to maintain internal order and protect the personal security of citizens.

4. To ensure that during and after implementation of general and complete disarmament, states also would support and provide agreed manpower for a United Nations Peace Force to be equipped with agreed types

¹ 46 Department of State Bulletin 747 (1962); U. S. Arms Control and Disarmament Agency Pub. No. 4 (General Series No. 8, May, 1962).

of armaments necessary to ensure that the United Nations can effectively deter or suppress any threat or use of arms.

5. To establish and provide for the effective operation of an International Disarmament Organization within the framework of the United Nations for the purpose of ensuring that all obligations under the disarmament program would be honored and observed during and after implementation of general and complete disarmament; and to this end to ensure that the International Disarmament Organization and its inspectors would have unrestricted access without veto to all places as necessary for the purpose of effective verification.

B. *Principles*

The guiding principles during the achievement of these objectives are:

1. Disarmament would be implemented until it is completed by stages to be carried out within specified time limits.

2. Disarmament would be balanced so that at no stage of the implementation of the treaty could any state or group of states gain military advantage, and so that security would be ensured equally for all.

3. Compliance with all disarmament obligations would be effectively verified during and after their entry into force. Verification arrangements would be instituted progressively as necessary to ensure throughout the disarmament process that agreed levels of armaments and armed forces were not exceeded.

4. As national armaments are reduced, the United Nations would be progressively strengthened in order to improve its capacity to ensure international security and the peaceful settlement of differences as well as to facilitate the development of international cooperation in common tasks for the benefit of mankind.

5. Transition from one stage of disarmament to the next would take place upon decision that all measures in the preceding stage had been implemented and verified and that any additional arrangements required for measures in the next stage were ready to operate.

INTRODUCTION

The Treaty would contain three stages designed to achieve a permanent state of general and complete disarmament in a peaceful world. The Treaty would enter into force upon the signature and ratification of the United States of America, the Union of Soviet Socialist Republics and such other states as might be agreed. Stage II would begin when all militarily significant states had become Parties to the Treaty and other transition requirements had been satisfied. Stage III would begin when all states possessing armed forces and armaments had become Parties to the Treaty and other transition requirements had been satisfied. Disarmament, verification, and measures for keeping the peace would proceed progressively and proportionately beginning with the entry into force of the Treaty.

STAGE I

Stage I would begin upon the entry into force of the Treaty and would be completed within three years from that date.

During Stage I the Parties to the Treaty would undertake:

1. To reduce their armaments and armed forces and to carry out other agreed measures in the manner outlined below;
2. To establish the International Disarmament Organization upon the entry into force of the Treaty in order to ensure the verification in the agreed manner of the obligations undertaken; and
3. To strengthen arrangements for keeping the peace through the measures outlined below.

A. Armaments

1. Reduction of Armaments

a. Specified Parties to the Treaty, as a first stage toward general and complete disarmament in a peaceful world, would reduce by thirty percent the armaments in each category listed in subparagraph b below. Except as adjustments for production would be permitted in Stage I in accordance with paragraph 3 below, each type of armament in the categories listed in subparagraph b would be reduced by thirty percent of the inventory existing at an agreed date.

b. All types of armaments within agreed categories would be subject to reduction in Stage I (the following list of categories, and of types within categories, is illustrative):

(1) Armed combat aircraft having an empty weight of 40,000 kilograms or greater; missiles having a range of 5,000 kilometers or greater, together with their related fixed launching pads; and submarine-launched missiles and air-to-surface missiles having a range of 300 kilometers or greater.

(Within this category, the United States, for example, would declare as types of armaments: the B-52 aircraft; Atlas missiles together with their related fixed launching pads; Titan missiles together with their related fixed launching pads; Polaris missiles; Hound Dog missiles; and each new type of armament, such as Minuteman missiles, which came within the category description, together with, where applicable, their related fixed launching pads. The declared inventory of types within the category by other Parties to the Treaty would be similarly detailed.)

(2) Armed combat aircraft having an empty weight of between 15,000 kilograms and 40,000 kilograms and those missiles not included in category (1) having a range between 300 kilometers and 5,000 kilometers, together with any related fixed launching pads. (The Parties would declare their armaments by types within the category.)

(3) Armed combat aircraft having an empty weight of between 2,500 and 15,000 kilograms. (The Parties would declare their armaments by types within the category.)

(4) Surface-to-surface (including submarine-launched missiles) and air-to-surface aerodynamic and ballistic missiles and free rockets having a range of between 10 kilometers and 300 kilometers, together with any related fixed launching pads. (The Parties would declare their armaments by types within the category.)

(5) Anti-missile missile systems, together with related fixed launching pads. (The Parties would declare their armaments by types within the category.)

(6) Surface-to-air missiles other than anti-missile missile systems, together with any related fixed launching pads. (The Parties would declare their armaments by types within the category.)

(7) Tanks. (The Parties would declare their armaments by types within the category.)

(8) Armored cars and armored personnel carriers. (The Parties would declare their armaments by types within the category.)

(9) All artillery, and mortars and rocket launchers having a caliber of 100 mm. or greater. (The Parties would declare their armaments by types within the category.)

(10) Combatant ships with standard displacement of 400 tons or greater of the following classes: Aircraft carriers, battleships, cruisers, destroyer types and submarines. (The Parties would declare their armaments by types within the category.)

2. Method of Reduction

a. Those Parties to the Treaty which were subject to the reduction of armaments would submit to the International Disarmament Organization an appropriate declaration respecting inventories of their armaments existing at the agreed date.

b. The reduction would be accomplished in three steps, each consisting of one year. One-third of the reduction to be made during Stage I would be carried out during each step.

c. During the first part of each step, one-third of the armaments to be eliminated during Stage I would be placed in depots under supervision of the International Disarmament Organization. During the second part of each step, the deposited armaments would be destroyed or, where appropriate, converted to peaceful uses. The number and location of such depots and arrangements respecting their establishment and operation would be set forth in an annex to the Treaty.

d. In accordance with arrangements which would be set forth in a Treaty annex on verification, the International Disarmament Organization would verify the foregoing reduction and would provide assurance that retained armaments did not exceed agreed levels.

3. Limitation on Production of Armaments and on Related Activities

a. Production of all armaments listed in subparagraph b of paragraph 1 above would be limited to agreed allowances during Stage I and, by the beginning of Stage II, would be halted except for production within agreed limits of parts for maintenance of the agreed retained armaments.

b. The allowances would permit limited production in each of the categories of armaments listed in subparagraph b of paragraph 1 above. In all instances during the process of eliminating production of armaments:

(1) any armament produced within a category would be compensated for by additional armament destroyed within that category to the end that the ten percent reduction in numbers in each category in each step, and the resulting thirty percent reduction in Stage I, would be achieved; and furthermore

(2) in the case of armed combat aircraft having an empty weight of 15,000 kilograms or greater and of missiles having a range of 300 kilometers or greater, the destructive capability of any such armaments produced within a category would be compensated for by the destruction of sufficient armaments within that category to the end that the ten percent reduction in destructive capability as well as numbers in each of these categories in each step, and the resulting thirty percent reduction in Stage I, would be achieved.

c. Should a Party to the Treaty elect to reduce its production in any category at a more rapid rate than required by the allowances provided in subparagraph b above, that Party would be entitled to retain existing armaments to the extent of the unused portion of its production allowance. In any such instance, any armament so retained would be compensated for in the manner set forth in subparagraph b(1) and, where applicable, b(2) above to the end that the ten percent reduction in numbers and, where applicable, destructive capability in each category in each step, and the resulting thirty percent reduction in Stage I, would be achieved.

d. The flight testing of missiles would be limited to agreed annual quotas.

e. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures at declared locations and would provide assurance that activities subject to the foregoing measures were not conducted at undeclared locations.

4. Additional Measures

The Parties to the Treaty would agree to examine unresolved questions relating to means of accomplishing in Stages II and III the reduction and eventual elimination of production and stockpiles of chemical and biological weapons of mass destruction. In light of this examination, the Parties to the Treaty would agree to arrangements concerning chemical and biological weapons of mass destruction.

B. *Armed Forces*

1. Reduction of Armed Forces

Force levels for the United States of America and the Union of Soviet Socialist Republics would be reduced to 2.1 million each and for other specified Parties to the Treaty to agreed levels not exceeding 2.1 million

each. All other Parties to the Treaty would, with agreed exceptions, reduce their force levels to 100,000 or one percent of their population, whichever were higher, provided that in no case would the force levels of such other Parties to the Treaty exceed levels in existence upon the entry into force of the Treaty.

2. Armed Forces Subject to Reduction

Agreed force levels would include all full-time, uniformed personnel maintained by national governments in the following categories:

a. Career personnel of active armed forces and other personnel serving in the active armed forces on fixed engagements or contracts.

b. Conscripts performing their required period of full-time active duty as fixed by national law.

c. Personnel of militarily organized security forces and of other forces or organizations equipped and organized to perform a military mission.

3. Method of Reduction of Armed Forces

The reduction of force levels would be carried out in the following manner:

a. Those Parties to the Treaty which were subject to the foregoing reductions would submit to the International Disarmament Organization a declaration stating their force levels at the agreed date.

b. Force level reductions would be accomplished in three steps, each having a duration of one year. During each step force levels would be reduced by one-third of the difference between force levels existing at the agreed date and the levels to be reached at the end of Stage I.

c. In accordance with arrangements that would be set forth in the annex on verification, the International Disarmament Organization would verify the reduction of force levels and provide assurance that retained forces did not exceed agreed levels.

4. Additional Measures

The Parties to the Treaty which were subject to the foregoing reductions would agree upon appropriate arrangements, including procedures for consultation, in order to ensure that civilian employment by military establishments would be in accordance with the objectives of the obligations respecting force levels.

C. *Nuclear Weapons*

1. Production of Fissionable Materials for Nuclear Weapons

a. The Parties to the Treaty would halt the production of fissionable materials for use in nuclear weapons.

b. This measure would be carried out in the following manner:

(1) The Parties to the Treaty would submit to the International Disarmament Organization a declaration listing by name, location and pro-

duction capacity every facility under their jurisdiction capable of producing and processing fissionable materials at the agreed date.

(2) Production of fissionable materials for purposes other than use in nuclear weapons would be limited to agreed levels. The Parties to the Treaty would submit to the International Disarmament Organization periodic declarations stating the amounts and types of fissionable materials which were still being produced at each facility.

(3) In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures at declared facilities and would provide assurance that activities subject to the foregoing limitations were not conducted at undeclared facilities.

2. Transfer of Fissionable Material to Purposes Other Than Use in Nuclear Weapons

a. Upon the cessation of production of fissionable materials for use in nuclear weapons, the United States of America and the Union of Soviet Socialist Republics would each transfer to purposes other than use in nuclear weapons an agreed quantity of weapons-grade U-235 from past production. The purposes for which such materials would be used would be determined by the state to which the material belonged, provided that such materials were not used in nuclear weapons.

b. To ensure that the transferred materials were not used in nuclear weapons, such materials would be placed under safeguards and inspection by the International Disarmament Organization either in stockpiles or at the facilities in which they would be utilized for purposes other than use in nuclear weapons. Arrangements for such safeguards and inspection would be set forth in the annex on verification.

3. Transfer of Fissionable Materials Between States for Peaceful Uses of Nuclear Energy

a. Any transfer of fissionable materials between states would be for purposes other than for use in nuclear weapons and would be subject to a system of safeguards to ensure that such materials were not used in nuclear weapons.

b. The system of safeguards to be applied for this purpose would be developed in agreement with International Atomic Energy Agency and would be set forth in an annex to the Treaty.

4. Non-Transfer of Nuclear Weapons

The Parties to the Treaty would agree to seek to prevent the creation of further national nuclear forces. To this end the Parties would agree that:

a. Any Party to the Treaty which had manufactured, or which at any time manufactures, a nuclear weapon would:

(1) Not transfer control over any nuclear weapons to a state which had not manufactured a nuclear weapon before an agreed date;

(2) Not assist any such state in manufacturing any nuclear weapons.

b. Any Party to the Treaty which had not manufactured a nuclear weapon before the agreed date would:

(1) Not acquire, or attempt to acquire, control over any nuclear weapons;

(2) Not manufacture, or attempt to manufacture, any nuclear weapons.

5. Nuclear Weapons Test Explosions

a. If an agreement prohibiting nuclear weapons test explosions and providing for effective international control had come into force prior to the entry into force of the Treaty, such agreement would become an annex to the Treaty, and all the Parties to the Treaty would be bound by the obligations specified in the agreement.

b. If, however, no such agreement had come into force prior to the entry into force of the Treaty, all nuclear weapons test explosions would be prohibited, and the procedures for effective international control would be set forth in an annex to the Treaty.

6. Additional Measures

The Parties to the Treaty would agree to examine remaining unresolved questions relating to the means of accomplishing in Stages II and III the reduction and eventual elimination of nuclear weapons stockpiles. In the light of this examination, the Parties to the Treaty would agree to arrangements concerning nuclear weapons stockpiles.

D. *Outer Space*

1. Prohibition of Weapons of Mass Destruction in Orbit

The Parties to the Treaty would agree not to place in orbit weapons capable of producing mass destruction.

2. Peaceful Cooperation in Space

The Parties to the Treaty would agree to support increased international cooperation in peaceful uses of outer space in the United Nations or through other appropriate arrangements.

3. Notification and Pre-launch Inspection

With respect to the launching of space vehicles and missiles:

a. Those Parties to the Treaty which conducted launchings of space vehicles or missiles would provide advance notification of such launchings to other Parties to the Treaty and to the International Disarmament Organization together with the track of the space vehicle or missile. Such advance notification would be provided on a timely basis to permit pre-launch inspection of the space vehicle or missile to be launched.

b. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would conduct pre-launch inspection of space vehicles and missiles and would

establish and operate any arrangements necessary for detecting unreported launchings.

4. Limitations on Production and on Related Activities

The production, stockpiling and testing of boosters for space vehicles would be subject to agreed limitations. Such activities would be monitored by the International Disarmament Organization in accordance with arrangements which would be set forth in the annex on verification.

E. *Military Expenditures*

1. Report on Expenditures

The Parties to the Treaty would submit to the International Disarmament Organization at the end of each step of each stage a report on their military expenditures. Such reports would include an itemization of military expenditures.

2. Verifiable Reduction of Expenditures

The Parties to the Treaty would agree to examine questions related to the verifiable reduction of military expenditures. In the light of this examination, the Parties to the Treaty would consider appropriate arrangements respecting military expenditures.

F. *Reduction of the Risk of War*

In order to promote confidence and reduce the risk of war, the Parties to the Treaty would agree to the following measures:

1. Advance Notification of Military Movements and Maneuvers

Specified Parties to the Treaty would give advance notification of major military movements and maneuvers to other Parties to the Treaty and to the International Disarmament Organization. Specific arrangements relating to this commitment, including the scale of movements and maneuvers to be reported and the information to be transmitted, would be agreed.

2. Observation Posts

Specified Parties to the Treaty would permit observation posts to be established at agreed locations, including major ports, railway centers, motor highways, river crossings, and air bases to report on concentrations and movements of military forces. The number of such posts could be progressively expanded in each successive step of Stage I. Specific arrangements relating to such observation posts, including the location and staffing of posts, the method of receiving and reporting information, and the schedule for installation of posts would be agreed.

3. Additional Observation Arrangements

The Parties to the Treaty would establish such additional observation arrangements as might be agreed. Such arrangements could be extended in an agreed manner during each step of Stage I.

4. Exchange of Military Missions

Specified Parties to the Treaty would undertake the exchange of military missions between states or groups of states in order to improve communications and understanding between them. Specific arrangements respecting such exchanges would be agreed.

5. Communications Between Heads of Government

Specified Parties to the Treaty would agree to the establishment of rapid and reliable communications among their heads of government and with the Secretary General of the United Nations. Specific arrangements in this regard would be subject to agreement among the Parties concerned and between such Parties and the Secretary General.

6. International Commission on Reduction of the Risk of War

The Parties to the Treaty would establish an International Commission on Reduction of the Risk of War as a subsidiary body of the International Disarmament Organization to examine and make recommendations regarding further measures that might be undertaken during Stage I or subsequent stages of disarmament to reduce the risk of war by accident, miscalculation, failure of communications, or surprise attack. Specific arrangements for such measures as might be agreed to by all or some of the Parties to the Treaty would be subject to agreement among the Parties concerned.

G. The International Disarmament Organization

1. Establishment of the International Disarmament Organization

The International Disarmament Organization would be established upon the entry into force of the Treaty and would function within the framework of the United Nations and in accordance with the terms and conditions of the Treaty.

2. Cooperation of the Parties to the Treaty

The Parties to the Treaty would agree to cooperate promptly and fully with the International Disarmament Organization and to assist the International Disarmament Organization in the performance of its functions and in the execution of the decisions made by it in accordance with the provisions of the Treaty.

3. Verification Functions of the International Disarmament Organization

The International Disarmament Organization would verify disarmament measures in accordance with the following principles which would be implemented through specific arrangements set forth in the annex on verification:

a. Measures providing for reduction of armaments would be verified by the International Disarmament Organization at agreed depots and

would include verification of the destruction of armaments and, where appropriate, verification of the conversion of armaments to peaceful uses. Measures providing for reduction of armed forces would be verified by the International Disarmament Organization either at the agreed depots or other agreed locations.

b. Measures halting or limiting production, testing, and other specified activities would be verified by the International Disarmament Organization. Parties to the Treaty would declare the nature and location of all production and testing facilities and other specified activities. The International Disarmament Organization would have access to relevant facilities and activities wherever located in the territory of such Parties.

c. Assurance that agreed levels of armaments and armed forces were not exceeded and that activities limited or prohibited by the Treaty were not being conducted clandestinely would be provided by the International Disarmament Organization through agreed arrangements which would have the effect of providing that the extent of inspection during any step or stage would be related to the amount of disarmament being undertaken and to the degree of risk to the Parties to the Treaty of possible violations. This might be accomplished, for example, by an arrangement embodying such features as the following:

(1) All parts of the territory of those Parties to the Treaty to which this form of verification was applicable would be subject to selection for inspection from the beginning of Stage I as provided below.

(2) Parties to the Treaty would divide their territory into an agreed number of appropriate zones and at the beginning of each step of disarmament would submit to the International Disarmament Organization a declaration stating the total level of armaments, forces, and specified types of activities subject to verification within each zone. The exact location of armaments and forces within a zone would not be revealed prior to its selection for inspection.

(3) An agreed number of these zones would be progressively inspected by the International Disarmament Organization during Stage I according to an agreed time schedule. The zones to be inspected would be selected by procedures which would ensure their selection by Parties to the Treaty other than the Party whose territory was to be inspected or any Party associated with it. Upon selection of each zone, the Party to the Treaty whose territory was to be inspected would declare the exact location of armaments, forces and other agreed activities within the selected zone. During the verification process, arrangements would be made to provide assurance against undeclared movements of the objects of verification to or from the zone or zones being inspected. Both aerial and mobile ground inspection would be employed within the zone being inspected. In so far as agreed measures being verified were concerned, access within the zone would be free and unimpeded, and verification would be carried out with the full cooperation of the state being inspected.

(4) Once a zone had been inspected it would remain open for further inspection while verification was being extended to additional zones.

(5) By the end of Stage III, when all disarmament measures had been completed, inspection would have been extended to all parts of the territory of Parties to the Treaty.

4. Composition of the International Disarmament Organization

a. The International Disarmament Organization would have:

(1) A General Conference of all the Parties to the Treaty;

(2) A Control Council consisting of representatives of all the major signatory powers as permanent members and certain other Parties to the Treaty on a rotating basis; and

(3) An Administrator who would administer the International Disarmament Organization under the direction of the Control Council and who would have the authority, staff, and finances adequate to ensure effective and impartial implementation of the functions of the International Disarmament Organization.

b. The General Conference and the Control Council would have power to establish such subsidiary bodies, including expert study groups, as either of them might deem necessary.

5. Functions of the General Conference

The General Conference would have the following functions, among others which might be agreed:

- a. Electing non-permanent members to the Control Council;
- b. Approving certain accessions to the Treaty;
- c. Appointing the Administrator upon recommendation of the Control Council;
- d. Approving agreements between the International Disarmament Organization and the United Nations and other international organizations;
- e. Approving the budget of the International Disarmament Organization;
- f. Requesting and receiving reports from the Control Council and deciding upon matters referred to it by the Control Council;
- g. Approving reports to be submitted to bodies of the United Nations;
- h. Proposing matters for consideration by the Control Council;
- i. Requesting the International Court of Justice to give advisory opinions on legal questions concerning the interpretation or application of the Treaty, subject to a general authorization of this power by the General Assembly of the United Nations;
- j. Approving amendments to the Treaty for possible ratification by the Parties to the Treaty;
- k. Considering matters of mutual interest pertaining to the Treaty or disarmament in general.

6. Functions of the Control Council

The Control Council would have the following functions, among others which might be agreed:

- a. Recommending appointment of the Administrator;
- b. Adopting rules for implementing the terms of the Treaty;

- c. Establishing procedures and standards for the installation and operation of the verification arrangements, and maintaining supervision over such arrangements and the Administrator;
- d. Establishing procedures for making available to the Parties to the Treaty data produced by verification arrangements;
- e. Considering reports of the Administrator on the progress of disarmament measures and of their verification, and on the installation and operation of the verification arrangements;
- f. Recommending to the Conference approval of the budget of the International Disarmament Organization;
- g. Requesting the International Court of Justice to give advisory opinions on legal questions concerning the interpretation or application of the Treaty, subject to a general authorization of this power by the General Assembly of the United Nations;
- h. Recommending to the Conference approval of certain accessions to the Treaty;
- i. Considering matters of mutual interest pertaining to the Treaty or to disarmament in general.

7. Functions of the Administrator

The Administrator would have the following functions, among others which might be agreed:

- a. Administering the installation and operation of the verification arrangements, and serving as Chief Executive Officer of the International Disarmament Organization;
- b. Making available to the Parties to the Treaty data produced by the verification arrangements;
- c. Preparing the budget of the International Disarmament Organization;
- d. Making reports to the Control Council on the progress of disarmament measures and of their verification, and on the installation and operation of the verification arrangements.

8. Privileges and Immunities

The privileges and immunities which the Parties to the Treaty would grant to the International Disarmament Organization and its staff and to the representatives of the Parties to the International Disarmament Organization, and the legal capacity which the International Disarmament Organization should enjoy in the territory of each of the Parties to the Treaty would be specified in an annex to the Treaty.

9. Relations with the United Nations and Other International Organizations

- a. The International Disarmament Organization, being established within the framework of the United Nations, would conduct its activities in accordance with the purposes and principles of the United Nations. It would maintain close working arrangements with the United Nations, and the Administrator of the International Disarmament Organization would

consult with the Secretary General of the United Nations on matters of mutual interest.

b. The Control Council of the International Disarmament Organization would transmit to the United Nations annual and other reports on the activities of the International Disarmament Organization.

c. Principal organs of the United Nations could make recommendations to the International Disarmament Organization, which would consider them and report to the United Nations on action taken.

Note: The above outline does not cover all the possible details or aspects of relationships between the International Disarmament Organization and the United Nations.

H. Measures To Strengthen Arrangements for Keeping the Peace

1. Obligations Concerning the Threat or Use of Force

The Parties to the Treaty would undertake obligations to refrain, in their international relations, from the threat or use of force of any type—including nuclear, conventional, chemical or biological means of warfare—contrary to the purposes and principles of the United Nations Charter.

2. Rules of International Conduct

a. The Parties to the Treaty would agree to support a study of a subsidiary body of the International Disarmament Organization of the codification and progressive development of rules of international conduct related to disarmament.

b. The Parties to the Treaty would refrain from indirect aggression and subversion. The subsidiary body provided for in subparagraph a would also study methods of assuring states against indirect aggression or subversion.

3. Peaceful Settlement of Disputes

a. The Parties to the Treaty would utilize all appropriate processes for the peaceful settlement of all disputes which might arise between them and any other state, whether or not a Party to the Treaty, including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, submission to the Security Council or the General Assembly of the United Nations, or other peaceful means of their choice.

b. The Parties to the Treaty would agree that disputes concerning the interpretation or application of the Treaty which were not settled by negotiation or by the International Disarmament Organization would be subject to referral by any party to the dispute to the International Court of Justice, unless the parties concerned agreed on another mode of settlement.

c. The Parties to the Treaty would agree to support a study under the General Assembly of the United Nations of measures which should be undertaken to make existing arrangements for the peaceful settlement of

international disputes, whether legal or political in nature, more effective; and to institute new procedures and arrangements where needed.

4. Maintenance of International Peace and Security

The Parties to the Treaty would agree to support measures strengthening the structure, authority, and operation of the United Nations so as to improve its capability to maintain international peace and security.

5. United Nations Peace Force

The Parties to the Treaty would undertake to develop arrangements during Stage I for the establishment in Stage II of a United Nations Peace Force. To this end, the Parties to the Treaty would agree on the following measures within the United Nations:

- a. Examination of the experience of the United Nations leading to a further strengthening of United Nations forces for keeping the peace;
- b. Examination of the feasibility of concluding promptly the agreements envisaged in Article 43 of the United Nations Charter;
- c. Conclusion of an agreement for the establishment of a United Nations Peace Force in Stage II, including definitions of its purpose, mission, composition and strength, disposition, command and control, training, logistical support, financing, equipment and armaments.

6. United Nations Peace Observation Corps

The Parties to the Treaty would agree to support the establishment within the United Nations of a Peace Observation Corps, staffed with a standing cadre of observers who could be despatched promptly to investigate any situation which might constitute a threat to or a breach of the peace. Elements of the Peace Observation Corps could also be stationed as appropriate in selected areas throughout the world.

I. *Transition*

1. Transition from Stage I to Stage II would take place at the end of Stage I, upon a determination that the following circumstances existed:

- a. All undertakings to be carried out in Stage I had been carried out;
- b. All preparations required for Stage II had been made; and
- c. All militarily significant states had become Parties to the Treaty.

2. During the last three months of Stage I, the Control Council would review the situation respecting these circumstances with a view to determining whether these circumstances existed at the end of Stage I.

3. If, at the end of Stage I, one or more permanent members of the Control Council should declare that the foregoing circumstances did not exist, the agreed period of Stage I would, upon the request of such permanent member or members, be extended by a period or periods totalling no more than three months for the purpose of bringing about the foregoing circumstances.

4. If, upon the expiration of such period or periods, one or more of the permanent members of the Control Council should declare that the fore-

going circumstances still did not exist, the question would be placed before a special session of the Security Council; transition to Stage II would take place upon a determination by the Security Council that the foregoing circumstances did in fact exist.

STAGE II

Stage II would begin upon the transition from Stage I and would be completed within three years from that date.

During Stage II, the Parties to the Treaty would undertake:

1. To continue all obligations undertaken during Stage I;
2. To reduce further the armaments and armed forces reduced during Stage I and to carry out additional measures of disarmament in the manner outlined below;
3. To ensure that the International Disarmament Organization would have the capacity to verify in the agreed manner the obligations undertaken during Stage II; and
4. To strengthen further the arrangements for keeping the peace through the establishment of a United Nations Peace Force and through the additional measures outlined below.

A. *Armaments*

1. Reduction of Armaments

a. Those Parties to the Treaty which had during Stage I reduced their armaments in agreed categories by thirty percent would during Stage II further reduce each type of armaments in the categories listed in Section A, subparagraph 1.b of Stage I by fifty percent of the inventory existing at the end of Stage I.

b. Those Parties to the Treaty which had not been subject to measures for the reduction of armaments during Stage I would submit to the International Disarmament Organization an appropriate declaration respecting the inventories by types, within the categories listed in Stage I, of their armaments existing at the beginning of Stage II. Such Parties to the Treaty would during Stage II reduce the inventory of each type of such armaments by sixty-five percent in order that such Parties would accomplish the same total percentage of reduction by the end of Stage II as would be accomplished by those Parties to the Treaty which had reduced their armaments by thirty percent in Stage I.

2. Additional Armaments Subject to Reduction

a. The Parties to the Treaty would submit to the International Disarmament Organization a declaration respecting their inventories existing at the beginning of Stage II of the additional types of armaments in the categories listed in subparagraph b below, and would during Stage II reduce the inventory of each type of such armaments by fifty percent.

b. All types of armaments within further agreed categories would be subject to reduction in Stage II (the following list of categories is illustrative):

(1) Armed combat aircraft having an empty weight of up to 2,500 kilograms (declarations by types).

(2) Specified types of unarmed military aircraft (declarations by types).

(3) Missiles and free rockets having a range of less than 10 kilometers (declarations by types).

(4) Mortars and rocket launchers having a caliber of less than 100 mm. (declarations by types).

(5) Specified types of unarmored personnel carriers and transport vehicles (declarations by types).

(6) Combatant ships with standard displacement of 400 tons or greater which had not been included among the armaments listed in Stage I, and combatant ships with standard displacement of less than 400 tons (declarations by types).

(7) Specified types of non-combatant naval vessels (declarations by types).

(8) Specified types of small arms (declarations by types).

c. Specified categories of ammunition for armaments listed in Stage I, Section A, subparagraph 1.b and in subparagraph b above would be reduced to levels consistent with the levels of armaments agreed for the end of Stage II.

3. Method of Reduction

The foregoing measures would be carried out and would be verified by the International Disarmament Organization in a manner corresponding to that provided for in Stage I, Section A, paragraph 2.

4. Limitation on Production of Armaments and on Related Activities

a. The Parties to the Treaty would halt the production of armaments in the specified categories except for production, within agreed limits, of parts required for maintenance of the agreed retained armaments.

b. The production of ammunition in specified categories would be reduced to agreed levels consistent with the levels of armaments agreed for the end of Stage II.

c. The Parties to the Treaty would halt development and testing of new types of armaments. The flight testing of existing types of missiles would be limited to agreed annual quotas.

d. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures at declared locations and would provide assurance that activities subject to the foregoing measures were not conducted at undeclared locations.

5. Additional Measures

a. In the light of their examination during Stage I of the means of accomplishing the reduction and eventual elimination of production and stockpiles of chemical and biological weapons of mass destruction, the

Parties to the Treaty would undertake the following measures respecting such weapons:

(1) The cessation of all production and field testing of chemical and biological weapons of mass destruction.

(2) The reduction, by agreed categories, of stockpiles of chemical and biological weapons of mass destruction to levels fifty percent below those existing at the beginning of Stage II.

(3) The dismantling or conversion to peaceful uses of all facilities engaged in the production or field testing of chemical and biological weapons of mass destruction.

b. The foregoing measures would be carried out in an agreed sequence and through arrangements which would be set forth in an annex to the Treaty.

c. In accordance with arrangements which would be set forth in the annex on verification the International Disarmament Organization would verify the foregoing measures and would provide assurance that retained levels of chemical and biological weapons did not exceed agreed levels and that activities subject to the foregoing limitations were not conducted at undeclared locations.

B. *Armed Forces*

1. Reduction of Armed Forces

a. Those Parties to the Treaty which had been subject to measures providing for reduction of force levels during Stage I would further reduce their force levels on the following basis:

(1) Force levels of the United States of America and the Union of Soviet Socialist Republics would be reduced to levels fifty percent below the levels agreed for the end of Stage I.

(2) Force levels of other Parties to the Treaty which had been subject to measures providing for the reduction of force levels during Stage I would be further reduced, on the basis of an agreed percentage, below the levels agreed for the end of Stage I to levels which would not in any case exceed the agreed level for the United States of America and the Union of Soviet Socialist Republics at the end of Stage II.

b. Those Parties to the Treaty which had not been subject to measures providing for the reduction of armed forces during Stage I would reduce their force levels to agreed levels consistent with those to be reached by other Parties which had reduced their force levels during Stage I as well as Stage II. In no case would such agreed levels exceed the agreed level for the United States of America and the Union of Soviet Socialist Republics at the end of Stage II.

c. Agreed levels of armed forces would include all personnel in the categories set forth in Section B, paragraph 2 of Stage I.

2. Method of Reduction

The further reduction of force levels would be carried out and would be verified by the International Disarmament Organization in a manner corresponding to that provided for in Section B, paragraph 3 of Stage I.

3. Additional Measures

Agreed limitations consistent with retained force levels would be placed on compulsory military training, and on refresher training for reserve forces of the Parties to the Treaty.

C. *Nuclear Weapons*

1. Reduction of Nuclear Weapons

In the light of their examination during Stage I of the means of accomplishing the reduction and eventual elimination of nuclear weapons stockpiles, the Parties to the Treaty would undertake to reduce in the following manner remaining nuclear weapons and fissionable materials for use in nuclear weapons:

a. The Parties to the Treaty would submit to the International Disarmament Organization a declaration stating the amounts, types and nature of utilization of all their fissionable materials.

b. The Parties to the Treaty would reduce the amounts and types of fissionable materials declared for use in nuclear weapons to minimum levels on the basis of agreed percentages. The foregoing reduction would be accomplished through the transfer of such materials to purposes other than use in nuclear weapons. The purposes for which such materials would be used would be determined by the state to which the materials belonged, provided that such materials were not used in nuclear weapons.

c. The Parties to the Treaty would destroy the non-nuclear components and assemblies of nuclear weapons from which fissionable materials had been removed to effect the foregoing reduction of fissionable materials for use in nuclear weapons.

d. Production or refabrication of nuclear weapons from any remaining fissionable materials would be subject to agreed limitations.

e. The foregoing measures would be carried out in an agreed sequence and through arrangements which would be set forth in an annex to the Treaty.

f. In accordance with arrangements that would be set forth in the verification annex to the Treaty, the International Disarmament Organization would verify the foregoing measures at declared locations and would provide assurance that activities subject to the foregoing limitations were not conducted at undeclared locations.

2. Registration of Nuclear Weapons for Verification Purposes

To facilitate verification during Stage III that no nuclear weapons remained at the disposal of the Parties to the Treaty, those Parties to the

Treaty which possessed nuclear weapons would, during the last six months of Stage II, register and serialize their remaining nuclear weapons and would register remaining fissionable materials for use in such weapons. Such registration and serialization would be carried out with the International Disarmament Organization in accordance with procedures which would be set forth in the annex on verification.

D. Military Bases and Facilities

1. Reduction of Military Bases and Facilities

The Parties to the Treaty would dismantle or convert to peaceful uses agreed military bases and facilities, wherever they might be located.

2. Method of Reduction

a. The list of military bases and facilities subject to the foregoing measures and the sequence and arrangements for dismantling or converting them to peaceful uses would be set forth in an annex to the Treaty.

b. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures.

E. Reduction of the Risk of War

In the light of the examination by the International Commission on Reduction of the Risk of War during Stage I the Parties to the Treaty would undertake such additional arrangements as appeared desirable to promote confidence and reduce the risk of war. The Parties to the Treaty would also consider extending and improving the measures undertaken in Stage I for this purpose. The Commission would remain in existence to examine extensions, improvements or additional measures which might be undertaken during and after Stage II.

F. The International Disarmament Organization

The International Disarmament Organization would be strengthened in the manner necessary to ensure its capacity to verify the measures undertaken in Stage II through an extension of the arrangements based upon the principles set forth in Section G, paragraph 3 of Stage I.

G. Measures to Strengthen Arrangements for Keeping the Peace

1. Peaceful Settlement of Disputes

a. In light of the study of peaceful settlement of disputes conducted during Stage I, the Parties to the Treaty would agree to such additional steps and arrangements as were necessary to assure the just and peaceful settlement of international disputes, whether legal or political in nature.

b. The Parties to the Treaty would undertake to accept without reservation, pursuant to Article 36, paragraph 1 of the Statute of the Inter-

national Court of Justice, the compulsory jurisdiction of that Court to decide international legal disputes.

2. Rules of International Conduct

a. The Parties to the Treaty would continue their support of the study by the subsidiary body of the International Disarmament Organization initiated in Stage I to study the codification and progressive development of rules of international conduct related to disarmament. The Parties to the Treaty would agree to the establishment of procedures whereby rules recommended by the subsidiary body and approved by the Control Council would be circulated to all Parties to the Treaty and would become effective three months thereafter unless a majority of the Parties to the Treaty signified their disapproval, and whereby the Parties to the Treaty would be bound by rules which had become effective in this way unless, within a period of one year from the effective date, they formally notified the International Disarmament Organization that they did not consider themselves so bound. Using such procedures, the Parties to the Treaty would adopt such rules of international conduct related to disarmament as might be necessary to begin Stage III.

b. In the light of the study of indirect aggression and subversion conducted in Stage I, the Parties to the Treaty would agree to arrangements necessary to assure states against indirect aggression and subversion.

3. United Nations Peace Force

The United Nations Peace Force to be established as the result of the agreement reached during Stage I would come into being within the first year of Stage II and would be progressively strengthened during Stage II.

4. United Nations Peace Observation Corps

The Parties to the Treaty would conclude arrangements for the expansion of the activities of the United Nations Peace Observation Corps.

5. National Legislation

Those Parties to the Treaty which had not already done so would, in accordance with their constitutional processes, enact national legislation in support of the Treaty imposing legal obligations on individuals and organizations under their jurisdiction and providing appropriate penalties for noncompliance.

H. *Transition*

1. Transition from Stage II to Stage III would take place at the end of Stage II, upon a determination that the following circumstances existed:

- a. All undertakings to be carried out in Stage II had been carried out;
- b. All preparations required for Stage III had been made; and
- c. All states possessing armed forces and armaments had become Parties to the Treaty.

2. During the last three months of Stage II, the Control Council would review the situation respecting these circumstances with a view to determining at the end of Stage II whether they existed.

3. If, at the end of Stage II, one or more permanent members of the Control Council should declare that the foregoing circumstances did not exist, the agreed period of Stage II would, upon the request of such permanent member or members, be extended by a period or periods totalling no more than three months for the purpose of bringing about the foregoing circumstances.

4. If, upon the expiration of such period or periods, one or more of the permanent members of the Control Council should declare that the foregoing circumstances still did not exist, the question would be placed before a special session of the Security Council; transition to Stage III would take place upon a determination by the Security Council that the foregoing circumstances did in fact exist.

STAGE III

Stage III would begin upon the transition from Stage II and would be completed within an agreed period of time as promptly as possible.

During Stage III, the Parties to the Treaty would undertake:

1. To continue all obligations undertaken during Stages I and II;
2. To complete the process of general and complete disarmament in the manner outlined below;
3. To ensure that the International Disarmament Organization would have the capacity to verify in the agreed manner the obligations undertaken during Stage III and of continuing verification subsequent to the completion of Stage III; and
4. To strengthen further the arrangements for keeping the peace during and following the achievement of general and complete disarmament through the additional measures outlined below.

A. *Armaments*

1. Reduction of Armaments

Subject to agreed requirements for non-nuclear armaments of agreed types for national forces required to maintain internal order and protect the personal security of citizens, the Parties to the Treaty would eliminate all armaments remaining at their disposal at the end of Stage II.

2. Method of Reduction

a. The foregoing measure would be carried out in an agreed sequence and through arrangements that would be set forth in an annex to the Treaty.

b. In accordance with arrangements that would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures and would provide assurance that retained armaments were of the agreed types and did not exceed agreed levels.

3. Limitations on Production of Armaments and on Related Activities

a. Subject to agreed arrangements in support of national forces required to maintain internal order and protect the personal security of citizens and subject to agreed arrangements in support of the United Nations Peace Force, the Parties to the Treaty would halt all applied research, development, production, and testing of armaments and would cause to be dismantled or converted to peaceful uses all facilities for such purposes.

b. The foregoing measures would be carried out in an agreed sequence and through arrangements which would be set forth in an annex to the Treaty.

c. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures at declared locations and would provide assurance that activities subject to the foregoing measures were not conducted at undeclared locations.

B. *Armed Forces*

1. Reduction of Armed Forces

To the end that upon completion of Stage III they would have at their disposal only those forces and organizational arrangements necessary for agreed forces to maintain internal order and protect the personal security of citizens and that they would be capable of providing agreed manpower for the United Nations Peace Force, the Parties to the Treaty would complete the reduction of their force levels, disband systems of reserve forces, cause to be disbanded organizational arrangements comprising and supporting their national military establishment, and terminate the employment of civilian personnel associated with the foregoing.

2. Method of Reduction

a. The foregoing measures would be carried out in an agreed sequence through arrangements which would be set forth in an annex to the Treaty.

b. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures and would provide assurance that the only forces and organizational arrangements retained or subsequently established were those necessary for agreed forces required to maintain internal order and to protect the personal security of citizens and those for providing agreed manpower for the United Nations Peace Force.

3. Other Limitations

The Parties to the Treaty would halt all military conscription and would undertake to annul legislation concerning national military establishments or military service inconsistent with the foregoing measures.

C. *Nuclear Weapons*

1. Reduction of Nuclear Weapons

In light of the steps taken in Stages I and II to halt the production of fissionable material for use in nuclear weapons and to reduce nuclear weapons stockpiles, the Parties to the Treaty would eliminate all nuclear weapons remaining at their disposal, would cause to be dismantled or converted to peaceful use all facilities for production of such weapons, and would transfer all materials remaining at their disposal for use in such weapons to purposes other than use in such weapons.

2. Method of Reduction

a. The foregoing measures would be carried out in an agreed sequence and through arrangements which would be set forth in an annex to the Treaty.

b. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measures and would provide assurance that no nuclear weapons or materials for use in such weapons remained at the disposal of the Parties to the Treaty and that no such weapons or materials were produced at undeclared facilities.

D. *Military Bases and Facilities*

1. Reduction of Military Bases and Facilities

The Parties to the Treaty would dismantle or convert to peaceful uses the military bases and facilities remaining at their disposal, wherever they might be located, in an agreed sequence except for such agreed bases or facilities within the territory of the Parties to the Treaty for agreed forces required to maintain internal order and protect the personal security of citizens.

2. Method of Reduction

a. The list of military bases and facilities subject to the foregoing measure and the sequence and arrangements for dismantling or converting them to peaceful uses during Stage III would be set forth in an annex to the Treaty.

b. In accordance with arrangements which would be set forth in the annex on verification, the International Disarmament Organization would verify the foregoing measure at declared locations and provide assurance that there were no undeclared military bases and facilities.

E. *Research and Development of Military Significance*

1. Reporting Requirement

The Parties to the Treaty would undertake the following measures respecting research and development of military significance subsequent to Stage III:

a. The Parties to the Treaty would report to the International Disarmament Organization any basic scientific discovery and any technological invention having potential military significance.

b. The Control Council would establish such expert study groups as might be required to examine the potential military significance of such discoveries and inventions and, if necessary, to recommend appropriate measures for their control. In the light of such expert study, the Parties to the Treaty would, where necessary, establish agreed arrangements providing for verification by the International Disarmament Organization that such discoveries and inventions were not utilized for military purposes. Such arrangements would become an annex to the Treaty.

c. The Parties to the Treaty would agree to appropriate arrangements for protection of the ownership rights of all discoveries and inventions reported to the International Disarmament Organization in accordance with subparagraph a above.

2. International Cooperation

The Parties to the Treaty would agree to support full international cooperation in all fields of scientific research and development, and to engage in free exchange of scientific and technical information and free interchange of views among scientific and technical personnel.

F. *Reduction of the Risk of War*

1. Improved Measures

In the light of the Stage II examination by the International Commission on Reduction of the Risk of War, the Parties to the Treaty would undertake such extensions and improvements of existing arrangements and such additional arrangements as appeared desirable to promote confidence and reduce the risk of war. The Commission would remain in existence to examine extensions, improvements or additional measures which might be taken during and after Stage III.

2. Application of Measures to Continuing Forces

The Parties to the Treaty would apply to national forces required to maintain internal order and protect the personal security of citizens those applicable measures concerning the reduction of the risk of war that had been applied to national armed forces in Stages I and II.

G. *The International Disarmament Organization*

The International Disarmament Organization would be strengthened in the manner necessary to ensure its capacity (1) to verify the measures undertaken in Stage III through an extension of arrangements based upon the principles set forth in Section G, paragraph 3 of Stage I so that by the end of Stage III, when all disarmament measures had been completed, inspection would have been extended to all parts of the territory of

Parties to the Treaty; and (2) to provide continuing verification of disarmament after the completion of Stage III.

H. Measures to Strengthen Arrangements for Keeping the Peace

1. Peaceful Change and Settlement of Disputes

The Parties to the Treaty would undertake such additional steps and arrangements as were necessary to provide a basis for peaceful change in a disarmed world and to continue the just and peaceful settlement of all international disputes, whether legal or political in nature.

2. Rules of International Conduct

The Parties to the Treaty would continue the codification and progressive development of rules of international conduct related to disarmament in the manner provided in Stage II and by any other agreed procedure.

3. United Nations Peace Force

The Parties to the Treaty would progressively strengthen the United Nations Peace Force established in Stage II until it had sufficient armed forces and armaments so that no state could challenge it.

I. Completion of Stage III

1. At the end of the time period agreed for Stage III, the Control Council would review the situation with a view to determining whether all undertakings to be carried out in Stage III had been carried out.

2. In the event that one or more of the permanent members of the Control Council should declare that such undertakings had not been carried out, the agreed period of Stage III would, upon the request of such permanent member or members, be extended for a period or periods totalling no more than three months for the purpose of completing any uncompleted undertakings. If, upon the expiration of such period or periods, one or more of the permanent members of the Control Council should declare that such undertakings still had not been carried out, the question would be placed before a special session of the Security Council, which would determine whether Stage III had been completed.

3. After the completion of Stage III, the obligations undertaken in Stages I, II and III would continue.

GENERAL PROVISIONS APPLICABLE TO ALL STAGES

1. Subsequent Modifications or Amendments of the Treaty

The Parties to the Treaty would agree to specific procedures for considering amendments or modifications of the Treaty which were believed desirable by any Party to the Treaty in the light of experience in the early period of implementation of the Treaty. Such procedures would include provision for a conference on revision of the Treaty after a specified period of time.

2. *Interim Agreement*

The Parties to the Treaty would undertake such specific arrangements, including the establishment of a Preparatory Commission, as were necessary between the signing and entry into force of the Treaty to ensure the initiation of Stage I immediately upon the entry into force of the Treaty, and to provide an interim forum for the exchange of views and information on topics relating to the Treaty and to the achievement of a permanent state of general and complete disarmament in a peaceful world.

3. *Parties to the Treaty, Ratification, Accession, and Entry into Force of the Treaty*

a. The Treaty would be open to signature and ratification, or accession, by all members of the United Nations or its specialized agencies.

b. Any other state which desired to become a Party to the Treaty could accede to the Treaty with the approval of the Conference on recommendation of the Control Council.

c. The Treaty would come into force when it had been ratified by ——— states, including the United States of America, the Union of Soviet Socialist Republics, and an agreed number of the following states:

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d. In order to assure the achievement of the fundamental purpose of a permanent state of general and complete disarmament in a peaceful world, the Treaty would specify that the accession of certain militarily significant states would be essential for the continued effectiveness of the Treaty or for the coming into force of particular measures or stages.

e. The Parties to the Treaty would undertake to exert every effort to induce other states or authorities to accede to the Treaty.

f. The Treaty would be subject to ratification or acceptance in accordance with constitutional processes.

g. A Depository Government would be agreed upon which would have all of the duties normally incumbent upon a Depository. Alternatively, the United Nations would be the Depository.

4. *Finance*

a. In order to meet the financial obligations of the International Disarmament Organization, the Parties to the Treaty would bear the International Disarmament Organization's expenses as provided in the budget approved by the General Conference and in accordance with a scale of apportionment approved by the General Conference.

b. The General Conference would exercise borrowing powers on behalf of the International Disarmament Organization.

5. *Authentic Texts*

The text of the Treaty would consist of equally authentic versions in English, French, Russian, Chinese and Spanish.

TREATY ON GENERAL AND COMPLETE DISARMAMENT UNDER
STRICT INTERNATIONAL CONTROL¹

Draft submitted by the Union of Soviet Socialist Republics

PREAMBLE

The States of the world,

Acting in conformity with the aspirations and will of the peoples,

Convinced that war cannot and should not serve as a means of resolving international disputes, the more so in the present conditions of rapid development of means of mass annihilation—nuclear weapons and rocket devices for their delivery—but should be for ever banished from the life of human society,

Fulfilling the historic mission of ridding all the nations of the horrors of war,

Proceeding from the fact that general and complete disarmament under strict international control is a reliable and realistic path to the realization of mankind's age-old dream of eternal and inviolable peace on earth,

Desirous of ending the senseless squandering of human labour on the creation of means of destroying human life and material values,

Anxious to direct all resources at ensuring the continued growth of well-being and social and economic progress in all countries of the world,

Conscious of the need to base international relations on the principles of peace, good-neighbourliness, equality of states and peoples, non-interference, respect for the independence and sovereignty of all countries,

Reaffirming their dedication to the objects and principles of the United Nations Charter,

Have resolved to conclude the present Treaty and immediately to implement general and complete disarmament under strict and effective international control.

PART 1

GENERAL

ARTICLE 1

Disarmament Obligations

The States party to the present Treaty solemnly assume the following obligations:

1. To carry out, over a period of four years, general and complete disarmament, which shall include:

—dissolution of all armed forces and prohibition of their re-establishment in any form whatsoever;

—prohibition, destruction of all stockpiles, and cessation of production, of all types of mass-destruction weapons, including nuclear, thermonuclear, chemical, biological and radiological weapons;

¹ Reprinted from New Times, No. 13 (March 28, 1962).

—destruction and cessation of production of all means of target-delivery of mass destruction weapons;

—liquidation of all military bases on foreign territory, withdrawal and dissolution of all troops on foreign territory;

—abolition of all forms of compulsory military service;

—termination of military training and closure of all military training establishments;

—abolition of War Ministries, General Staffs and their local bodies, and of all other military and para-military institutions and organizations;

—elimination of all types of conventional armaments and materiel, cessation of their production, with the exception of a strictly limited quantity of agreed types of small arms for the police (militia) contingents remaining at the disposal of the States after general and complete disarmament;

—discontinuance of allocations for military purposes, whether out of the State budget or by organizations or private persons.

2. To retain after the full achievement of general and complete disarmament only strictly limited contingents of police (militia) equipped with small arms, and designed for the maintenance of internal order and the fulfilment of obligations to preserve international peace and security in conformity with the United Nations Charter and the provisions of Article 37 of the present Treaty.

3. To effect general and complete disarmament simultaneously, in three consecutive stages, as provided for in Parts 2, 3 and 4 of the present Treaty. Transition to the next stage shall be undertaken upon a decision of the International Disarmament Organization confirming that all disarmament measures of the preceding stage have been implemented and verified, and that additional verification measures considered necessary for the next stage have been prepared and can, when necessary, be put into operation.

4. To effect all general and complete disarmament measures in such a way that at no stage of disarmament will any State or group of States enjoy military advantages, and that the security of all the Treaty Nations is equally ensured.

ARTICLE 2

Control Obligations

1. The Treaty Nations solemnly undertake to carry out all disarmament measures, from beginning to end, under strict international control and to ensure implementation on their territories of all the control measures set forth in Parts 2, 3 and 4 of the present Treaty.

2. Each disarmament measure shall be attended by control measures necessary to verify its implementation.

3. An International Disarmament Organization composed of all the Treaty Nations shall be established within the framework of the United Nations to control disarmament. It shall begin to function as soon as disarmament measures are initiated. The structure and functions of the

International Disarmament Organization and its bodies are defined in Part 5 of the present Treaty.

4. In all Treaty Nations the International Disarmament Organization shall have its own personnel, recruited on an international basis and in such a way as to assure adequate representation of all three groups of states existing in the world.

This personnel shall exercise control, on a temporary or permanent basis, depending on the nature of the measure being carried out, over fulfilment by the States of their obligations to reduce or eliminate armaments and their production and to reduce or disband their armed forces.

5. Treaty Nations shall submit in good time to the International Disarmament Organization such data about their armed forces, armaments, military production and military allocations as are necessary for effectuating the measures of the given stage.

6. The International Disarmament Organization shall continue to exist after completion of the general and complete disarmament programme and exercise supervision of fulfilment by States of their obligations, in order to prevent the re-establishment of the military potential of States in any form whatsoever.

ARTICLE 3

Obligations to Maintain International Peace and Security

1. The Treaty Nations solemnly reaffirm their determination, in the course and after implementation of general and complete disarmament,

a) to base their relations on the principles of peaceful and amicable co-existence and co-operation;

b) not to resort to the threat or use of force in the settlement of any international dispute that may arise, but to employ for this purpose the procedures provided for by the United Nations Charter;

c) to strengthen the United Nations as the chief institution for the maintenance of peace and peaceful settlement of international disputes.

2. The Treaty Nations undertake to refrain from employing the police (militia) contingents remaining after general and complete disarmament for any purpose other than ensuring internal security and fulfilment of their obligations to maintain international peace and security in conformity with the U. N. Charter.

PART 2

FIRST STAGE OF GENERAL AND COMPLETE DISARMAMENT

ARTICLE 4

First-Stage Objectives

During the first stage of general and complete disarmament the Treaty Nations undertake simultaneously to eliminate all means of delivering nuclear weapons, all military bases on foreign territories, withdraw all

troops from these territories, reduce their armed forces, conventional weapons and their production, and military expenditure.

CHAPTER I

ELIMINATION OF THE MEANS OF DELIVERING NUCLEAR WEAPONS AND BASES ON FOREIGN TERRITORIES, WITHDRAWAL OF TROOPS FROM THESE TERRITORIES, CONTROL OVER THESE MEASURES

A. MEANS OF DELIVERY

ARTICLE 5

Elimination of Rockets Capable of Delivering Nuclear Weapons

1. Rockets of all calibres and ranges capable of delivering nuclear weapons, whether strategic, operational-tactical or tactical (with the exception of a strictly limited number of rockets converted to peaceful uses) and pilotless aircraft of all types, shall be eliminated from the armed forces and destroyed. All launching sites, silos and launching pads for rockets and pilotless aircraft, with the exception of sites retained for launching rockets for peaceful purposes under the provisions of Article 15 of the present Treaty, shall be demolished. All instruments for the equipment, launching and guidance of the aforesaid rockets and pilotless aircraft shall be destroyed. All underground facilities for storing these rockets, pilotless aircraft and auxiliary devices shall be destroyed.

2. The production of all types of rockets and pilotless aircraft, also of materials and instruments for their equipment, launching and guidance, referred to in Paragraph 1 of this Article, shall be totally discontinued. All industrial establishments or departments thereof engaged in the production of these items shall be dismantled; machines and equipment specially and exclusively designed for the production of these items shall be destroyed; the premises of these establishments, general-purpose machinery and other equipment shall be converted to peaceful purposes. All proving grounds for the testing of these rockets and pilotless aircraft shall be demolished.

3. International Disarmament Organization inspectors shall exercise control over the measures referred to in Paragraphs 1 and 2.

4. The production and testing of rockets for peaceful space exploration shall be permitted, on condition that plants manufacturing such rockets, and the rockets themselves, will be subject to supervision by International Disarmament Organization inspectors.

ARTICLE 6

Elimination of Military Aircraft Capable of Delivering Nuclear Weapons

1. All military aircraft capable of delivering nuclear weapons shall be eliminated from the armed forces and destroyed. Military airfields on which such aircraft are based, repair, maintenance and storage facilities at these airfields shall be rendered inoperative or converted to peaceful uses. Establishments for training crews of these aircraft shall be closed.

2. The production of all military aircraft referred to in Paragraph 1 of this Article shall be totally discontinued. Industrial establishments or departments thereof designed for the production of these military aircraft shall be dismantled or converted to the production of civilian aircraft or other peaceful items.

3. International Disarmament Organization inspectors shall exercise control over the measures referred to in Paragraphs 1 and 2.

ARTICLE 7

Elimination of All Surface Naval Craft Capable of Use As Carriers of Nuclear Weapons, and Submarines

1. All surface naval craft capable of being used as nuclear-weapon carriers, and submarines of every class and type, shall be eliminated from the armed forces and destroyed. Naval bases and other installations for servicing these ships and submarines shall be demolished or dismantled and converted to peaceful uses by the mercantile marine.

2. The building of ships and submarines referred to in Paragraph 1 of this Article shall be totally discontinued. Shipyards and other plants wholly or partly designed for the building of these ships and submarines shall be dismantled or converted to peaceful production.

3. International Disarmament Organization inspectors shall exercise control over the measures referred to in Paragraphs 1 and 2.

ARTICLE 8

Elimination of All Artillery Systems Capable of Delivering Nuclear Weapons

1. All artillery systems capable of delivering nuclear weapons shall be withdrawn from the armed forces and destroyed. All auxiliary apparatus and materiel designed for the operation of these artillery systems shall be destroyed. Surface storage and transport facilities shall be destroyed or converted to peaceful uses. All stocks of non-nuclear ammunition for these artillery systems, whether in the armed forces or in storage, shall be totally destroyed. Underground storage facilities for these artillery systems and for their non-nuclear ammunition shall be destroyed.

2. The production of artillery systems referred to in Paragraph 1 of this Article shall be totally discontinued. To that end, all industrial establishments or departments thereof engaged in the manufacture of these systems shall be closed and dismantled. All their specialized equipment and machinery shall be destroyed, the remainder converted to peaceful uses. Production of non-nuclear ammunition for these artillery systems shall be discontinued. Industrial establishments or departments thereof engaged in the manufacture of such ammunition shall be fully dismantled and their specialized equipment destroyed.

3. International Disarmament Organization inspectors shall exercise control over the measures referred to in Paragraphs 1 and 2.

B. MILITARY BASES AND TROOPS ON FOREIGN TERRITORIES

ARTICLE 9

Liquidation of Foreign Military Bases

1. Simultaneously with elimination of means of delivering nuclear weapons, under the provisions of Articles 5-8 of the present Treaty, Treaty Nations having army, air or naval bases on foreign territories shall liquidate all such bases, whether principal or stand-by, and storage bases of every designation. Their personnel shall be withdrawn to national territory. All installations and armaments that come under Articles 5-8 of the present Treaty shall be destroyed on the spot. All other armaments shall be destroyed on the spot, in accordance with Article 11 of the present Treaty, or evacuated to the territory of the State to which the base belonged. All installations of a military nature shall be demolished. Living quarters and auxiliary installations shall be transferred to the States on whose territories the bases were situated, to be used for peaceful purposes.

2. The measures indicated in Paragraph 1 of this Article shall fully apply to military bases utilized by foreign troops, even if legally they belong to the State on whose territory they are situated. These measures shall apply also to army, air and naval bases established under military treaties or agreements for use by other States or groups of States, regardless of whether or not foreign troops were stationed at these bases at the time the present Treaty was concluded.

All previous contractual obligations, decisions of military-bloc organs, and all rights and privileges pertaining to the establishment or use of military bases on foreign territory, shall be considered invalid and unrenewable. The granting of military bases to foreign troops and the conclusion for this purpose of bilateral or multilateral treaties or agreements shall hereafter be prohibited.

3. The Legislatures and Governments of Treaty Nations shall enact legislation and issue ordinances to ensure that no foreign military bases shall be established on their territories. International Disarmament Organization inspectors shall exercise control over the measures referred to in Paragraphs 1 and 2 of this Article.

ARTICLE 10

Withdrawal of Troops from Foreign Territories

1. Simultaneously with elimination of means of delivering nuclear weapons, under Articles 5-8 of the present Treaty, Treaty Nations having troops or military personnel of any designation in foreign territories shall withdraw all such troops and personnel from these territories. All armaments and installations of a military nature situated at points where foreign troops are stationed and coming under Articles 5-8 of the present Treaty, shall be destroyed on the spot. Other armaments shall be de-

stroyed on the spot in conformity with Article 11 of the present Treaty, or removed to the territory of the State withdrawing its troops. Living quarters and auxiliary installations occupied by these troops or personnel shall be transferred to the States on whose territories these troops were stationed, to be used for peaceful purposes.

2. The measures referred to in Paragraph 1 of this Article shall fully apply to foreign civilians employed by the armed forces, or in the production of armaments, or in any other activity serving military purposes on foreign territories.

These persons shall be recalled to the countries of their citizenship, and all previous contractual obligations, decisions of military-bloc organs, and all rights and privileges pertaining to their activity shall be considered invalid and unrenovable. The dispatch to foreign territory of troops or military personnel or of the civilians referred to above shall hereafter be prohibited.

3. International Disarmament Organization inspectors shall exercise control over the withdrawal of the troops, demolition of the installations and transfer of the premises referred to in Paragraph 1 of this Article. The International Disarmament Organization shall also have the right to control recall of the civilians referred to in Paragraph 2 of this Article. The legislative acts and ordinances referred to in Paragraph 3, Article 9 of the present Treaty shall contain provisions prohibiting citizens of Treaty Nations to serve in the armed forces, or undertake any other duties of a military nature, in foreign countries.

CHAPTER II

REDUCTION OF ARMED FORCES, CONVENTIONAL ARMAMENTS AND MILITARY EXPENDITURE. CONTROL OVER THESE MEASURES

ARTICLE 11

Reduction of Armed Forces and Conventional Armaments

1. In the first stage of general and complete disarmament the armed forces of the Treaty Nations shall be reduced to the following levels:

The United States of America—1,700,000 soldiers, officers and civilian personnel.

The Union of Soviet Socialist Republics—1,700,000 soldiers, officers and civilian personnel.

(Agreed armed forces levels for other Treaty Nations shall be included in this Article)

2. The reduction of armed forces shall be carried out primarily by demobilizing the personnel released by elimination of the means of delivering nuclear weapons, liquidation of foreign military bases and withdrawal of troops from foreign territories, under the provisions of Articles 5-10 of the present Treaty, and, principally, by complete dissolution of units and ships' crews and demobilization of their officers and other ranks.

3. All conventional armaments, military materiel and ammunition of units thus disbanded shall be destroyed, and transport and auxiliary facili-

ties destroyed or converted to peaceful uses. Conventional armaments and equipment for reserve forces shall likewise be destroyed.

All living quarters, storage and special premises occupied by the disbanded units, also all proving grounds, firing ranges and drill grounds, shall be transferred to the civilian authorities to be used for peaceful purposes.

4. International Disarmament Organization inspectors shall exercise control at places where military units are being disbanded and their conventional armaments and other materiel destroyed. They shall also control conversion to peaceful uses of transport and other non-combat facilities, premises, proving grounds, etc.

ARTICLE 12

Reduction of Conventional Armaments Production

1. Production of conventional armaments and ammunition not covered by Articles 5-8 of the present Treaty shall be curtailed in proportion to the reduction of armed forces, as provided for in Article 11 of the Treaty. Such curtailment shall be effected principally through liquidation of enterprises engaged exclusively in the manufacture of these armaments and ammunition. They shall be dismantled, their specialized machinery and equipment destroyed, and premises and general-purpose machines and equipment converted to peaceful uses.

2. International Disarmament Organization inspectors shall exercise control over the measures referred to in Paragraph 1 of this Article.

ARTICLE 13

Reduction of Military Expenditure

1. The Treaty Nations shall reduce their military budgets and military allocations in proportion to the destruction, and discontinuance of production, of the means of delivering nuclear weapons, liquidation of foreign military bases and withdrawal of troops from foreign territories; also in proportion to the reduction of their armed forces and conventional armaments and curtailment of their production, as provided for in Articles 5-12 of the present Treaty.

The funds released as a result of implementation of first-stage measures shall be used for peaceful purposes, including reduction of taxes on the population and subsidizing of the national economy. A definite share of the released funds shall be used for economic and technical assistance to underdeveloped countries. The size of this share shall be agreed upon by the Treaty Nations.

2. The International Disarmament Organization shall exercise control over the measures referred to in Paragraph 1 of this Article through its financial inspectors. The Treaty Nations shall be under obligation to allow them unhindered access to the records of their central financial institutions, including relevant decisions of their legislative and executive bodies, pertaining to reduction of budgetary allocations resulting from

elimination of the means of delivery of nuclear weapons, liquidation of foreign military bases and reduction of armed forces and conventional armaments.

CHAPTER III

MEASURES TO ENSURE THE SECURITY OF STATES

ARTICLE 14

Restrictions of Movements of Nuclear-Weapon Delivery Means

1. From the initiation of the first stage, and until final destruction of all means of delivery of nuclear weapons, as provided for in Articles 5-8 of the present Treaty, the orbiting or placing in outer space of special devices capable of carrying mass-destruction weapons, the dispatch beyond territorial waters of warships, and of military aircraft beyond national territories, capable of carrying mass-destruction weapons shall be prohibited.

2. The International Disarmament Organization shall control observance by the Treaty Nations of the provisions set out in Paragraph 1 of this Article. The Treaty Nations shall give advance notification to the International Disarmament Organization of all rockets launched for peaceful purposes, as provided for in Article 15 of the present Treaty, and of all movements of military aircraft within their national territories and of naval ships within their territorial waters.

ARTICLE 15

Control of Launchings of Rockets for Peaceful Purposes

1. Rockets and space devices shall be launched exclusively for peaceful purposes.

2. The International Disarmament Organization shall exercise control over fulfilment of Paragraph 1 of this Article by stationing at rocket launching sites used for peaceful purposes control teams which shall be present at launchings and thoroughly examine every rocket or satellite before launching.

ARTICLE 16

Prevention of the Further Spread of Nuclear Weapons

Treaty Nations possessing nuclear weapons shall undertake not to transfer control over such weapons, or the information necessary for their manufacture, to States not possessing them.

Treaty Nations not possessing nuclear weapons shall undertake not to produce or acquire them, and not to allow nuclear weapons of any other country on their territory.

ARTICLE 17

Prohibition of Nuclear-Weapon Tests

Nuclear-weapon tests of any description shall be prohibited. (If such a prohibition is not implemented under other international agreements at the time of the conclusion of the present Treaty.)

ARTICLE 18

*Measures to Strengthen U. N. Capacity to Maintain
International Peace and Security*

1. To enable the United Nations effectively to protect the States against a menace to peace or its violation, the Treaty Nations shall, in the period from the signing of the present Treaty and up to its entry into force, conclude agreements with the Security Council to make available to it armed forces, assistance and facilities, including rights of passage, as envisaged in Article 43 of the United Nations Charter.

2. The armed forces thus made available shall be part of the national armed forces of the respective states and shall be stationed within their territories. They shall be fully manned, equipped and prepared for combat action. These forces shall be under the command of the military authorities of the respective states, and shall be placed at the disposal of the Security Council when employed under Article 42 of the U. N. Charter.

CHAPTER IV

TIME SCHEDULE FOR FIRST-STAGE MEASURES. TRANSITION FROM FIRST
TO SECOND STAGE

ARTICLE 19

Time Schedule for First Stage

1. The first stage of general and complete disarmament shall begin within 6 months after entry into force of the present Treaty (in accordance with the provisions of Article 46). The International Disarmament Organization shall be established during this period.

2. The duration of the first stage of general and complete disarmament shall be 15 months.

ARTICLE 20

Transition from First to Second Stage

In the last three months of the first stage the International Disarmament Organization shall review fulfilment of the first-stage measures for general and complete disarmament for a report to the Treaty Nations and the United Nations Security Council and General Assembly.

PART 3

SECOND STAGE OF GENERAL AND COMPLETE DISARMAMENT

ARTICLE 21

Second-Stage Objectives

In the second stage of general and complete disarmament the Treaty Nations undertake totally to eliminate nuclear and other mass-destruction weapons and further to reduce their armed forces, stockpiles and production of conventional weapons, and military expenditure.

CHAPTER V

ELIMINATION OF NUCLEAR, CHEMICAL, BIOLOGICAL AND RADIOLOGICAL
WEAPONS. CONTROL OVER THESE MEASURES

ARTICLE 22

Elimination of Nuclear Weapons

1. a) Nuclear weapons of all kinds, types and calibres shall be withdrawn from the armed forces and destroyed. The fissionable materials extracted from such weapons, whether directly at the disposal of the troops or in storage, shall be appropriately processed to render them unfit for direct reconversion into weapons, and shall form a special fund of materials for peaceful uses, belonging to the State that previously owned the nuclear weapons. The non-nuclear elements of such weapons shall be totally destroyed.

All nuclear-weapon depots and storage facilities shall be liquidated.

b) All stockpiles of weapon-grade nuclear materials shall be transferred to the aforesaid fund after appropriate processing to render them unfit for direct reconversion into weapons.

c) International Disarmament Organization inspectors shall exercise control over the measures for eliminating nuclear weapons referred to in points (a) and (b) of this Paragraph.

2. a) Production of nuclear weapons and weapon-grade fissionable materials shall be totally discontinued. All industrial establishments, installations and laboratories specially designed for the production of nuclear weapons or their components shall be liquidated or converted to peace production. All departments, installations and laboratories for the manufacture of nuclear-weapon components at plants partially engaged in nuclear-weapon production shall be demolished or converted to peace production.

b) The measures for the cessation of the production of nuclear weapons and weapon-grade fissionable materials referred to in point (a) shall be controlled by International Disarmament Organization inspectors.

The International Disarmament Organization shall have the right to inspect enterprises producing nuclear raw materials, or manufacturing or using nuclear materials or nuclear energy.

Treaty Nations shall make available to the International Disarmament Organization documents relative to the production of nuclear raw materials, their processing and use for military and peaceful purposes.

3. Each Treaty Nation shall, in accordance with its constitutional processes, enact legislation providing for total prohibition of nuclear weapons and making any attempt by individuals or organizations to re-create them a criminal offence.

ARTICLE 23

Elimination of Chemical, Biological and Radiological Weapons

1. All types of chemical, biological and radiological weapons, whether at the disposal of the armed forces or in storage, shall be withdrawn

from national armaments and destroyed (neutralized). Simultaneously, all instruments and facilities for the combat employment of these weapons, specialized means for their transport and special installations and devices for their conservation and storing, shall be destroyed.

2. Production of all types of chemical, biological and radiological weapons and of all means and devices for their combat employment, transportation and storing, shall be totally discontinued. All industrial establishments, installations and laboratories fully or partially engaged in the production of these weapons shall be destroyed or converted to peace production.

3. The measures referred to in Paragraphs 1 and 2 shall be implemented under the control of International Disarmament Organization inspectors.

CHAPTER VI

FURTHER REDUCTION OF ARMED FORCES, CONVENTIONAL WEAPONS AND MILITARY EXPENDITURE. CONTROL OVER THESE MEASURES

ARTICLE 24

Further Reduction of Armed Forces and Conventional Weapons

1. In the second stage of general and complete disarmament, the armed forces of the Treaty Nations shall be further reduced to the following levels:

The United States of America—1,000,000 soldiers, officers and civilian personnel.

The Union of Soviet Socialist Republics—1,000,000 soldiers, officers and civilian personnel.

(Agreed armed-forces levels for the other Treaty Nations shall be included in this Article.)

The reduction of armed forces shall be carried out primarily by demobilizing personnel servicing the nuclear and other weapons eliminated in pursuance of Articles 22 and 23 of the present Treaty, and, principally, by complete dissolution of units and ships' crews and demobilization of their officers and other ranks.

2. All conventional armaments, military materiel and ammunition of units thus disbanded shall be destroyed, and transport and auxiliary facilities destroyed or converted to peaceful uses.

All living quarters, storage and special premises occupied by the disbanded units, also all proving grounds, firing ranges and drill grounds, shall be transferred to the civilian authorities to be used for peaceful purposes.

3. International Disarmament Organization inspectors shall, as in the first stage of general and complete disarmament, exercise control at places where military units are being disbanded and their conventional armaments and other materiel destroyed. They shall also control conversion to peaceful uses of transport and other non-combat facilities, premises, proving grounds, etc.

ARTICLE 25

Further Reduction of Conventional Armaments Production

1. Production of conventional armaments and ammunition shall be curtailed in proportion to the reduction of armed forces as provided for in Article 24 of the present Treaty. Such curtailment, as in the first stage of general and complete disarmament, shall be effected principally through liquidation of enterprises engaged exclusively in the manufacture of these armaments and ammunition. They shall be dismantled, their specialized machinery and equipment destroyed, and premises and general-purpose machinery and equipment converted to peaceful uses.

2. The measures referred to in Paragraph 1 of this Article shall be effected under control of International Disarmament Organization inspectors.

ARTICLE 26

Further Reduction of Military Expenditure

1. Treaty Nations shall further reduce their military budgets and military allocations in proportion to the destruction and discontinuance of production of nuclear, chemical, biological and radiological weapons; also in proportion to the further reduction of armed forces and conventional armaments and curtailment of their production, as provided for in Articles 22-25 of the present Treaty.

The funds released by second-stage measures shall be used for peaceful purposes, including further reduction of taxes on the population and subsidizing of the national economy. A definite share of the released funds shall be used for economic and technical assistance to underdeveloped countries. The size of this share shall be agreed upon by the Treaty Nations.

2. Control over the measures referred to in Paragraph 1 of this Article shall be exercised in accordance with the provisions of Paragraph 2, Article 13, of the present Treaty. International Disarmament Organization financial inspectors shall have unhindered access also to records pertaining to reduction of budgetary allocations resulting from elimination of nuclear, chemical, biological and radiological weapons.

CHAPTER VII

MEASURES TO ENSURE THE SECURITY OF STATES

ARTICLE 27

Continued Strengthening of United Nations Capacity to Maintain International Peace and Security

The Treaty Nations shall continue to implement the measures, referred to in Article 18 of the present Treaty, to make available to the Security Council armed forces for employment under Article 42 of the United Nations Charter.

CHAPTER VIII

TIME SCHEDULE FOR SECOND-STAGE MEASURES. TRANSITION FROM
SECOND TO THIRD STAGE

ARTICLE 28

Time Schedule for Second Stage

The duration of the second stage of general and complete disarmament shall be 15 months.

ARTICLE 29

Transition from Second to Third Stage

In the last three months of the second stage, the International Disarmament Organization shall review fulfilment of the second-stage measures.

The measures for transition from the second to the third stage of general and complete disarmament are similar to those prescribed for the first stage and set out in Article 20 of the present Treaty.

PART 4

THIRD STAGE OF GENERAL AND COMPLETE DISARMAMENT

ARTICLE 30

Third-Stage Objectives

In the third stage of general and complete disarmament, the Treaty Nations undertake totally to disband all their armed forces and thereby complete the liquidation of their military establishment.

CHAPTER IX

COMPLETION OF THE LIQUIDATION OF THE MILITARY ESTABLISHMENT
OF STATES. CONTROL OVER THESE MEASURES

ARTICLE 31

*Completion of the Liquidation of Armed Forces and
Conventional Armaments*

1. To complete the liquidation of armed forces, the Treaty Nations shall disband all the armed forces personnel retained by them after the first two stages of disarmament. The system of military reserves of every Treaty Nation shall be completely abolished.

2. The Treaty Nations shall destroy all armaments, combat equipment and ammunition retained by them after the implementation of the first two stages of the Treaty, whether in the armed forces or in storage. All military equipment which cannot be converted to peaceful uses shall be destroyed.

3. International Disarmament Organization inspectors shall exercise control over the disbanding of the armed forces and the destruction of armaments and combat equipment, and shall control the conversion of

transport and other non-combat equipment, premises, proving grounds, etc., to peaceful uses.

The International Disarmament Organization shall have access to the documents relating to the disbanding of all armed forces personnel of the Treaty Nations.

ARTICLE 32

Total Cessation of Military Production

1. All military industrial production shall be terminated, except for the manufacture of agreed types and quantities of small arms for the purposes stated in Paragraph 2 of Article 36 of the present Treaty. The industrial establishments subject to liquidation shall be dismantled, their specialized machinery and equipment destroyed, and the premises and general-purpose machinery and equipment converted to peaceful uses. All scientific research for military purposes at all scientific research institutions and designing offices shall be discontinued. All blueprints and other documents required for the manufacture of the weapons and military equipment subject to liquidation shall be destroyed.

All orders placed by military departments for the manufacture of armaments, military equipment, ammunition and other war materiel, whether with national or foreign government enterprises or private firms, shall be annulled.

2. International Disarmament Organization inspectors shall exercise control over the measures referred to in Paragraph 1 of this Article.

ARTICLE 33

Liquidation of Military Institutions

1. War Ministries, General Staffs and all other military and para-military organizations and institutions designed to organize the military effort of the Treaty Nations shall be abolished. The Treaty Nations shall:

- a) Disband all personnel of these institutions and organizations;
- b) Abolish all legislation, instructions and regulations governing the organization of the military effort and the status, structure and activity of such institutions and organizations;
- c) Destroy all documents relating to the planning of the mobilization and operational deployment of the armed forces in time of war.

2. The entire process of the abolition of military and para-military institutions and organizations shall be carried out under the control of International Disarmament Organization inspectors.

ARTICLE 34

Abolition of Conscription and Military Training

The Treaty Nations shall enact, in accordance with their respective constitutional processes, legislation prohibiting all military training, abol-

ishing conscription and all other forms of recruiting armed forces, and terminating all musters of reservists. Simultaneously, all institutions and organizations engaged in military training shall be closed down as provided for in Article 33 of the present Treaty. The liquidation of all military training institutions and organizations shall be carried out under the control of International Disarmament Organization inspectors.

ARTICLE 35

Prohibition of Military Expenditure

1. Allocation of funds for military purposes in any form, whether by government bodies or by private individuals or public organizations, shall be discontinued.

The funds released by the implementation of general and complete disarmament shall be used for peaceful purposes, notably for reducing or entirely abolishing taxes on the population and for subsidizing the national economy. A certain share of the funds thus released shall be channelled for economic and technical assistance to underdeveloped countries. The size of this share shall be subject to agreement between the Treaty Nations.

2. With a view to controlling compliance with the provisions of this Article, the International Disarmament Organization shall have the right of access to the legislative acts and budgetary documents of the Treaty Nations.

CHAPTER X

MEASURES TO SAFEGUARD THE SECURITY OF STATES AND TO MAINTAIN INTERNATIONAL PEACE

ARTICLE 36

Contingents of Police (Militia)

1. For purposes of maintaining internal order, including protection of frontiers and of the personal safety of citizens, and discharging their obligations under the United Nations Charter in maintaining international peace and security, the Treaty Nations shall be entitled to have, after the complete liquidation of armed forces, strictly limited contingents of police (militia) equipped with small arms.

The strength of these police (militia) contingents for each of the Treaty Nations shall be as follows:

.

2. The Treaty Nations shall be allowed to manufacture strictly limited quantities of small arms for the use of these police (militia) contingents. The lists of factories manufacturing these arms, and the quotas and types of them for each Treaty Nation, shall be laid down in a special agreement.

3. International Disarmament Organization inspectors shall control the Treaty Nations' compliance with their obligations in regard to limited production of the said small arms.

ARTICLE 37

Provision of Police (Militia) Formations to the Security Council

1. The Treaty Nations undertake to make available to the Security Council, on its call, formations of the police (militia) contingents which they retain, and also appropriate assistance and facilities, including rights of passage. These formations will be made available to the Security Council under the provisions of Article 43 of the United Nations Charter. In order to enable prompt military measures to be taken, the Treaty Nations shall hold immediately available the portion of the police (militia) contingents intended for combined international enforcement action. The strength of the formations which the Treaty Nations undertake to make available to the Security Council, and the areas of their location, shall be specified in agreements to be concluded by the Treaty Nations with the Security Council.

2. The command of the formations referred to in Paragraph 1 shall be made up of representatives of the three principal groups of States in the world, on a basis of equal representation. It shall decide all questions by agreement among the members representing the three groups of States.

ARTICLE 38

Control to Prevent the Re-establishment of Armed Forces

1. The police (militia) contingents retained by the Treaty Nations after the completion of general and complete disarmament shall stand under the control of the International Disarmament Organization, which shall verify the reports submitted by States concerning the areas of location of these contingents, their strength and armament in each of these areas, and all movements of substantial contingents of the police (militia).

2. For purposes of control to prevent the reestablishment of the armed forces and armaments liquidated as a result of general and complete disarmament, the International Disarmament Organization shall have the right of access at any time to any point on the territory of every Treaty Nation.

3. The International Disarmament Organization shall have the right to institute a system of aerial inspection and aerial photography over territories of the Treaty Nations.

CHAPTER XI

TIME SCHEDULE FOR THIRD-STAGE MEASURES

ARTICLE 39

The third stage of general and complete disarmament shall be completed in the space of one year. During the last three months of this stage the International Disarmament Organization shall review fulfilment of the third-stage measures of general and complete disarmament for purposes of

a report to the Treaty Nations and to the U.N. Security Council and General Assembly.

PART 5

STRUCTURE AND FUNCTIONS OF THE INTERNATIONAL DISARMAMENT ORGANIZATION

ARTICLE 40

Functions and Principal Bodies

The International Disarmament Organization to be established under Paragraph 3 of Article 2 of the present Treaty, hereinafter referred to as "The Organization," shall have a Conference composed of all the Treaty Nations, hereinafter referred to as "The Conference," and a Control Council, hereinafter referred to as "The Council."

The functions of the Organization shall be to supervise the fulfilment by States of their obligations under the present Treaty. All questions relating to the safeguarding of international peace and security which may arise in the implementation of the present Treaty, including the use of preventive and enforcement measures, shall be decided by the Security Council in accordance with its powers under the U. N. Charter.

ARTICLE 41

The Conference

1. The Conference shall consist of all the nations party to the Treaty. It shall hold regular sessions at least once a year, and also special sessions which the Council shall convene on its own decision or at the request of a majority of the Treaty Nations to consider matters relating to effective control over disarmament. The sessions shall be held at the Headquarters of the Organization, unless otherwise decided by the Conference.

2. Each Treaty Nation shall have one vote. Decisions on procedural matters shall be adopted by a simple majority, and on all other matters by a two-thirds majority. Pursuant to the provisions of the present Treaty, the Conference shall adopt its own rules of procedure.

3. The Conference may discuss any matters relating to measures of control over general and complete disarmament, and may make recommendations to the Treaty Nations or to the Council on any such matters or measures.

4. The Conference shall:

- a) Elect the non-permanent members of the Council;
- b) Examine the annual and any special reports from the Council;
- c) Approve the budget on the basis of Council recommendations;
- d) Approve reports to be submitted to the United Nations Security Council and General Assembly;
- e) Adopt amendments to the present Treaty in accordance with Article 47 of the Treaty;

- f) Take decisions on any matter specifically referred to it for this purpose by the Council;
- g) Propose matters for consideration by the Council and request from the Council reports on any matter relating to the Council's functions.

ARTICLE 42

The Control Council

1. The Council shall consist of:

- a) the five permanent members of the U.N. Security Council;
- b) . . . (number) other Treaty Nations, elected by the Conference for a term of two years.

The composition of the Council shall ensure proper representation of the three principal groups of States in the world.

2. The Council shall:

a) Practically direct the measures of control over general and complete disarmament, set up such bodies under the Headquarters of the Organization as it shall deem necessary for the performance of its functions, establish procedures for their operation, and draw up the necessary instructions and regulations in conformity with the present Treaty;

b) Submit to the Conference annual reports and such special reports as it shall deem necessary to prepare;

c) Keep in constant contact with the U.N. Security Council, as the principal organ for maintaining international peace and security, periodically inform it of the progress of general and complete disarmament, and immediately notify it of any non-compliance by Treaty Nations with their disarmament obligations under the present Treaty;

d) Review the fulfilment of the measures of each stage of general and complete disarmament in order to report on it to the Treaty Nations and to the U.N. Security Council and General Assembly;

e) Recruit the personnel of the Organization on an international basis, ensuring proper representation of the three principal groups of States existing in the world. The personnel of the Organization shall be recruited of persons recommended by the governments, both nationals and non-nationals of the respective countries;

f) Draw up and submit to the Conference the annual budget estimates of the Organization's expenses;

g) Draw up instructions to direct the work of the various control elements;

h) Promptly process reports received;

i) Require from States such information on their armed forces and armaments as is necessary to control fulfilment of the disarmament measures provided for by the present Treaty;

j) Perform such other functions as are laid down in the present Treaty.

3. Each member of the Council shall have one vote. Council decisions on procedural matters shall be adopted by a simple majority, and on all other matters by a two-thirds majority.

4. The Council shall be so organized as to be able to function continuously. The Council shall adopt its own rules of procedure and shall be authorized to establish such subsidiary bodies as it shall deem necessary for the performance of its functions.

ARTICLE 43

Privileges and Immunities

The Organization, its personnel and representatives of the Treaty Nations shall enjoy in the territory of each of the Treaty Nations such privileges and immunities as are necessary for independent and unhindered control over the fulfilment of the present Treaty.

ARTICLE 44

Finances

1. All expenses of the Organization shall be met out of funds contributed by the Treaty Nations. The budget of the Organization shall be drawn up by the Council and approved by the Conference in accordance with Paragraph 4 (c) of Article 41 and Paragraph 2 (f) of Article 42 of the present Treaty.

2. The contributions to be made by the Treaty Nations to cover the expenses of the Organization shall be apportioned as follows:

.

(agreed scale of contributions to be inserted).

ARTICLE 45

Preparatory Commission

Immediately upon the signing of the present Treaty the member States of the 18-Nation Disarmament Committee shall set up a Preparatory Commission which shall take practical measures to establish the International Disarmament Organization.

PART 6

FINAL CLAUSES

ARTICLE 46

Ratification and Entry Into Force

The present Treaty shall be ratified by the signatory States in accordance with their respective constitutional processes within six months of the date of signature and shall come into force upon the deposit of instruments of ratification with the United Nations Secretariat by all the permanent members of the Security Council and States associated with them in bilateral or multilateral military alliances, and by . . . (number) non-aligned States.

ARTICLE 47

Amendments

Any amendment to the text of the present Treaty shall come into force upon being adopted by a vote of two-thirds of the Conference of all the Treaty Nations and ratified in accordance with their respective constitutional processes by the States referred to in Article 46 of the present Treaty.

ARTICLE 48

Authentic Texts

The present Treaty, done in the Russian, English, French, Chinese and Spanish languages, each text being equally authentic, shall be deposited with the United Nations Secretariat, which shall transmit certified copies thereof to all the signatory States.

In witness whereof the undersigned, duly authorized, have signed the present Treaty.

Done at on

PEACEFUL USES OF OUTER SPACE

RESOLUTION ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY AT ITS 1085TH PLENARY MEETING, DECEMBER 20, 1961¹

A

The General Assembly,

Recognizing the common interest of mankind in furthering the peaceful uses of outer space and the urgent need to strengthen international co-operation in this important field,

Believing that the exploration and use of outer space should be only for the betterment of mankind and to the benefit of States irrespective of the stage of their economic or scientific development,

1. *Commends* to States for their guidance in the exploration and use of outer space the following principles:

(a) International law, including the Charter of the United Nations, applies to outer space and celestial bodies;

(b) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation;

2. *Invites* the Committee on the Peaceful Uses of Outer Space to study and report on the legal problems which may arise from the exploration and use of outer space.

B

The General Assembly,

Believing that the United Nations should provide a focal point for international co-operation in the peaceful exploration and use of outer space,

¹ Res. 1721 (XVI), U.N. General Assembly, 16th Sess., Official Records, Supp. No. 17 (Doc. A/5100), pp. 6-7; reprinted in 46 Dept. of State Bulletin 185-186 (1962).

1. *Calls upon* States launching objects into orbit or beyond to furnish information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary-General, for the registration of launchings;

2. *Requests* the Secretary-General to maintain a public registry of the information furnished in accordance with paragraph 1 above;

3. *Requests* the Committee on the Peaceful Uses of Outer Space, in co-operation with the Secretary-General and making full use of the functions and resources of the Secretariat:

(a) To maintain close contact with governmental and non-governmental organizations concerned with outer space matters;

(b) To provide for the exchange of such information relating to outer space activities as Governments may supply on a voluntary basis, supplementing but not duplicating existing technical and scientific exchanges;

(c) To assist in the study of measures for the promotion of international co-operation in outer space activities;

4. *Further requests* the Committee on the Peaceful Uses of Outer Space to report to the General Assembly on the arrangements undertaken for the performance of those functions and on such developments relating to the peaceful uses of outer space as it considers significant.

C

The General Assembly,

Noting with gratification the marked progress for meteorological science and technology opened up by the advances in outer space,

Convinced of the world-wide benefits to be derived from international co-operation in weather research and analysis,

1. *Recommends* to all Member States and to the World Meteorological Organization and other appropriate specialized agencies the early and comprehensive study, in the light of developments in outer space, of measures:

(a) To advance the state of atmospheric science and technology so as to provide greater knowledge of basic physical forces affecting climate and the possibility of large-scale weather modification;

(b) To develop existing weather forecasting capabilities and to help Member States make effective use of such capabilities through regional meteorological centres;

2. *Requests* the World Meteorological Organization, consulting as appropriate with the United Nations Educational, Scientific and Cultural Organization and other specialized agencies and governmental and non-governmental organizations, such as the International Council of Scientific Unions, to submit a report to the Governments of its Member States and to the Economic and Social Council at its thirty-fourth session regarding appropriate organizational and financial arrangements to achieve those ends, with a view to their further consideration by the General Assembly at its seventeenth session;

3. *Requests* the Committee on the Peaceful Uses of Outer Space, as it deems appropriate, to review that report and submit its comments and

recommendations to the Economic and Social Council and to the General Assembly.

D

The General Assembly,

Believing that communication by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis,

Convinced of the need to prepare the way for the establishment of effective operational satellite communication,

1. *Notes with satisfaction* that the International Telecommunication Union plans to call a special conference in 1963 to make allocations of radio frequency bands for outer space activities;

2. *Recommends* that the International Telecommunication Union consider at that conference those aspects of space communication in which international co-operation will be required;

3. *Notes* the potential importance of communication satellites for use by the United Nations and its principal organs and specialized agencies for both operational and informational requirements;

4. *Invites* the Special Fund and the Expanded Programme of Technical Assistance, in consultation with the International Telecommunication Union, to give sympathetic consideration to requests from Member States for technical and other assistance for the survey of their communication needs and for the development of their domestic communication facilities, so that they may make effective use of space communication;

5. *Requests* the International Telecommunication Union, consulting as appropriate with Member States, the United Nations Educational, Scientific and Cultural Organization and other specialized agencies and governmental and non-governmental organizations, such as the Committee on Space Research of the International Council of Scientific Unions, to submit a report on the implementation of these proposals to the Economic and Social Council at its thirty-fourth session and to the General Assembly at its seventeenth session;

6. *Requests* the Committee on the Peaceful Uses of Outer Space, as it deems appropriate, to review that report and submit its comments and recommendations to the Economic and Social Council and to the General Assembly.

E

The General Assembly,

Recalling its resolution 1472 (XIV) of 12 December 1959,²

Noting that the terms of office of the members of the Committee on the Peaceful Uses of Outer Space expire at the end of 1961,

Noting the report of the Committee on the Peaceful Uses of Outer Space,³

² General Assembly, 14th Sess., Official Records, Supp. No. 16 (Doc. A/4354) (1959); 42 Department of State Bulletin 68 (1960).

³ General Assembly, 16th Sess., Official Records, Annexes, Agenda Item 21, Doc. A/4987.

1. *Decides* to continue the membership of the Committee on the Peaceful Uses of Outer Space as set forth in General Assembly resolution 1472 (XIV) and to add Chad, Mongolia, Morocco and Sierra Leone to its membership in recognition of the increased membership of the United Nations since the Committee was established;

2. *Requests* the Committee on the Peaceful Uses of Outer Space to meet not later than 31 March 1962 to carry out its mandate as contained in General Assembly resolution 1472 (XIV), to review the activities provided for in resolutions A, B, C and D above and to make such reports as it may consider appropriate.



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* Deceased September 14, 1962.

"PEACEFUL CO-EXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW

BY EDWARD MCWHINNEY

Of the Faculty of Law, University of Toronto

In his address to the 22nd Congress of the Communist Party on October 17, 1961, Premier Khrushchev assured his listeners that the principles of peaceful co-existence, whose source he attributed to Lenin, had "always been the central feature of Soviet foreign policy"; and he coupled these remarks with a call for "more extensive business relations with all countries," among which he specifically listed Britain, France, Italy, West Germany and other West European countries.¹ "Peaceful co-existence" and "peaceful economic competition," as identified by Mr. Khrushchev,² are thus firmly linked as the two major elements of the current Soviet diplomatic and political offensive in the West. Apart from its current significance in what might be called the polemics of East-West relations, the subject of peaceful co-existence has been on the agenda, and has been extensively debated, at the three most recent conferences of the International Law Association, in 1956, 1958, and 1960, and it was listed again for the meeting in Brussels in August, 1962, when the question of codification of the principles of peaceful co-existence was discussed.³ The provisional agenda of the General Assembly of the United Nations for its Seventeenth Session (1962-1963) includes the question of "legal aspects of friendly relations and co-operation among states."⁴

I. THE PEDIGREE OF PEACEFUL CO-EXISTENCE. HISTORICAL ANTECEDENTS (SOVIET STYLE)

Not the least intriguing feature of the current Soviet campaign is a resolute attempt by certain of the Soviet theorists to appropriate the term "peaceful co-existence" itself and the central conception of a legal condition of co-operation between capitalist and Communist societies which, according to these same Soviet jurists, it implies as a specifically Soviet invention. The most ingenious such attempt, perhaps, is Premier Khrushchev's linking, in his 22nd Party Congress address, of the concept of peaceful co-existence to Lenin's choice of the hammer and sickle as the coat

¹ Khrushchev, *An Account to the Party and the People*. Report of the C.C.C.P.S.U. to the 22nd Congress of the Party, Oct. 17, 1961, pp. 34-35, 45.

² *Ibid.* at 48.

³ International Law Association, Report of the Forty-Ninth Conference, 1960, at 362-363 (1961).

⁴ See *Future Work in the Field of Codification and Progressive Development of International Law*, Report of the Sixth Committee, U.N. Doc. A/5036, Dec. 15, 1961.

of arms of the Soviet Union, a ploy that is recorded as having been greeted with "stormy applause" by his audience.⁵

With somewhat more technical sophistication, Soviet jurists have attempted to establish, *ex post facto*, an historical line of development for the concept of peaceful co-existence stemming from the earliest roots of Soviet legal theory. The most skillful and sustained Soviet venture in the legal theory of international law in the postwar years is possibly Dr. Krylov's lectures at the Hague Academy in 1947,⁶ though Dr. Krylov's elaboration on the theme of peaceful co-existence may be somewhat embarrassing for Soviet jurists to invoke today, insofar as it rests in part on some erstwhile Party faithfuls who are now fallen idols—at the head of this list, J. V. Stalin, and also publicly identified members of the "anti-Party group" like V. M. Molotov.⁷ In his Hague lectures Dr. Krylov gave first credit, in point of time, to Lenin; and he followed this up by citing an interview given in 1927 by Stalin to an unnamed American workers' delegation, a further interview in 1932 by Stalin with another American, identified only as Campbell, plus assorted addresses in 1925, 1927, 1930, 1934, and 1939 by Stalin to the Communist Party Congress.⁸ The most celebrated example relied on by Dr. Krylov is a reputed conversation between Stalin and the then younger Republican Party leader, Harold Stassen, on April 9, 1947, in which Stalin is represented as saying that it is not indispensable that nations should have the same economic and state systems to be able to co-operate, and that it is necessary to respect the systems chosen by each nation if one wants co-operation to be possible.⁹

Most recently, another well-known Soviet jurist, Professor Tunkin, in his own Hague Academy lectures in 1958, took as his main text the thesis that four decades of co-existence have shown that "peaceful co-existence, and therefore also general international law, are possible."¹⁰ Professor Tunkin went on specifically and in terms to repudiate a number of Soviet legal writers, and especially Professor Korovin, whose writings both in the period 1924-1926 and also after the second World War he proceeded to castigate as having erroneously given rise to interpretations in Western legal circles that Soviet international lawyers do not recognize a general international law.¹¹

It is perhaps because of the suspicions aroused by these sometimes not overly subtle Soviet attempts to appropriate to the Soviet Union itself and its own purposes a specifically juridical concept of co-existence, that many delegates to the 1958 meeting of the International Law Association in New York, while accepting a factual, existential condition of co-existence between the main national power groupings in the world community, pre-

⁵ Khrushchev, *op. cit.* note 1 above, p. 34.

⁶ Krylov, "Les notions principales du droit des gens (La doctrine soviétique du droit international)," 70 *Hague Academy Recueil des Cours* (hereafter cited as "*Hague Recueil*") 407 (1947).

⁷ *Ibid.* at 423 *et seq.*, 426-427.

⁸ *Ibid.* at 423-425.

⁹ *Ibid.* at 425-426.

¹⁰ Tunkin, "Co-existence and International Law," 95 *Hague Recueil* 1, 59 (1958).

¹¹ *Ibid.* at 59-60.

ferred to characterize the juridical consequences of that condition under some less colorable term;¹² and moreover, as Professor John Hazard pointed out, the connotation of "peaceful co-existence," in English anyway, is a somewhat negative one suggesting a "condition in which essentially hostile forces are required by circumstances to refrain from fighting."¹³ It is for this reason that Professor Hazard and other North American delegates preferred a term signifying "active participation in efforts to create conditions of lasting peace—not just an armed truce."¹⁴ The General Assembly of the United Nations, as already noted, has preferred the formula "friendly relations and co-operation among states" for the listings in the provisional agenda for its Seventeenth Session,¹⁵ rather than the term "peaceful co-existence" still retained by the International Law Association.

II. PRIMARY AND SECONDARY PRINCIPLES OF PEACEFUL CO-EXISTENCE

The Soviet detailed elaboration of the theme of peaceful co-existence rests on a group of four, or, depending on how they are counted, five, cardinal or primary principles; plus a special set of institutionally-based attitudes as to the sources of international law and the degree of priority and authority to be given to the various agencies or modes of creating or modifying norms of international law.

The five primary principles of peaceful co-existence, as set out in a current leading Soviet textbook on international law¹⁶ and as expressly accepted by Professor Tunkin in his 1958 Hague lectures¹⁷ and by Soviet writers in general,¹⁸ are indicated as having first been verbalized in that precise form in the so-called *Pancha Shila* or "Agreement between the People's Republic of China and India on Trade and Intercourse between the Tibetan Region of China and India," of April 29, 1954, and a Joint Statement by Prime Minister Chou En Lai and Prime Minister Nehru on June 28, 1954.¹⁹

¹² International Law Association, Report of the Forty-Eighth Conference, 1958 at 417 *et seq.* (1959).

¹³ *Ibid.* at 427.

¹⁴ *Ibid.* Note the wry criticisms by one American delegate to the 1958 I.L.A. reunion, Mr. Moses, as to the exclusively Yugoslav sources relied upon by the Conference Rapporteur on the subject, Professor Radojković, himself a Yugoslav, "as if the idea of a world, changed and crying for collaboration, was developed and recognised only in Yugoslavia." *Ibid.* at 433. And compare the comments by Professor Radojković on the semantic problem, in "La coexistence," 7 *Jugoslovenska Revija za Međunarodno Pravo* 205 (1960); and, generally, see also Bartoš, "Quelques Observations sur la Coexistence Pacifique Active," *ibid.* at 216.

¹⁵ Note 4 above. See also 1962 Proceedings, American Society of International Law at 96, 102, 111.

¹⁶ Kozhevnikov (ed.), *International Law. A Textbook for Use in Law Schools* 16.

¹⁷ 95 *Hague Recueil* 1, 68 (1958); and see also Tunkin, "Forty Years of Coexistence and International Law," 1958 *Sovetskii Ezhegodnik Mezhdunarodnogo Prava* (hereafter cited as "Sovetskii Ezhegodnik") 15.

¹⁸ See, for example, most recently, Durdenevsky, "Neutrality and Atomic Weapons (In the Light of the Principle of Peaceful Co-existence)," 1960 *ibid.* 105; Korovin, "The United Nations Charter and Peaceful Coexistence," *ibid.* 15.

¹⁹ Kozhevnikov (ed.), *op. cit.* note 16 above, p. 17.

The official Soviet textbook on *International Law*, edited by Professor Kozhevnikov, lists these primary principles as follows:

mutual respect for territorial integrity and sovereignty; non-aggression; non-interference in internal affairs; equality and mutual advantage.²⁰

It will be recognized at the outset that this is a catalogue of abstract general principles with which Western jurists can have no quarrel, as such, for indeed their ultimate sources, as verbal formulations, are to be found in the mainsprings of Western conceptions of international law. The basic problem in connection with the current pronouncement is the failure of the Soviet jurists to elaborate and develop and explain these primary principles in terms of concrete secondary principles immediately utilizable in terms of current problem-solving. For the primary principles are formulated at a very high level of generality and abstraction, and they really only take on meaning when they are further defined in terms of secondary principles; and there is a risk that the Soviet jurists will seek to give them their own unique detailed references which we cannot accept. We need to know what Soviet decision-makers mean by them in concrete cases before we can be sure that any agreement or accord between East and West based on "peaceful co-existence" will be a substantial and not merely a verbal one. Professor Tunkin shows himself to be aware of this problem when, in his Hague lectures, he admits the need to define "aggression";²¹ but the semantic confusion and the dangers in particular of a "double standard," with Soviet jurists reserving to themselves at any time the right to inject their own special content into the principles, are amply indicated in the works of second-string Soviet writers with their express exception of what they characterize as "colonial" questions from the ambit of the principle of non-intervention,²² and with the veiled threats even to what the Soviet themselves recognize as permanently neutral states, if these latter should include atomic weapons among their weapons of self-defense.²³

It is true that the normative ambiguity of "standards"-type provisions in legal codes and constitutions has always been recognized by Western

²⁰ *Ibid.* at 16.

²¹ 95 Hague Recueil 1, 78 (1958).

²² See, for example, the remarks of Mr. Touzmoukhamedov (Soviet Union) at the 1960 I.L.A. reunion. International Law Association, Report of the Forty-Ninth Conference, 1960, at 335-336 (1961).

²³ See, for example, Durdenevsky, "Neutrality and Atomic Weapons (In the light of the Principle of Peaceful Co-existence)," 1960 *Sovetskii Ezhegodnik* 105; Galina, "Neutrality in Contemporary International Law," 1958 *ibid.* 200. Galina's comment that neutrality presupposes an "active" attitude, and not "self-withdrawal or isolation in resolving the burning questions of the day—combating the threat of war, all aspects of colonialism," recalls the dissenting opinion of Judge Krylov of the Soviet Union in the Advisory Opinion of the International Court of Justice of May 28, 1948, on Conditions of Admission of a State to Membership in the United Nations. Judge Krylov there contended that Portugal and Eire were not "peace-loving" in terms of the United Nations Charter because they had been neutral in World War II, the criterion "peace-loving" having, in his view, an "active sense." [1948] I.C.J. Rep. 57; Sohn, Cases and Other Materials on World Law 178 *et seq.* (1950).

jurists, and we have further recognized this factor in our own domestic, municipal law as permitting and facilitating the continuing adjustment of the positive law to changed social conditions, insofar as the very generality of drafting veils the necessity and also the fact itself of compromise and reconciliation among competing community interests and demands. Professor Tunkin himself, quoting Western writing in this area, points out that in the domestic law of a given state there may often be much disagreement on ideological questions, and he goes on from this to suggest:

So States may profoundly disagree as to the nature of norms of international law, but this disagreement does not create an insurmountable obstacle to reaching an agreement relating to accepting specific rules as norms of international law.²⁴

III. INSTITUTIONALLY-BASED SOVIET ATTITUDES ON PEACEFUL CO-EXISTENCE

The current Soviet campaign in behalf of peaceful co-existence is accompanied by a special institutional emphasis and bias as to the location of norm-making power and competence for international law, and also as to the degree of deference that should be accorded to the various approved sources of international law. The most striking feature of Soviet thinking in this regard—in the textbooks, in the Hague lectures of both Dr. Krylov and Dr. Tunkin, and in the learned periodicals generally—is the top priority that is accorded to treaties, and especially bilateral treaties, as affirmative sources of international law rules.²⁵ Correspondingly, there is a conscious depreciation of the rôle of historical practice between states (custom) as a source of international law; and a very drastic attempt to limit, if not to reject altogether, the rôle of international agencies—whether the United Nations General Assembly, the Security Council, or even the World Court—in the fashioning or creation of new international law rules and principles.²⁶

Thus, as to custom, Professor Tunkin would assert that it is necessary to establish that a given practice is “general” in the sense of being recognized by all states as international law before it can be recognized as a norm of general international law, and he cites the example of the International Law Commission when discussing diplomatic privileges and immunities,²⁷ indicating clearly that, in Soviet thinking, custom will not be allowed to perform a significant rôle as a source of international law.²⁸ Professor

²⁴ 95 Hague Recueil 1, 59 (1958).

²⁵ See generally Kozhevnikov (ed.), *op. cit.* note 16 above; Krylov, *loc. cit.* note 6 above; Tunkin, *loc. cit.* note 10 above.

²⁶ *Ibid.*

²⁷ 95 Hague Recueil 1, 19–20 (1958); also 1958 Sovetskii Ezhegodnik 15.

²⁸ “The doctrine according to which customary norms recognised as such by a considerable number of States are binding upon all the States implies a considerable danger in the epoch of coexistence. This point should be specifically emphasized in view of the fact that this doctrine is widely accepted by western writers, and some judgments of the International Court of Justice may be interpreted in favour of this doctrine.” 95 Hague Recueil 1, 20 (1958).

Tunkin would, indeed, regard treaties and custom as together exhausting the enumeration of the forms in which the process of molding the principles and rules of general international law culminates.²⁹ All other methods he would view as purely subsidiary and as not leading directly to the appearance of rules of general international law.³⁰ Even as to the general principles enumerated in Article 38 of the Statute of the World Court, he would contend that these become international law only through international agreement (treaty) or by way of custom, and for this reason cannot be regarded as independent sources in themselves of international law.³¹

In regard to treaties, it must be noted that Soviet theory has a ready-made, built-in quality of ambivalence. In giving top priority to treaties as sources of international law,³² Soviet jurists also postulate a concomitant principle, that of the strict observance of treaties—*Pacta sunt servanda* in an absolute form.³³ Thus Soviet writers uniformly tend to reject the more *avant-garde* Western theories as to the necessity for the novation or dissolution of treaties according to changed historical and political situations; and in particular they would reject the *clausula rebus sic stantibus* doctrine.³⁴ Yet the Soviet jurists would retain for themselves, so to speak, a unilateral right of repudiation or denunciation of those treaties that they

²⁹ 1958 Sovetskii Ezhegodnik 15.

³⁰ 95 Hague Recueil 1, 26 *et seq.* (1958).

³¹ *Ibid.* at 28–30.

³² "The concept that international custom constitutes a primary and the most important means of creating norms of international law was certainly correct for the 19th century, but . . . it no longer reflects the present day situation in international law. In contemporary conditions the principal means of creating norms of international law is a treaty. This is the point of view held by the great majority, if not by all, of the Soviet authors who have treated this subject." Tunkin, *loc. cit.*, 95 Hague Recueil 1, 23 (1958). And see also Tunkin, 1958 Sovetskii Ezhegodnik 15; Kozhevnikov (ed.), International Law, at 12 and 247 *et seq.*; Krylov, 70 Hague Recueil 407, 486 *et seq.* (1947); Lukashuk, "The Soviet Union and International Treaties," 1959 Sovetskii Ezhegodnik 16. For an earlier formulation of Professor Tunkin's proposition, above, see the remarks of Soviet Ambassador Troyanovsky, in his address in 1934 to the American Society of International Law at its annual dinner, in 1934 Proceedings of the Society 196–197, quoted in Brown, "The Russian Soviet Union and the Law of Nations," 28 A.J.I.L. 783 (1934).

³³ Kozhevnikov (ed.), International Law at 248–249; Lukashuk, 1959 Sovetskii Ezhegodnik 16; Talalayev, "The Termination of International Treaties in the History and Practice of the Soviet State," *ibid.* 144; Shurshalov, "Juridical Content of the Principle *Pacta Sunt Servanda* and Its Realization in International Relations," 1958 *ibid.* 150. For an earlier formulation see Korovin, "The Second World War and International Law," 40 A.J.I.L. 742, 751–752 (1946).

³⁴ Professor Schlesinger in particular suggests that the explanation for the strong Soviet rejection of the *clausula rebus sic stantibus* doctrine may lie in its repeated invocation by the Nazi-Fascist states as the doctrinal basis for repudiation of their international obligations; for example, the repudiation by Nazi Germany of the Treaty of Versailles, 1919. Schlesinger, Soviet Legal Theory 275 *et seq.* (2nd ed., 1951). And see also Korovin, *loc. cit.*, 40 A.J.I.L. 742 at 752 (1946). Professor Kozhevnikov scores the use of the *clausula* doctrine "by capitalist States, in the sense that any change in the international situation gives the right to annul a treaty. Such an interpretation has been used by aggressor countries to justify expansionist foreign policies." Kozhevnikov (ed.), International Law 281.

themselves do not particularly like.³⁵ In this sense, Dr. Krylov would expressly except from the operation of the *pacta sunt servanda* principle what he chooses to call "unequal" treaties: this is a somewhat open-ended concept as developed by Dr. Krylov, for it is defined by way only of example as including treaties between "imperialist Powers" and Turkey, Iran, China, plus the régime of the Capitulations.³⁶ As to the question of the continued binding force, after the October Revolution of 1917, of the treaties entered into by Imperial Russia, Dr. Krylov retreats into the convenient cloudiness of Lenin's aphorism that those treaties that were treaties of "good neighborliness" would remain in force.³⁷ The long-range needs of Soviet foreign policy, as Soviet policy-makers see it, seem to dictate that the Soviet Union hold firm to the principle of the binding force of treaties and that it reject the more *avant-garde* Western-derived notions like *clausula rebus sic stantibus*, which stress flexibility rather than rigidity in legal relations between states. Yet at the same time the practical needs of Soviet policy-makers to be able, if need be, to pick and choose among their own old treaty obligations, and in particular to be able to repudiate onerous treaty-imposed financial obligations from the past, explain the rather ingenious attempts, of which Professor Korovin's earlier writings are simply the most skillful, to write off the Tsarist debts, for example, in terms of

³⁵ Among the second-string Soviet jurists, Shurshalov supports the repudiation of treaty obligations in the case "when a revolution or a national-liberation struggle gives rise to a new social structure and a new state authority, which is entitled to denounce the humiliating and unacceptable treaties of the deposed government." 1958 *Sovetskii Ezhegodnik* 150. Talalayev cites, as examples of treaties which may be unilaterally dissolved, "invalid international treaties" which he defines as "aggressive, colonialist, coercive, unequal"; and "treaties contradicting the new social system of a state which has emerged as a result of social revolution." 1959 *ibid.* 144. Zakharova claims as "indisputable" the right of a state to repudiate, "following a social revolution, those treaties which do not correspond to the basic principles of the new system of property ownership and the new economy of the country"; also those treaties "concluded in the special interests of the overthrown classes or with the aim of suppressing the class which has come to power." Zakharova, "States as Subjects of International Law and Social Revolution (Some Problems of Succession)," 1960 *ibid.* 157.

³⁶ 70 *Hague Recueil* 407, at 433-434 (1947). Professor Korovin, writing in 1928, admitted that this would be, in itself, an application by the Soviet Union of the *clausula rebus sic stantibus* doctrine, though seeking partly to justify the Soviet Union's selective invocation of the doctrine as an "extension of the principle . . . at the same time limiting its field of application by a single circumstance—the social revolution." Korovin, "Soviet Treaties and International Law," 22 *A.J.I.L.* 753, 763 (1928); and see also *Harvard Research in International Law, Law of Treaties*, 29 *A.J.I.L. Supp.* at 1053 (1935).

Lukashuk defines "unequal" treaties as "treaties which do not correspond to the real will of the signatories." 1959 *Sovetskii Ezhegodnik* 16. Professor Kozhevnikov provides a further definition by citing King Farouk's Government's decision of Oct. 15, 1951, to repudiate the Anglo-Egyptian Treaty of 1936, as an example of a valid annulment of an "unequal" treaty in that the annulment "corresponded to the principles of democracy supported by all progressive mankind, since these treaties violated the elementary sovereign rights of the Egyptian people." Kozhevnikov (ed.), *International Law* at 280-281.

³⁷ 70 *Hague Recueil* 407, 437 (1947).

creating a special category (*res inter alios gesta*), without officially adverting to *clausula rebus sic stantibus* and related doctrines.³⁸

IV. SOVIET LEGAL THEORY AND ITS CRITIQUE OF WESTERN LEGAL THEORY

The main lines of Soviet criticisms of Western legal theory in general are sufficiently well known for us not to be surprised at the trend and emphasis of their criticisms of Western thinking in the field of international law theory. Soviet jurists have little more patience in international law than they have in the field of purely internal, municipal law, for Kelsenism and the "Pure Theory" of law, or for the more traditionally positivist approaches to law with their emphasis on formal logic.³⁹ For Soviet writers, these particular Western schools represent the decline of bourgeois legal science into pessimistic abstraction;⁴⁰ and the Soviet writers do not always seem to be fully aware of the extent to which those same theories may be out of touch with dominant thinking in Western society today.⁴¹

More interesting, perhaps, are Soviet criticisms of contemporary sociological and realist trends in American thinking on international law. As the main exponent of the sociological approach, the Soviet jurists single out Professor Hans Morgenthau, whose teachings are identified with a "strident campaign against 'legalism,' 'moralism,' and 'pactomania,' and even against the study and teaching of international law itself," and as calling for research, not into the norms of international law, but into the factors

³⁸ Compare Schlesinger, *op. cit.* note 34 above, at 275; though see also Korovin, 22 A.J.I.L. 753, 763 (1928), note 36 above. Cf. Harvard Research in International Law, Law of Treaties, 29 A.J.I.L. Supp 1118-1119 (1935); for a recent discussion of the Soviet attitude, see Shurshalov, *Osnovaniia Deistvitelnosti Mezhdunarodnykh Dogovorov* 94-129 (1957).

³⁹ For a more general Soviet critique of Western thinking, see especially Tunkin, 95 Hague Recueil 1, at 36-44 (1958); Levin, "The Main Trends of Contemporary Bourgeois Theories of International Law," 1959 Sovetskii Ezhegodnik 88; Zakharova and Bagrova, "The 'Balance of Power' Theory," *ibid.* 272.

⁴⁰ See, for example, Tunkin, 95 Hague Recueil 1, 75 (1958); *idem*, 1958 Sovetskii Ezhegodnik 15; Levin, 1959 *ibid.* 88. For analogous Soviet criticisms of Kelsenism as a philosophy of law for internal, municipal law purposes in Western countries, see the discussion in Golunsky and Strogovich, "The Theory of the State and Law," in Babb (trans.), Soviet Legal Philosophy 419-424 (1951); Ziva, *Krisis Burzhuaznoe Zakonnosti v Sovremennikh Imperialisticheskikh Gosudarstvakh* 109-117 (1958). For Kelsen's own reply, see Kelsen, *The Communist Theory of Law* 133-147, especially at 142-144 (1955).

⁴¹ Professor Tunkin, at least, among Soviet jurists, is aware of some of the Western criticisms of these theories, though apparently his study is limited to the purely European criticisms. See his comments in 95 Hague Recueil 1, 38 (1958). Professor Tunkin also attacks Western natural-law thinking on international law, though again he confines himself to European writers, and his actual choice of subjects for attack is curiously selective: thus, mainly on the basis of the German nationalist jurist, Kaufmann, he concludes: "Indeed, 'the road to hell is paved with good intentions', or at least with good words. In the world of today different doctrines of natural law may, in real life, only be detrimental to international law. It is characteristic of the present situation that the partisans of 'power politics' usually prefer to invoke abstract principles of 'justice', rather than principles of international law." *Ibid.* at 44.

determining the behavior of governments in international relations.⁴² Professor Morgenthau is further identified, in somewhat unqualified, black-and-white terms, as seeing the main weakness of the science of international law in its underestimation of the factor of force, and of variously espousing the notions that legal obligations must give place to national interests, and that international politics cannot be based on legal rules.⁴³ Dr. Levin, who is the spearhead of these Soviet criticisms, does not appear to have taken note of various authoritative American criticisms of Professor Morgenthau's main theses and the related opinions of Ambassador George F. Kennan.⁴⁴

It may be that Dr. Levin has, as a matter of jurisprudential characterization, somewhat mixed up his categories, for the Morgenthau-Kennan position seems more generally, in terms of North American juridical science as a whole, a reflection of the realist, in the more special sense of *realpolitik*, rather than the sociological,⁴⁵ approach. However that may be, Dr. Levin proceeds to identify, as the main exponent of the realist approach in North American thinking, Professor Myres S. McDougal. He charges Professor McDougal with lack of frankness in comparison with Morgenthau and his associates, and with concealing an essentially similar philosophy to the Morgenthau "*Machtpolitik*" approach under "artificial terminology."⁴⁶ Dr. Levin's two major objections to Professor McDougal, understandably perhaps, are in areas where McDougal's main thesis runs directly counter to the institutionally-based aspects of the Soviet "peaceful co-existence" campaign. Thus, Professor McDougal is excoriated by Dr. Levin for openly disputing the conception of the identity of the content of international treaties regardless of the passage of time, and similarly for disputing the conception of the possibility of the interpretation of treaties in strict accordance with the original desires of their signatories. More seriously, from Dr. Levin's viewpoint, he detects in Professor McDougal's reasoning the

⁴² See, especially, Levin, 1959 *Sovetskii Ezhegodnik* 88, 100-102; Zakharova and Bagrova, *ibid.* 272, 276. The Morgenthau works selected for attack by the Soviet writers are his *Politics among Nations* (1st ed., 1948; 2nd ed., 1954); and his *In Defense of the National Interest* (1951).

⁴³ Levin, 1959 *Sovetskii Ezhegodnik* 88, 100-102.

⁴⁴ As to these American criticisms, see especially McDougal, "Law and Power," 46 *A.J.I.L.* 102 (1952); *idem*, "The Realist Theory in Pyrrhic Victory," 49 *ibid.* 376 (1955); and see also Oliver, "Reflections on Two Recent Developments Affecting the Function of Law in the International Community," 30 *Texas Law Rev.* 815 (1952). For Kennan's views, see, variously, Kennan, *American Diplomacy 1900-1950* (1952); *Russia, the Atom, and the West* (1958); *Russia and the West under Lenin and Stalin* (1960).

⁴⁵ Compare the various criticisms of McDougal, 46 *A.J.I.L.* 102 (1952); 49 *ibid.* 376 (1955).

⁴⁶ The McDougal works identified by Dr. Levin for purposes of criticism are his essay, "Law and Power," 46 *A.J.I.L.* 102 (1952); and his Hague lectures, "International Law, Power and Policy: A Contemporary Conception," 82 *Hague Recueil* 140 (1953). Coupled with McDougal's writings as objects of attack by Dr. Levin are the writings of Professor F. S. C. Northrop and, in particular, his essay, "Naturalistic and Cultural Foundations for a More Effective International Law," 59 *Yale Law J.* 1430 (1950). Levin, 1959 *Sovetskii Ezhegodnik* 88, 101-102.

"trend in reactionary propaganda in favor of Mondialism"; and he supports this impeachment by charging that Professor McDougal asserts that international law is the primary form of law and that Professor McDougal further asserts that during the future study of legal decisions there are prospects for an approach to a "unified world community."⁴⁷ The tie-in, here, between Dr. Levin's denunciation of Professor McDougal and the more general body of Soviet thinking on "peaceful co-existence" becomes clear: it is precisely Professor McDougal's degree of emphasis, in contrast to the Morgenthau-Kennan school, on the rôle of law in shaping and controlling conduct of nation-states, institutions, and individuals, and his emphasis in particular on the rôle of international agencies and, above all, the United Nations and the World Court in creating law, which challenges the Soviet doctrinal approach to "peaceful co-existence" at one of its most fundamental points.

V. DILEMMAS AS TO THE THEORETICAL BASIS OF PEACEFUL CO-EXISTENCE.
ECONOMIC BASE AND LEGAL SUPERSTRUCTURE: CAPITALIST
AND COMMUNIST INTERNATIONAL LAW

The most recent Soviet formulations of peaceful co-existence have the advantage, in comparison to earlier Soviet writings on international law, of being generally free from the sterilities of analysis in terms of conventional Marxist-Leninist theory, which have so often deterred or irritated Western jurists in the past. But the very freedom from traditional Marxist folklore in such recent studies as Professor Tunkin's, tends to conceal the fact that, from the viewpoint of Soviet legal science itself as an internally self-consistent system, these are intellectual *tours de force* which are somewhat less than satisfactory. Thus Professor Tunkin in his 1958 Hague lectures sharply takes to task Professor Korovin and other Soviet writers for developing the thesis that each social system has its own peculiar set of international principles and norms and, hence, that there can be no general international law common to both main competing political systems of the world.⁴⁸ Professor Tunkin, however, nowhere essays to resolve the main dilemma of Soviet international law: Since law is, in Marxist terms, a product of the market-place and each economic system thus gets the body of law appropriate to its stage of economic development, how may two different economic systems—capitalism and Communism—yield identical bodies of international law doctrine? Or, putting it in more traditional Marxist language, if international law, like national law, belongs to the superstructure and is determined uniquely by the base of productive relationships, how can radically different bases yield the same superstructure of international law?⁴⁹

Pashukanis had tried to resolve the dilemma in 1935 by making use of

⁴⁷ *Ibid.*

⁴⁸ 95 Hague Recueil 1, 59-60 (1958).

⁴⁹ As to this, see generally Schlesinger, *Soviet Legal Theory* at 273 *et seq.* (2nd ed., 1951); Kulski, "The Soviet Interpretation of International Law," 49 *A.J.I.L.* 518 (1955); Hazard, "Pashukanis Is No Traitor," 51 *ibid.* 385 (1957); Lipson, 1959 *Proceedings, American Society of International Law* 41.

the distinction between *form* and *content*: although the forms of international law might be identical for all states, he contended, opposing social systems could avail themselves of these legal forms for their own ends.⁵⁰ Pashukanis thus repudiated any notion of international law as the expression of a common ideology between states, and accepted it instead as an instrument to be used by Soviet policy-makers in the class struggle against bourgeois states. Pashukanis for this reason considered it as purely scholastic, and as no help in the practical conduct of Soviet foreign policy, to attempt to define the "nature" of international law; and he therefore considered the prior Soviet discussions of the subject to have been the result of the continuing influence in Soviet legal circles of bourgeois legal methodology, resting, in his view, on the error of association of law with substance developing in accord with its own internal principles.⁵¹

After Pashukanis' downfall in 1937, the great debate continued among Soviet international lawyers, with the dominant theory seeming to be one that presented the legal relations between the Soviet Union and its capitalist neighbors as a combination of competition and co-operation, with existing international law as a mixture of three groups of norms, distinguished by their social origin: first, traditional international law (with bourgeois democratic origins), containing institutions and practices, for example, the League of Nations, accepted by the Soviet Union; second, specifically "imperialist" institutions, for example, Mandates, rejected by the U.S.S.R.; and, finally, new elements of international law introduced by Soviet practice, for example, Soviet state trading practices.⁵²

After the war, the most ambitious Soviet attempt to explain how international law could simultaneously serve both capitalist and Communist states was made by Professor Korovin.⁵³ In Professor Tunkin's own words, uttered in his 1958 Hague lectures:

Korovin developed the idea that to the States of one "social structure" are inherent certain "international law principles and norms," whereas to the States of another "social structure" are inherent other international law principles and norms; and universally recognised principles and norms of international law are "identical norms of various legal super-structures."

But Professor Tunkin quoted Professor Korovin only to use him as a whipping boy for purposes of his own defense of Soviet legal science against the charge that it does not recognize the existence of general international law regulating relations between all states and binding upon them. Professor Tunkin recorded his "regret" at opinions such as Professor Korovin's; he further declared such views, after their formulation, to have been recognized as erroneous even by Professor Korovin himself; and he declared finally that the overwhelming majority of Soviet international lawyers had

⁵⁰ Schlesinger, *op. cit.* at 278 *et seq.*; Lipson, *loc. cit.* above.

⁵¹ Hazard, 51 A.J.I.L. 385, 387 (1957).

⁵² Schlesinger, *op. cit.* at 281-282.

⁵³ See generally Kulski, 49 A.J.I.L. 518 (1955).

never shared these views of Professor Korovin, and that the views had in fact been strongly criticized by many Soviet lawyers.⁵⁴

The vehemence and finality with which Professor Tunkin sought to dispose of Professor Korovin's "heresies" may perhaps be explained by Professor Tunkin's contention in his Hague lectures, immediately following these particular remarks, that the thesis about the impossibility of the existence of general international law leads objectively to a justification of the "position of strength" policy and of the "Cold War"⁵⁵—a policy which he elsewhere associates also with the American sociological and realist schools. The partisans of this particular policy, Professor Tunkin asserts, try to justify it by the allegation that agreements between capitalist and socialist countries are impossible, that such agreements are of little value, and that nowadays only the language of force is of any use in international relations.⁵⁶ With these particular contentions, Professor Tunkin would, according to his Hague lectures, seek to join issue:

Difference of ideologies has always existed. True, this difference at present is profound. But when States agree on recognition of this or that norm as a norm of international law they do not agree on problems of ideology. They do not try to agree on such problems, for instance, as what is international law, what is its social foundation, its sources, what are the main characteristics of a norm of this law, etc. They do agree on rules of conduct. . . . For thousands of years jurists have not been able to agree on what is law. And still throughout all this time law existed. So States may profoundly disagree as to the nature of norms of international law, but this disagreement does not create an insurmountable obstacle to reaching an agreement relating to accepting specific rules as norms of international law.⁵⁷

VI. PEACEFUL CO-EXISTENCE: A FACTUAL OR A JURIDICAL CONDITION?

If Professor Tunkin seems here to have moved rather close to a Western pragmatist test of asking only whether international relations exist *de facto* between the two major power blocs and, if so, what are their legal manifestations and legal machinery, without bothering too much to inquire as to their theoretical basis or justification, we may still ask what has become of traditional Soviet international law doctrine and, in particular, currently authoritative Soviet definitions of what international law is? For the answers to these questions may help us in part to decide just how viable Professor Tunkin's thesis is likely to be if, as with Pashukanis and Professor Korovin before him, temporary or permanent changes in the balance of Soviet power advantage internationally may seem to render this new (Tunkin) theory inconvenient or outmoded to Soviet policy-makers. Certainly, the current leading Soviet textbook definition of international law, published in the text edited by Professor Kozhevnikov, and written by

⁵⁴ 95 Hague Recueil 1, 60 (1958).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 74; and see Professor Tunkin's remarks also in 1958 Sovetskii Ezhegodnik 15.

⁵⁷ 95 Hague Recueil 1, 59 (1958).

Professor Korovin, accommodates itself in terms to the notion of peaceful co-existence:

International Law can be defined as the aggregate of rules governing relations between States in the process of their conflict and co-operation, designed to safeguard their peaceful coexistence, expressing the will of the ruling classes of these States and defended in case of need by coercion applied by States individually or collectively.⁵⁸

This definition is a curious compound of various elements of legal theory. The emphasis on the rules of international law being an expression of "the will of the ruling classes" of the various states is very close to the highly positivistic Soviet definition of internal, municipal law, with its Austinian (command theory of law) associations.⁵⁹ At the same time, the specification that international law is the "aggregate of rules governing relations between States in the process of their conflict and cooperation," recognizes the *de facto*, existential element in international legal relations and in effect comes very close to embracing the American realist position which Soviet jurists still officially deride.

The ambivalence which this currently authoritative Soviet definition of international law, formulated by Professor Korovin, hardly troubles to conceal (even in the conventional dialectical formulae), may stem from the fact that Professor Korovin personally still hews intellectually to a position that he reached in the middle 1950's, that international law, to the extent that it actually exists and works today, must be composed of inter-class, hybrid rules produced by both economic bases (capitalism and Communism). This earlier position of Professor Korovin might make more sense than the textbook definition he has currently formulated, insofar as the former more nearly corresponds to the actual situation of *de facto* working relationships between the two main world power blocs; though it has the disadvantage, from the internal Soviet viewpoint, of being too obviously "heretical" and un-Marxist.⁶⁰ A textbook definition that is light from the theoretical viewpoint and that faces several ways at once is perhaps an understandable contemporary exercise in academic gamesmanship under such circumstances.

That theoretical questions can still exercise the minds of Soviet jurists, in spite of the ease and nimbleness with which Professor Tunkin has now

⁵⁸ Kozhevnikov (ed.), *International Law* 7. This definition in large part reproduces earlier definitions by Krylov, Vyshinsky and Korovin himself. Cf. Lissitzyn, in 11 *American Slavic and East European Review* 257, 258-259 (1952). See also Tunkin, in 49 *Calif. Law Rev.* 419 (1961).

⁵⁹ "Law is the aggregate of the rules of conduct (norms) established or approved (sanctioned) by state authority, expressing the will of the dominant class, as to which the coercive force of the state guarantees their being put into operation to the end of safeguarding, making secure, and developing social relationships and arrangements agreeable and advantageous to the dominant class." Golunsky and Strogovich, "The Theory of the State and Law," in Babb (trans.), *Soviet Legal Philosophy* at 370 (1951); similarly, Vyshinsky (Gen. Ed.), *The Law of the Soviet State* 50 (Babb, trans., 1954).

⁶⁰ Compare Kulski, 49 *A.J.I.L.* 518 (1955).

disposed of them by in effect writing them off altogether for purposes of consideration of the main question of whether a general international law can exist, is shown by Professor Tunkin's express joinder of issue with Dr. Philip Jessup and Professor McDougal over their respective theories as to the nature of international law during the "Cold War" era.⁶¹ Thus Professor Tunkin challenges Dr. Jessup's suggestion for the acceptance in international law doctrine of the existence of an "intermediate status" between peace and war,⁶² even though that intermediate status, as defined by Dr. Jessup, seems not so far removed from Professor Tunkin's own proclaimed ideas on peaceful co-existence insofar as it involves an absence of intention or at least of a decision to resort to war as the means of solving the issues between the opposing parties.⁶³ Perhaps it is the additional factor of Dr. Jessup's postulation of a basic condition of hostility and strain between the rival power blocs that renders his views on the "intermediate status" in international law unpalatable to Professor Tunkin;⁶⁴ just as, in regard to Professor Korovin's latter-day "heresies," the recognition of the existence of conflict as well as co-operation between capitalism and Communism seems to have been a significant element in their formal repudiation by Professor Tunkin as official Soviet doctrine in the new era emphasizing the peaceful element in peaceful co-existence.⁶⁵

Professor Tunkin's quarrel with Professor McDougal here⁶⁶ may well stem from lack of full comprehension of the latter's essential purpose, which seems more simply, in the full American realist strain, to work from the *de facto*, existential condition of the relations between the two power blocs over the more than a decade of continuing "Cold War" crisis, to look to the legal consequences of that condition, and to recommend legal procedures for clarifying the relationships of peoples under all conditions.⁶⁷ In rejecting the old peace/war dichotomy of traditional doctrine as artificial and abstract and ultimately untrue in the sense of not corresponding

⁶¹ 95 Hague Recueil 1, 72-74 (1958).

⁶² Jessup, "Should International Law Recognize an Intermediate Status between Peace and War?" 48 A.J.I.L. 98 (1954).

⁶³ Tunkin, 95 Hague Recueil 1, at 63-67 and 70-72; 1958 Sovetskii Ezhegodnik 15.

⁶⁴ "... A 'status of intermediacy' with its international tension and hostility is a dangerous status which may easily lead to war.

"The introduction in international law of the suggested 'status of intermediacy' would be a step back. In fact it would mean that peaceful coexistence, which is a normal state of relations according to contemporary international law, would be replaced by a 'state of intermediacy' or, in other words, by the state of 'cold war', which would be legally accepted as a normal status of international relations." Tunkin, 95 Hague Recueil 1, 74 (1958).

⁶⁵ Professor Tunkin, as noted, immediately followed his indictment in his Hague lectures of Professor Korovin's views by a more general indictment of the thesis as to the "impossibility of the existence of general international law," which thesis, he charged, "leads objectively to a justification of the 'position of strength' policy and of the 'cold war'." *Ibid.* 60.

⁶⁶ Tunkin, *ibid.* 73-74.

⁶⁷ See, in particular, McDougal, "Peace and War: Factual Continuum with Multiple Legal Consequences," 49 A.J.I.L. 63 (1955).

to present-day realities, which are best reflected in the form of a continuum between peace and war,⁶⁸ Professor McDougal might himself well say that the concept of co-existence, if it is to be a meaningful international law category, can be no more than a projection of the existing factual condition and of the future willingness of the Powers to accept the basic policy of minimum order: that unauthorized coercion is not to be used as an instrument of change. Certainly, there is no intention or desire evidenced in Professor McDougal's writings in this area, or for that matter in Dr. Jessup's, to take a "step back," as Professor Tunkin contends, with the purpose or result of "legally consecrating the situation of international tension and 'cold war,' which have been created after the Second World War by the 'position of strength' policy."⁶⁹

VII. CODIFICATION AND PEACEFUL CO-EXISTENCE

The 1960 Conference of the International Law Association charged its own international Committee on Juridical Aspects of Co-existence specifically to examine the question of codification of the principles of peaceful co-existence for purposes of the 1962 Conference.⁷⁰

Inevitably, codification at the international level,⁷¹ raises much the same issues, though in far greater intensity of course, as the issue of codification at the national level. The great debate of the 19th century over the question of codification of German civil law, initiated by Thibaut and von Savigny in 1814 and lasting really until after the effectuation of German political unification in 1871, when the final decision to proceed to codification was taken,⁷² is immediately relevant here. As von Savigny pointed out in his famous reply to Thibaut's proposal for a German civil code, the act of codification must necessarily be a highly deliberate and careful step, preceded by much discussion and study, since an effective codification is by inherent nature a rather final, permanent step. In particular, before a codification that is likely to be viable can be expected to be achieved in a particular society, two important elements must be satisfied: a technical element and a political one. The technical element looks to the degree of professional legal expertise and sophistication in the society concerned: in the world community, a prerequisite to a viable codification of international law, as far as it concerns co-existence, would clearly seem to be, in our own law schools and in the Soviet law schools, some far greater

⁶⁸ *Ibid.*

⁶⁹ 95 Hague Recueil 1, 74 (1958).

⁷⁰ International Law Association, Report of the Forty-Ninth Conference, 1960, at 362 (1961).

⁷¹ See generally Jennings, "The Progressive Development of International Law and Its Codification," 24 Brit. Yr. Bk. of Int. Law 304 (1947); Lauterpacht, "Codification and Development of International Law," 49 A.J.I.L. 16 (1955); Stone, "On the Vocation of the International Law Commission," 57 Columbia Law Rev. 16 (1957).

⁷² Thibaut, "Über die Notwendigkeit eines allgemein bürgerlichen Rechts für Deutschland," in *Civilistische Abhandlungen* 404 (1814); von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814). And see generally Stone, *The Province and Function of Law* 430-438 (1946).

degree of exposure to, and training in, the distinctive philosophy of law and substantive legal principles, including international law principles, of both main competing legal systems, capitalism and Communism. We may need to accept frankly the situation that we are dealing in part with a question of *comparative* international law,⁷³ and that the solution of the problem of reconciliation and synthesis of the competing legal systems at the international level may lie rather in a *jus gentium* type of approach that looks to selection of the highest common denominator of agreement among the principles of the two systems. The principles *common* to both legal systems, selected on this basis, may be more likely immediately to correspond to a common law of mankind⁷⁴ than principles arrived at by other, more ambitious, long-range processes of agreement.

There remains also the political element in codification, adverted to by von Savigny. Von Savigny himself warned against a "premature" codification, attempted before a society had reached its full stage of development or maturity. Rejecting, as we would, the large strain of historical determinism and fatalism inherent in von Savigny's analysis here, his conclusion, nevertheless, that too early or rapid a codification can act as an undesirable brake on political development still seems a valid one. Concomitantly with this, all our experience in that special area of national codification that is perhaps closest of all to the problems of codification at the international law level—national constitution-making—suggests that a codification arrived at or attempted without there being a very large degree of consensus in the society concerned as to fundamental goal values which the legal system is to implement and give effect to, is hardly likely to be a viable one. On this view, a codification of the law of peaceful co-existence would sensibly appear to be a final phase, and not the first phase, in legal development.

Nevertheless, accepting the specific charge of the 1960 Conference of the International Law Association to study the question of codification for purposes of the 1962 Conference, and avoiding the temptation to adopt a purely negative or hostile attitude in the face of the often rather rhetorical, even demagogical, way in which the Soviet Union has mounted its present campaign in behalf of peaceful co-existence, it does seem possible to postulate ground rules for action by Western jurists in approaching the issue of a codification of the law of co-existence.

First, the attractions of agreeing formally on a new fundamental declaration of a general or abstract nature and imagining, thereby, that one's main task is completed, should be resisted. As a continental jurist comments:

⁷³ Compare McDougal and Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," 53 A.J.I.L. 1 (1959).

⁷⁴ Compare, generally, Jenks, *The Common Law of Mankind* (1958); Alvarez, *Le Droit International Nouveau dans Ses Rapports avec la Vie Actuelle des Peuples* (1959); McDougal, "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order," 61 Yale Law J. 915 (1952).

The uselessness of the latter is evident. Its sole purpose is and can only be to allow both sides to mobilize their respective partisans and to increase both their own enthusiasm and the Russo-American breach.⁷⁵

The greater the degree of generality and abstractness, indeed, the more likely is any East-West agreement to be a purely illusory one, resting on verbal or semantic confusion between the two competing systems.⁷⁶ It is for this reason that the five primary principles of peaceful co-existence, currently postulated by Soviet leaders, of themselves serve little practical purpose, at least until such time as Soviet writers should supplement this catalogue of abstracts by the further elaboration of detailed secondary principles providing clear, objective criteria capable of yielding definite, predictable answers in concrete problem-situations. And, accepting the sincerity and good faith—in the light of the current trends, amply attested to by competent Western observers, to legal reform and legal revisionism within the Soviet Union and Soviet law itself in the de-Stalinization era⁷⁷—of the current professions on peaceful co-existence by jurists of the standing of Professor Tunkin, he would at least seem to be under some obligations to restrain some of his more obstreperous academic colleagues, who sometimes seem to be at pains to defeat Professor Tunkin's more pragmatic approach to East-West relations right at the outset by setting up all sorts of exceptions and qualifications—the (in Jerome Frank's pungent phrase) "weasel words"-type of exceptions of "imperialism," "colonialism," and the like—even to the five primary principles of co-existence that Professor Tunkin has himself embraced.

VIII. AN OPERATIONAL CODE FOR THE WEST

The rational approach on the part of Western jurists, at this stage, would seem, therefore, to be directed less to arriving at substantive law definitions in themselves than to establishing a plan of procedure or ground rules as to methods for reaching agreement or compromise on substantive issues in the future,⁷⁸ remembering that, in our own history of legal development in the West, substantive law principles have had a habit of developing from the adjectival law—coming, so to speak, embedded in the interstices of the law of procedure.⁷⁹ It is possible, in this sense, that, as in our own legal history,

⁷⁵ Berlia, "Le Droit des Gens et la Coexistence Russo-Américaine," 79 *Journal du Droit International (Clunet)* 26, 36 (1952).

⁷⁶ See the perceptive analysis by Lasswell, "The Value Analysis of Legal Discourse," 1958 *Western Reserve Law Rev.* 188; McDougal and Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," 53 *A.J.I.L.* 1 (1959).

⁷⁷ See, for example, Berman, "Soviet Law Reform—Dateline Moscow 1957," 66 *Yale Law J.* 1191 (1957); Hazard, "Governmental Developments in the U.S.S.R. since Stalin," 303 *Annals Am. Acad. Pol. and Soc. Sci.* 11 (1956); Ginsburgs, "Socialist Legality" in the U.S.S.R. since the XXth Party Congress," 6 *A.J. Comp. Law* 546 (1957); Loeber, "Sozialistische Gesetzlichkeit" im Zeichen des XX Parteikongresses der K P d S U," 2 *Osteuropa-Recht* 243 (1956).

⁷⁸ Compare Berlia, *loc. cit.* note 75 above, at 42-46.

⁷⁹ "... Turn to the seventeenth century and the great struggle between king and parliament; this truly is a constitutional struggle in the strictest sense of the word, it

a prime operational emphasis on issues of legal technique may frequently show that what has seemed to be a disagreement over issues of values in the abstract has really been no more than a disagreement over techniques or methods of achieving or giving effect to those values in concrete problem-situations. This is the Western pragmatist approach to law in its best sense, and its utility as an operational methodology for approaching international law problems in the current era of bipolarization seems especially relevant.⁸⁰

It is in this vein that some Western speakers at the 1960 Conference of the International Law Association, and now, most recently, the American national Committee of the International Law Association on Peaceful Co-existence, have suggested that the approach to the drafting of a code on peaceful co-existence should not be in terms of an exhaustive listing, but rather to establishing *priorities* as to the major issues requiring regulation in the interest of alleviation of tensions.⁸¹ The specific priorities actually chosen by the American national committee⁸² are a blend of substantive and what we might call procedurally-based issues; nevertheless they manage to range over most of the questions adverted to by Professor Tunkin and his colleagues in the recent spate of Soviet writing on peaceful co-existence. The current Soviet campaign in behalf of peaceful co-existence rests, as has been noted, on certain institutionally-based attitudes involving the according of top significance to treaties—specifically bilateral-type East-West accords and accommodations—as sources of international law norms: correspondingly, there is a consciously avowed purpose on the part of the Soviet leaders and their jurists substantially to write down the United Nations Organization, and to depreciate also the World Court and

is a struggle for sovereignty, but how can you study it without knowing something of criminal law and criminal procedure? At more than one moment the whole history of England seems to depend on what it is possible to describe as a detail of criminal procedure—the question whether ‘He is committed to prison *per speciale mandatum domini regis*’, is or is not a good return to a writ of habeas corpus. How can we form any opinion about that question unless we know something about the ordinary course of criminal procedure? A modern code-maker would very possibly not put the provisions of the Habeas Corpus Act into that part of the code which dealt with constitutional law—he would keep it for that part which dealt with criminal procedure—still we can see that the history of the writ is very truly part of the history of our constitution.” Maitland, *The Constitutional History of England* 538-539 (1909).

⁸⁰ Compare Rozmaryn, “La Règle de la Légalité,” 1958 *Revue Internationale de Droit Comparé* 1; and see, generally, the present author’s discussion, “Toward the Scientific Study of Values in Comparative Law Research,” in Nadelmann, von Mehren, and Hazard (eds.), *XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema* 29 (1961).

⁸¹ International Law Association, Report of the Forty-Ninth Conference, 1960 (1961), address by Dr. Martin (United Kingdom), pp. 834-335; address by Professor Hazard (United States), *ibid.* at 341-343.

⁸² International Law Association, Report of American Branch Committee on Peaceful Co-existence (1962) (to be published as an annex to the official Report of the Fiftieth Conference, I.L.A., held in Brussels in August, 1962). The members of the American Branch Committee are John N. Hazard (Chairman), Martin Domke, Oscar R. Houston, Fritz Moses, and Louis B. Sohn.

other agencies for the settlement and arbitrament of international disputes. Even while conceding the frequent virtues of direct negotiation and "summit" diplomacy pointed to bilateral agreements and accords⁸³ as methods of resolving both specific⁸⁴ and also more general East-West discords, the current Soviet campaign against the United Nations and its agencies and also against the historical, custom-based, corpus of international law principles, must be resisted. The American national committee's according of top priority, in the approach to drafting a code of peaceful co-existence, to a restatement of the primary obligations of all states to observe the United Nations Charter, will undoubtedly find general acceptance and approval throughout the West, as will also the committee's emphasis on the resolution of disputes through third parties applying international law.

In the area of substantive principles, the West must continue to give prime importance to the acceptance of the necessity for disarmament, supervised through an adequately worked-out inspection system, and including the principle of limitation and control of nuclear weapons and nuclear testing. More general, but no less significant because wide-ranging, is the West's interest in the facilitation and promotion of trade and commerce and commercial intercourse among the nations,⁸⁵ and also in the free exchange of information and ideas, transcending the boundaries of the rival power blocs. These values—reflecting the open society ideal of Western legal philosophy and looking as they do, in Professor McDougal's phrase, to an "international law of human dignity,"⁸⁶—necessarily include acceptance of the obligation of full co-operation by all advanced industrial nations in the extending of economic development aid to the new nations, and the assisting and fostering, in full association with the United Nations Organization, of the attainment of self-government and independence by those nations. The West has no need to be sensitive in the face of Soviet charges of "colonialism," comparing its own inspired record of the postwar years of development of its trust territories to full political nationhood and economic and social well-being, to the militarily-maintained Soviet hegemony over the satellite countries of Eastern Europe.

⁸³ See generally Pinto, "Le Droit International et la Coexistence," 82 *Journal du Droit International (Clunet)* 306, at 319-321 (1955); Lyon-Caen, "Le Droit International et la Coexistence Pacifique des Etats Relevant de Systèmes Politiques Opposés," 79 *Journal du Droit International (Clunet)* 48 (1952); Vergnaud, "La Guerre Froide," 29 *Revue Générale de Droit International Public* 220, 236 (1958); Virally, "La Conférence au Sommet," 1959 *Annuaire Français de Droit International* 7.

⁸⁴ Compare Idman, "Quelques Observations sur la Coexistence Pacifique et le Traité d'Amitié entre l'U.R.S.S. et la Finlande," 80 *Revue Générale de Droit International Public* 639, 647 (1959).

⁸⁵ Compare the views, respectively, of Zourek, "Quelques Observations sur les Difficultés Rencontrés lors du Règlement Judiciaire des Différends Nés du Commerce entre les Pays à Structures Economiques et Sociales Différentes," 86 *Journal du Droit International (Clunet)* 638 (1959); and Seidl-Hohenveldern, "Souveranität und Wirtschaftliche Koexistenz," *ibid.* 1050.

⁸⁶ *International Law Association, Report of the Forty-Eighth Conference, 1958*, at 437-440 (1959); and see also McDougal and Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," 53 *A.J.I.L.* 1, 11-15 (1959).

The further elaboration and refinement and concretization of these substantive principles can be allowed to proceed on an empirical basis, to some extent determined *ad hoc* as the problems actually arise, which in part has already been the approach in connection with subjects like the codification of the law of the sea and, on the whole, the work of the International Law Commission.

As long as Soviet jurists continue to adhere resolutely to such views on co-existence as were recently proclaimed by Professor Tunkin, and to reject the sort of approach, originally adumbrated by Premier Khrushchev in January, 1961, but apparently abandoned by him by October, 1961, at the time of his address to the 22nd Congress of the Party,⁸⁷ that the policy of peaceful co-existence is no more than a "form of intensive economic, political and ideological struggle of the proletariat against the aggressive forces of imperialism in the international arena,"⁸⁸ then there seems to be no reason why Western jurists cannot sit down seriously with Soviet jurists to attempt now what Western jurists have indeed been interested in doing ever since the end of the war—in Professor Tunkin's own words:

the elaboration and introduction in international law of principles and norms aimed at reducing armaments, banning the tests, use and manufacture of nuclear weapons, prohibiting war propaganda, defining aggression, and other norms aimed at preserving peace, furthering friendly relations and co-operation between sovereign and equal States.⁸⁹

If the contemporary Soviet propagation of co-existence is a mere tactic in what they regard as a death struggle, this might be an effective way of exposing their true perspectives.

⁸⁷ Khrushchev, *op. cit.* note 1 above.

⁸⁸ *Kommunist*, No. 1 (January, 1961), pp. 3-57: 13 Current Digest of the Soviet Press 10.

⁸⁹ 95 *Hague Recueil* 1, 78 (1958). For a further discussion of the Soviet doctrine of peaceful co-existence in connection with the development of international law, see Robert D. Crane, "Soviet Attitude toward International Space Law," 56 *A.J.I.L.* 685, esp. pp. 710-723 (1962).

LEGAL BASIS FOR UNITED NATIONS ARMED FORCES

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The question of the legal basis for United Nations armed forces is one of immense practical significance for the future effectiveness of the organization in keeping the peace. Three times the United Nations has authorized armed forces to deal with a threat to the peace. In each instance responsible authority can be found to say that the United Nations action may have averted a third World War. The action in repelling the invasion of South Korea, according to Trygve Lie, kept that incident from starting the kind of chain of events that we now trace to the Manchurian incident.¹ The formation of the United Nations Emergency Force (UNEF) was a critical and perhaps indispensable part of the checking of the Suez invasion, at a time when land, sea and naval units were already engaged in hostilities, and when the Soviet Union was threatening to send in "volunteers" and use rockets. And the creation of the United Nations Force in the Congo (ONUC) forestalled what Under Secretary of State Ball pictured as "a confrontation that could lead to another Korean war, that could, in fact, blow the flames of a brush fire conflict into the horrible fire storm of nuclear devastation."²

At this writing, there are, as always, incipient trouble spots in Africa and Asia with all the potential of the Congo crisis for setting off international conflict and, in some cases, with potentialities that look even worse. Is the United Nations, within the constitutional framework of the Charter, equipped to deal with such potential threats to the peace?

By this time, with the experience of these three United Nations armed forces, it might be thought that we would have a solid legal foundation on which to build the particular kind of armed forces needed for any future emergency. In part, however, because existing situations did not permit these forces to be formed in accordance with prevailing interpretations concerning the Charter provisions pertaining to the use of force, and in part, perhaps, because of the crisis conditions in which these forces were established, their legal basis has been somewhat unclear and unsatisfactory.^{2a} This causes some present problems, but a more serious difficulty is the inability to make a confident extrapolation from present theory and practice which will show us the potential form, manner of creation, scope of func-

¹ Lie, *In the Cause of Peace* 346 (1954).

² Ball, *The Elements of Our Congo Policy* at 3 (Department of State Publication 7826, African Series 25, December, 1961).

^{2a} For consideration of some of these issues, see I.C.J. Advisory Opinion of July 20, 1962, on *Certain Expenses of the United Nations* (Art. 17, par. 2, of the Charter), [1962] I.C.J. Rep. 151, reported below, p. 1053.

tion, and range of methods of a possible future United Nations armed force. Specifically, suppose that a Congo-type situation developed in another newly independent African country, but that in this instance action was vetoed in the Security Council and no invitation from the government of the African country was forthcoming, as it was in the case of the Congo. Would the United Nations be helpless? Or could the General Assembly perhaps create some effective type of force, and dispatch it to the scene to prevent a breach of international peace even without an invitation?

The purpose of this paper is to suggest that there is a satisfactory legal basis in the Charter for such United Nations operations as have been taken in the past, and as may be required in the future.

The broad thesis is that substantive legal authority for the establishment and deployment of United Nations armed forces is found in Articles 1(1), 39 and 42 of the Charter. It will be undertaken to show that actions already taken by the United Nations involving armed force can be considered as "collective measures" and that, indeed, they must be so considered, since other legal explanations are unsatisfactory. It will thus be undertaken to clarify what are believed to be misapprehensions concerning the scope of United Nations authority in such matters. Such a misapprehension, for instance, is believed to be the view that forces of the general character of UNEF and ONUC, not being collective measures, are prohibited *by the Charter* from being deployed without the permission of the country or countries concerned. The correct rule is believed to include the propositions (a) that there is no Charter authority, other than that pertaining to collective measures, for sending out forces such as this, even with the permission of the countries concerned; (b) that such forces must meet the requirements of collective measures; and (c) that once they are properly so constituted, there is no Charter requirement that permission for the movement of such forces be obtained.

On the other hand, there may, of course, be effective requirements to this effect laid down by considerations of principle and policy in particular cases. The range of action open to the United Nations is conditioned by the practical willingness of Member states to support particular measures—by contributing troops, for example. However, the problems faced by the responsible officials could be lessened to the extent that the legal basis of possible United Nations measures can be clarified.

ARTICLE 1(1) AS THE SUBSTANTIVE LEGAL BASIS FOR UNITED NATIONS ARMED FORCES

The most fundamental grant of power supporting the creation of armed forces is contained in Article 1(1) of the Charter:

The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . .

If the Charter said no more than this, unquestionably a complete legal basis would exist for the creation and administration of United Nations armed forces of the UNEF and ONUC type.³

Trouble has arisen, in considerable measure, from the failure, from this point on, to distinguish the substantive creation of constitutional power from the description of particular procedures through which this power may be expressed. Too often in the past the preoccupation with finding precise procedural authority for a particular armed forces action has obscured the more fundamental consideration of the substantive creation of power to perform the central function for which the United Nations was created.

In addition to the underlying substantive provision in Article 1(1), there is also relevant substantive content in the following articles:

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions. . . . These may include complete or partial interruption of economic relations and of . . . communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

PROPOSED WORKING DEFINITIONS OF "COLLECTIVE MEASURES"

The argument here advanced centers around the words "collective measures" in Article 1(1). If the UNEF and ONUC actions, for example, are not "collective measures," they could not readily fall within the provisions of this article. At this point, therefore, it is essential to suggest a working definition of "collective measures." The definition here proposed is put forward in the full knowledge that there is eminent and even official authority which would add or subtract requirements. These arguments will be dealt with shortly. The first task is to make an affirmative case in favor of the proposed definition.

³ Seyersted refers to Art. 1(1) in this connection as embracing an "inherent capacity" of the Organization. "Can the United Nations Establish Military Forces and Perform Other Acts Without Specific Basis in the Charter?" 12 *Österreichische Zeitschrift für Öffentliches Recht* 188, 214-215 (1962).

It is submitted that the term "collective measures" should be taken to apply to measures that satisfy the three following objective tests: (1) They are measures taken by the United Nations; (2) They entail the application of tangible, as distinct from moral, pressures to international situations; (3) They are to be applied only in situations amounting to threats to the peace, breaches of the peace or acts of aggression. The obverse of this proposition is that all United Nations measures amounting to tangible pressures should be taken within the framework of the Charter provisions pertaining to collective measures. The reason is that the gravity entailed in the application of tangible pressures in international situations should rule out the undertaking of such measures on the supposed authority of articles selected here or there in the Charter.

The constitutional justification for this set of three tests is, of course, the plain language of Article 1(1): "to take effective collective measures for the prevention and removal of threats to the peace." The words "to take" supply the first test, which requires that the action be taken by the United Nations and not by its Members independently. The words "effective collective measures" supply the requirement of the application of tangible pressure. Given their normal meaning, these words do not include mere moral persuasion, particularly when it is considered that the problem to be acted upon is a threat to the peace, breach of the peace, or an act of aggression. Finally, the words "for the prevention and removal of threats to the peace, and for the suppression of acts of aggression" directly set forth the third element in the definition, which limits "collective measures" to these particularly serious categories of situations.

THE "COLLECTIVE MEASURES" TEST APPLIED TO PAST ACTIONS

Let us try out this proposed definition on past United Nations actions involving armed forces or other tangible pressure.

Korea

The second and third elements in the definition are easily satisfied in the case of Korea. Tangible pressures were certainly applied, and the threat to peace was obvious. Indeed, the Security Council officially found that a breach of the peace had occurred,⁴ and the resolution of July 27, 1950, recommended such effective assistance to the Republic of Korea "as may be necessary to repel the armed attack and to restore international peace and security in the area."⁵

The troublesome problem in the case of Korea is the question whether it was a measure "taken by" the Organization. The view apparently prevalent at the time, and still widely held, is that the Korean operation was not a measure "taken by" the United Nations. For example, the United Kingdom representative in the Security Council said:

⁴ U.N. Doc. S/1501, June 25, 1950; Repertoire of the Practice of the Security Council 1946-1951, at 355 (U.N. Doc. ST/PSCA/1) (U.N. Pub. Sales No. 1954. VII. 1).

⁵ U.N. Doc. S/1511, June 27, 1950, *ibid.* 356.

[H]ad the agreements provided for in Article 43 of the Charter been concluded . . . the action to be taken by the Security Council . . . would no doubt have been founded on Article 42. As it is, however, the Council can naturally act only under Article 39, which enables the Security Council to recommend what measures should be taken to restore international peace and security.⁶

The recommendation being that the Member states take the necessary action, the implication of this statement is that the action is taken by the Member states and not by the United Nations.⁷

This view seems to confuse the substantive content of what is done with procedural devices. The true nature of an operation of such importance seemingly ought to be determined on the basis of its actual practical consequences rather than upon the question of its form or the procedure by which it is initiated. By this criterion the Korean operation would seem to have been a United Nations operation. The moral backing of the Organization was conferred, and its responsibility and that of its Members were engaged. This view is supported by the affirmation of the General Assembly in its resolution of February 1, 1951, of the "determination of the United Nations to continue its action in Korea to meet the aggression."⁸ Thus the pre-existing status of the action as a United Nations operation seems to have been recognized. As to the question of when and by what means it acquired this status, this seems most logically attributable to the original Security Council action initiating United Nations sponsorship of the operation, notwithstanding that this took the form of a recommendation to Member states. Various other evidences that it was a United Nations operation,⁹ such as its use of the United Nations flag, seem properly to be regarded as ancillary, attesting to a status already acquired.

An additional measure in this case was the General Assembly's resolution of May 18, 1951, recommending that Member states apply an embargo of arms and strategic materials against the North Korean and Communist Chinese regimes.¹⁰ This is certainly tangible pressure of the most obvious sort and, although procedurally in the form of a recommendation, it is

⁶ U.N. Security Council, 5th year, Official Records, 476th Meeting 3 (U.N. Doc. S/P.V. 476) (1950). Accord: Schachter, "Legal Issues at the United Nations," in *Annual Review of United Nations Affairs 1960-1961*, at 142 (Swift ed., 1961).

⁷ Professor Leo Gross considers that it is an action of the United Nations at least to the extent of obliging Members, under Art. 2(5), to "give the United Nations every assistance in any action it takes in accordance with the present Charter." "Voting in the Security Council: Abstention from Voting and Absence from Meetings," 60 *Yale Law J.* 209, 254-255 (1951). Professors Julius Stone and Lacharrière consider that the operation took place outside the United Nations and had the legal nature of war. Stone, *Legal Controls of International Conflict* 234 (London, 1954); Lacharrière, "L'Action des Nations Unies pour la Sécurité et pour la Paix," 18 *Politique Étrangère* 307, 333-334 (1953).

⁸ Res. 498 (V), Feb. 1, 1951, General Assembly, 5th Sess., Official Records, Supp. No. 20A, at 1 (U.N. Doc. A/1775/Add. 1) (1951).

⁹ For a comprehensive compilation, see Gunter Weissberg, *The International Status of the United Nations* 78-105 (1961).

¹⁰ Res. 500 (V), May 18, 1951, General Assembly, 5th Sess., Official Records, Supp. 20A at 2 (U.N. Doc. A/1775/Add. 1).

substantively an action which can be adequately accounted for by derivation from the underlying authority to undertake collective measures to maintain international peace.

The General Assembly resolution of February 1, 1951,¹¹ finding that the Communist Chinese regime was guilty of aggression in Korea and affirming the determination of the United Nations to continue its action in Korea to meet the aggression, seems to have had the effect of making applicable to Communist China the United Nations measures already under way to meet the original aggression in Korea. The action was taken because the Council, which had initiated the earlier measures against the North Korean regime, was prevented by the veto from acting to meet the new aggression from Communist China. The two parts of this resolution, taken in conjunction, scarcely permit of interpretation as being anything other than an application of collective measures and seem to render unrealistic the view that the Korean operation was not a United Nations measure.

Arms Embargo in Greek Case

On November 18, 1949, the General Assembly made a recommendation to Member states that they impose an embargo of war materials against Albania and Bulgaria because of activities of those countries deemed to be a threat to the independence and territorial integrity of Greece.¹² This action fits the definition of "collective measures" here suggested.

In the first place, it is an action "taken by" the United Nations under the line of reasoning developed in connection with the Korean operation. As to the second test, embargoes constitute tangible pressures on states and are a type of collective measures specifically enumerated in Article 41 of the Charter. As to the third test, the existence of a breach of the peace was known to the world and was explicitly recognized in the resolution under discussion where it calls upon Yugoslavia, Bulgaria and Albania to cease making their territories available as a base for armed action against the Greek Government.¹³

United Nations Emergency Force (UNEF)

The only instance in which the General Assembly has initiated the use of armed force was in connection with the Suez crisis of 1956. When the

¹¹ Res. 498 (V), note 8 above.

¹² Res. 288 (IV), General Assembly, 4th Sess., Official Records, Resolutions 9 (U.N. Doc. A/1251) (1949).

¹³ The Assembly's Res. 39 (I), Dec. 12, 1946, recommending that Member states withdraw their ambassadors and ministers from Spain (General Assembly, 1st Sess., Official Records, Resolutions (2nd Pt.) 63-64 (U.N. Doc. A/64/Add. 1) (1947)), shared some of the characteristics of the embargo resolutions in the Korean and Greek cases. While not comprising full "diplomatic sanctions" (which is specifically authorized in Art. 41), it was the application of a modified form of this type of pressure, directed against the Spanish Government and in favor of its replacement by a more democratic regime. The resolution does not conform to the objective criteria of collective measures here under discussion since, according to a finding of a subcommittee of the Security Council, the situation to which it was directed did not constitute a threat to the peace. Report of

Security Council proved unable to act in the matter because of the veto, the General Assembly met to consider the crisis upon the call of seven members of the Council in accordance with a procedure outlined in the "Uniting for Peace" Resolution. By resolution of November 4, 1956,¹⁴ the General Assembly asked the Secretary General to prepare plans for an emergency international United Nations force to secure and supervise the cessation of hostilities which had been called for in an earlier Assembly resolution.¹⁵ The Assembly proceeded to authorize the formation of UNEF along the lines recommended by the Secretary General pursuant to this request.¹⁶

This force meets the three tests proposed as indicating a valid concept of "collective measures." The first test is satisfied, since this measure was taken by the United Nations. It is true that the force was recruited by means of voluntary contributions of states and that, in this respect, the action of the Assembly was recommendatory and in no way encroached upon the exclusive prerogative of the Security Council to order states to participate in collective measures. However, the Assembly also employed directly operative decisions, not recommendations, in initiating the force, in ordering its deployment and in providing for its continuing control by the United Nations.¹⁷ It is therefore impossible to regard the operation as resting wholly upon the Assembly's power of recommendation. Although some authorities attribute it to this basis of Charter authority,¹⁸ the United Nations itself does not appear to have done so.¹⁹

the Sub-Committee on the Spanish Question, May 31, 1946, Security Council, 1st Year, Official Records, 1st Ser., Spec. Supp., Rev. ed. 8 (U.N. Doc. S/75).

¹⁴ Res. 998 (ES-I), General Assembly, 1st Em. Spec. Sess., Official Records, Supp. No. 1, at 2 (U.N. Doc. A/3354).

¹⁵ Res. 997 (ES-I), *ibid.*

¹⁶ Legal problems involved in the establishment of UNEF are discussed in the Report of the Committee on Study of Legal Problems of the United Nations, in 1957 Proceedings, American Society of International Law 206-229.

¹⁷ Decisions such as the following led to the establishment, organization and deployment of the Force: Establishment of the U.N. Command for UNEF, Res. 1000 (ES-I), Nov. 5, 1956, General Assembly, 1st Em. Spec. Sess., Official Records, Supp. No. 1, at 2-3 (U.N. Doc. A/3354); Appointment of the Chief of the Command, *ibid.*; Authorization of the latter to recruit an officer corps (*ibid.*) and to proceed with the full organization of the Force, Res. 1001 (ES-I), Nov. 7, 1956, *ibid.* at 3; Approval of the guiding principles and definitions of functions of the Force as expounded in a report of the Secretary General, *ibid.*; Authorization of the Secretary General to issue regulations and instructions for the Force and to take necessary executive and administrative measures, *ibid.*

¹⁸ Hula, "The United Nations in Crisis," 27 Social Research 387, 418 (1960). To similar effect see Goodrich and Rosner, "The United Nations Emergency Force," 11 International Organization 413, 418 (1957); Sohn, "The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force," 52 A.J.I.L. 229, 234 (1958).

¹⁹ An implication that the action was recommendatory might be drawn from the statement in the Secretary General's early report on the Force, dated Nov. 6, 1956, that it was formed on the basis of a decision reached under the "Uniting for Peace" Resolution. Second and Final Report of the Secretary General on the Plan for an Emergency International United Nations Force Requested in the Resolution adopted by the General Assembly on 4 November, 1956, General Assembly, 1st Em. Spec. Sess., Official Records,

The second test, that of application of tangible pressures, is also met, since UNEF had the authority to employ force in defense of assigned positions. The original description of UNEF's terms of reference left the question of its right to use force rather vague. Thus the Secretary General's report on the force, dated November 6, 1956, stated:

It would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor, moreover, should the Force have military functions exceeding those necessary to secure peaceful conditions on the assumption that parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly. . . .²⁰

This left the question: What would be the position if states did not comply with the recommendations of the General Assembly? Although the Salvadoran Delegation raised this question during the discussion in the General Assembly,²¹ the point was not pressed and there seems to have been little attention devoted to the question of UNEF's powers with respect to the use of force. There has been a tendency among writers to regard it as somewhat similar to an observer corps.²²

However, during the discussion in the Security Council of the Lebanese-Jordanian crisis of 1958, the fact became inescapable that if an armed force is to assert more than moral pressure in an international situation, it must at least possess the power to defend its assigned positions.²³ Later that year, in the Secretary General's report on UNEF dated October 9, 1958, it is explicitly and officially stated that UNEF has this power:

Plenary Meetings and Annexes: Annexes, Agenda Item No. 5, at 19, 20 (U.N. Doc. A/3302) (1956). The resolution referred to provides only for recommendatory action on the part of the General Assembly. However in the later report of Oct. 9, 1958, it is merely indicated that UNEF was formed at a meeting called pursuant to the terms of the "Uniting for Peace" Resolution. United Nations Emergency Force: Summary Study derived from the establishment and operation of the Force: Report of the Secretary General, Oct. 9, 1958, General Assembly, 13th Sess., Official Records, Annexes, Agenda Item No. 65 at 8, 10 (U.N. Doc. A/3948) (1958).

²⁰ Second and Final Report, note 19 above, at 21.

²¹ General Assembly, 1st Em. Spec. Sess., Official Records, Plenary Meetings 119-120 (U.N. Doc. A/P.V. 567) (1956).

²² Schachter, *loc. cit.*, note 6 above, at 142; Sohn, note 18 above, at 234-235; Chaumont, "La Situation Juridique des États Membres à l'Égard de La Force d'Urgence des Nations Unies," 4 *Annuaire Français de Droit International* 399, 408-409 (1958). See also Frye, who regards UNEF as an extension of the General Assembly's powers in the field of peaceful settlement of disputes: *A United Nations Peace Force* 13 (1957).

²³ The Secretary General, in discussing with the Council possible methods of protecting the independence and territorial integrity of Lebanon, and of preventing infiltration of Lebanese borders, referred to a U. S. proposal, which had just been defeated by the veto, that an armed force be established and deployed by the Council for this purpose. The Secretary General indicated that such a force would be of the UNEF type, and while he emphasized its essentially defensive nature, he also reiterated the U. S. representative's description of the proposed force as being empowered "to fire in self-defense in performance of [its] duties to prevent infiltration and to protect the integrity of the Lebanon." Security Council, 13th Year, Official Records, 835th Meeting 8 (U.N. Doc. S/P.V. 835) (1958).

[M]en engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the General Assembly and within the scope of its Resolutions. . . .²⁴

This right to defend assigned positions is of a different order from the mere right of physical self-defense against wrongful attack normally possessed by any individual or group. An observer group, if it found itself under attack, would normally have such a right of self-defense. A "United Nations guard" assigned to an observer group or other United Nations mission might have the object of assisting the mission to defend itself in case of need. What places UNEF on an entirely different basis, and gives it a new dimension, is its right to fight and use physical armed force, not merely to defend itself, but to defend positions as such.

The third test of "collective measures" is quickly accounted for in this instance, since the existence of a breach of the peace in the Suez crisis was known to the world. UNEF was, indeed, called into being to supervise a cease-fire which had been called for in an earlier Assembly resolution.

United Nations Force in the Congo (ONUC)

Pursuant to the request of the Congolese Government,²⁵ and to the recommendation of the Secretary General,²⁶ the Security Council on July 14, 1960, authorized the Secretary General to furnish military assistance to that country until such time as its own security forces were in a position to fulfill their tasks.²⁷ This assistance was to be furnished in consultation with the Government of the Congo. The Secretary General accordingly supervised the establishment of the U.N. Force, which was formed of troops voluntarily contributed by Member states, and arranged for its organization and deployment under United Nations command. Except for being authorized by the Security Council instead of the General Assembly, the Force was thus essentially like UNEF in the manner of its establishment and organization.

The three tests of "collective measures" here proposed are readily satisfied in the case of ONUC. As to the test of being "taken by" the United Nations, this operation was placed under a United Nations com-

²⁴ United Nations Emergency Force, note 19 above, at 31. Reports such as this by the Secretary General, in which he acted under instructions in formulating the principles applicable to UNEF (and later of the U.N. Force in the Congo), generally received the explicit or implicit approval of the Assembly or Council, and are herein regarded as representing official U.N. positions except as otherwise indicated.

²⁵ Telegrams dated July 12 and 13, 1960, from the President and Prime Minister of the Republic of the Congo to the Secretary General, Security Council, 15th Year, Official Records, Supp. July-Sept., 1960, at 11 (U.N. Doc. S/4382) (1960).

²⁶ Security Council, 15th Year, Official Records, 873d Meeting 3-5 (U.N. Doc. S/P.V. 873) (1960).

²⁷ U.N. Doc. S/4387, July 14, 1960, Security Council, 15th Year, Official Records, Supp. July-Sept., 1960, at 16 (1960).

mand which was exercised under control of the Secretary General, pursuant to Security Council resolutions adopted from time to time. The second test, involving application of tangible pressures, was, in the early stages, satisfied in the same way as it was in the case of UNEF. In an early report on the matter, the Secretary General stated that ONUC, like UNEF, possessed legal authority to defend positions held under authority of its commander.²⁸ However, by a later resolution of February 21, 1961,²⁹ the Security Council urged that the United Nations take all appropriate measures to prevent the occurrence of civil war in the Congo, including, "if necessary" and "in the last resort," the use of force. This provision conferred upon ONUC at least a limited power of initiative and, to this extent, took it out of the strictly defensive rôle to which it had previously been limited. The same resolution urged "that measures be taken" for the immediate withdrawal and evacuation from the Congo of the category of personnel generally referred to as "mercenaries." This provision stated the policy of the United Nations, but was later held not to constitute authority for enforcement measures by ONUC.³⁰ Such authority was, however, given by the Security Council's later resolution of November 24, 1961.³¹

As to the third test, the Secretary General described the juridical bases of the operation as follows:

[I]t was the breakdown of those instruments [of government for the maintenance of order] which had created a situation which through its consequences represented a threat to the peace and security justifying United Nations intervention on the basis of the explicit request of the government. . . .³²

This report has been explicitly approved and "thus—together with later stands taken by the Security Council and General Assembly—represents an authoritative interpretation of the position of the United Nations."³³ A finding of a threat to the peace is also contained in an Assembly resolution of April 15, 1961,³⁴ which begins by stating that the Assembly is "*gravely concerned* at the danger of civil war and foreign intervention and the threat to international peace and security."

The three elements, then, of action "taken by the United Nations," the application of tangible pressure, and a threat to the peace, are thus clearly present in the Congo operation.

²⁸ First Report by the Secretary General on the Implementation of Security Council Resolution S/4387 of 14 July, 1960, July 18, 1960, Security Council, 15th Year, Official Records, Supp. July-Sept., 1960 at 16, 19-20 (U.N. Doc. S/4389) (1960).

²⁹ U.N. Doc. S/4741, Feb. 21, 1961.

³⁰ See text accompanying note 52 below.

³¹ U.N. Doc. S/5002, Nov. 24, 1961.

³² First Report by the Secretary General on the Implementation of Security Council Resolution S/4387 of 14 July, 1960, note 28 above, at 17.

³³ Annex VII to Report of the Secretary General on Certain Steps Taken in Regard to the Implementation of the Security Council Resolution Adopted on 21 February, 1961, at 2 (U.N. Doc. S/4752, Feb. 27, 1961).

³⁴ Res. 1600 (XV), General Assembly, 15th Sess., Official Records, Supp. No. 16A, at 17, 18 (U.N. Doc. A/4684/Add. 1) (1961).

Such United Nations operations as those in Korea, the Suez area and the Congo, and such other measures as the arms embargoes recommended in the Greek and Korean cases, would thus seem to conform to the criteria herein deemed to represent a valid definition of "collective measures" pursuant to an objective view of Charter provisions dealing with this subject. It remains to be seen, however, whether this view of the matter can be sustained in the light of a more detailed consideration of applicable Charter provisions.

COLLECTIVE MEASURES AND ENFORCEMENT MEASURES

One of the principal obstacles to the view of collective measures advanced in the present paper is the prevailing idea that "collective measures" are to be equated with "enforcement measures," in the sense of measures directed *against* states which threaten or breach international peace and security. The effect would be to narrow the scope of Articles 1(1), 39, 41 and 42 to "enforcement measures," and this in turn would make it impossible to account for the initiation of UNEF and ONUC under these provisions. The consent of the states concerned forms a part of the juridical base of these operations. They are forbidden to intervene in domestic conflicts. That they conform to the general non-interventionist rôle of the United Nations, as prescribed by Article 2(7) of the Charter, has been emphasized in official descriptions of their rôles.

It is, of course, quite understandable that this interpretation of the meaning of "collective measures" became predominant, since action in the nature of "enforcement measures" was the only kind of action anyone thought of until probably the Lebanese-Jordanian crisis of 1958.³⁵ UNEF had, meanwhile, been established, but there had apparently been little thought that it might impinge upon the Charter concept of "collective measures." However, when it became necessary to think of a possible force to be created by the Council, to serve purposes similar to those of UNEF, the question of Charter justification came into focus with respect to such forces formed either by the General Assembly or Security Council. Since they were contemplated as performing functions quite different from those normally associated with "enforcement measures," and since troops for these forces had to be obtained by voluntary contributions from Member states, it is natural that an effort was made to find a different basis for them than one normally associated with the forcible suppression of aggression.

The language of the Charter seems to permit of a broader interpretation of "collective measures" than the one just referred to as representing the prevailing view. The phrase used in Article 1(1) is "collective measures." The word used in Articles 39, 41, and 42 is "measures." The term "enforcement measures" is not employed in these articles, which are the ones which define the concept of collective measures.

"Enforcement measures" are referred to elsewhere in the Charter, most importantly, perhaps in Articles 2(7) and 53, which seem clearly to con-

³⁵ See note 23 above.

template situations involving the application of measures against states. Thus in Article 2(7), which incorporates the principle of non-intervention in the Charter, the concluding phrase provides that "this principle shall not prejudice the application of enforcement measures under Chapter VII." The proviso seems intended to make it clear that the principle of non-intervention could not interfere with or hamper the employment of enforcement measures in proper cases. In Article 53 the provision is that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."

For purposes of the present discussion, of course, the important articles are those which authorize the United Nations to apply tangible pressures in international situations. The phraseology there used—"collective measures"—seems clearly broad enough to embrace measures like UNEF and ONUC. Such operations, at first glance, may seem to involve attempted compromises between the concepts of "enforcement measures" and of "non-intervention." This apparent contradiction³⁶ disappears, however, in light of the consideration that the United Nations is here undertaking to deal with "situations" involving threats to peace without taking measures against states. There appears to be no inherent juridical inconsistency in such measures being taken on the territory of one or more states, with their consent, and with the principle of non-intervention being interposed as an insulating barrier between the United Nations operations and states with which such measures may come in contact.

Specific Charter language sustains this view.³⁷ Article 1(1), which describes collective measures in the context of the major purpose of the Organization of maintaining peace and security, provides that such measures may be used for preservation of the peace and to deal with threats to the peace. According to this language, collective measures would not need to be directed against states. Article 39 is in accord with Article 1(1) in this respect, for it provides that measures under Article 41 or 42 may be applied to deal with threats to the peace. Since Article 42 provides for the application of armed force, these articles seem expressly to provide that force may be used to deal with threats to peace as distinguished from actual breaches. Nowhere in the Charter is there any requirement that such force must be directed against states.

Articles 1(1) and 39 thus endow the Organization with considerable latitude in the choice of measures employed to deal with varying situations. There is evidence in the record to indicate that the drafters of the Charter made this provision deliberately and intended it to be used. This was indicated in a discussion that took place concerning the provision of Article 39,

³⁶ There appears to be, in fact, no contradiction in principle between "collective measures" and the rule of non-intervention. The former are, by definition, concerned wholly with international situations while the latter applies to "essentially domestic" matters.

³⁷ E. M. Miller is in accord as far as concerns specific language, but holds that it was not the kind of armed force contemplated in the corresponding Charter articles. Miller, "Legal Aspects of the United Nations Action in the Congo," 55 A.J.I.L. 1, 7-8 (1961).

originally suggested in the Dumbarton Oaks Proposals, giving the Council the discretion either to make recommendations or decide upon collective measures in the event of a threat to the peace or breach of the peace. The principal concern of several delegations was to assure that effective enforcement measures would always be applied in case of an actual breach of the peace. They proposed that such measures should be mandatory in the event of aggression, and, to this end, the question of formulating a definition of aggression was considered. The significant fact for present purposes is that it was deliberately decided that it would be preferable to leave to the discretion of the Security Council the decision as to which type of measure would be most appropriate in a given case. The Chinese Delegation, for example, defending the original concept of the Dumbarton Oaks Proposal, said in effect:

Because it was not possible in every case to distinguish between a threat to the peace and a rupture of the peace, it was safer not to authorize one kind of Council action for a threat and another for a rupture. The wiser course was to leave the evaluation of the situation to the Council.³⁸

Committee III/3 upheld this point of view. Its report to Commission III stated:

The Committee believed that this [proposed] distinction, which had the merit of clarity, might endanger the Council's free discretion as proposed in the text of Dumbarton Oaks. Too rigid a distinction between threats to the peace and attempts against the peace, or acts of aggression, appeared to the Committee to be in contradiction with the previous decision to avoid a definition of aggression and with the general spirit of the Charter.³⁹

The Security Council was thus deliberately intended to have and to exercise the full degree of latitude provided in Article 39 of the Charter. It does not need to use force to deal with an actual aggression if it feels that measures short of force, provisional measures or mere recommendations would be more appropriate or effective; on the other hand, it might employ armed force in situations involving no more than "threats" to peace and security. The language of the Charter thus seems to permit an interpretation of "collective measures" broader than "enforcement measures," and one which would embrace such operations as UNEF and ONUC, which are not directed against states.

Within the broad concept of "collective measures," it is possible to envision juridical sub-categories including, of course, "enforcement measures." These might be useful in some situations, by contributing to the clear delineation of the boundaries within which forces of limited scope are required to operate by their terms of reference. It would be undesirable, however, to allow such sub-categories to acquire the kind of rigidity that would impair the latitude of the United Nations in tailoring its collective

³⁸ Doc. No. 628, III/3/33, 12 U.N.C.I.O. Docs. 379, 380 (1945).

³⁹ United Nations Conference on International Organization: Selected Documents 764 (1946).

measures to meet the needs of particular situations. To illustrate this danger, reference may be made to the suggestion made within the United Nations, prior to the formation of ONUC, that forces of this general type to be formed by the Council should be linked with UNEF and placed in a distinct category apart from Chapter VII of the Charter.⁴⁰ Later, ONUC was formed, apparently under the authority of Chapter VII, but still categorized as strictly defensive and non-interventionist in character. Subsequently, while still retaining this essential character, ONUC was authorized to take the initiative in the use of force in respect to certain limited and carefully defined subjects. Within the framework of possible sub-categories of collective measures, ONUC thus could be said to have evolved into an entity belonging primarily to the "non-interventionist" sub-category but partaking to some extent of the characteristics of an "enforcement measure." The Council has thus used all necessary flexibility in defining the rôle and mission of ONUC, but might have been hampered in doing so by too rigid applications of such concepts as the "UNEF-type force" and "non-interventionist" operations.

PROCEDURAL QUESTIONS AFFECTING INITIATION OF COLLECTIVE MEASURES

Another obstacle in the path of the proposed formulation concerning the nature of collective measures is the prevailing belief that the Security Council is legally empowered to initiate "collective measures" only by means of binding orders on Member states. It should be pointed out that, while the question of the inherent meaning of "collective measures" in relation to "enforcement measures" has substantive content, the question now to be discussed is essentially a procedural matter.

That the Council would normally act through binding orders was probably the general expectation of the framers of the Charter. States were, of course, expected to conclude agreements with the Security Council under Article 43 of the Charter as to the "numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided" on the "call" of the Council. It seems clear that states were only to be legally bound to contribute troops and other facilities in accordance with the agreements contemplated in Article 43.⁴¹ Since this rather elaborate procedure was provided in the Charter, it was perhaps natural for the idea to grow up that it was the only possible procedure by which the United Nations could use force. However, because of the "cold war," it has been impossible to conclude the agreements contemplated by Article 43 and, since the Council was thus prevented from acting according to the procedure generally contemplated, it is perhaps not surprising that the idea was advanced and generally accepted that the action in Korea could not be a "collective measure"—that it was, instead, a recommenda-

⁴⁰ See note 47 below and accompanying text.

⁴¹ Sohn, note 18 above, at 237; Schmidt, "The Charter of the United Nations: An Instrument to Re-Establish International Peace and Security!" 33 *Indiana Law J.* 322, 337 (1958); Seyersted, note 3 above, at 216.

tion to the Member states. The traditional view was thus perpetuated, so that, when the need for ONUC emerged in the midst of a crisis, it would have been very difficult for the responsible authorities to have claimed that it was a "collective measure." Compounding the difficulty, of course, was that other facet of the problem which holds that "collective measures" are "enforcement measures," which ONUC was definitely not intended to be.

However, the terms of the Charter do not seem to make it mandatory that collective measures be initiated by binding orders of the Council based on Article 43. In the case of ONUC, for example, the Council's action in initiating the operation seems to be well within its powers under Article 39 to "decide what measures shall be taken" to deal with a situation deemed to constitute a threat to international peace, and under Article 42 to "take such action by air, sea, or land forces as may be necessary to maintain . . . international peace and security." In this case, it will be recalled, the Council did not order that states participate in the operation, the force being recruited by means of voluntary contributions of Member states. In such situations Article 42 seems to stand very well by itself as a specific source of authority enabling the Council to proceed to the application of armed force.⁴²

Some difficulty with respect to this interpretation is posed by the language of Article 106 which provides:

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall . . . consult . . . with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

According to the interpretation just referred to in connection with Article 43, this article is not needed to enable the Council to fulfill its responsibilities under Article 42. This was demonstrated in the Korean case, when forces were recruited through voluntary contributions, and has again been demonstrated in the case of ONUC. Article 106 was obviously a transitional and temporary provision, and since no Article 43 agreements have been required, the interim period contemplated by Article 106 has long since expired.

The question must then be considered whether the power of "decision" in Articles 39 and 42 of the Charter is applicable to that vital aspect of the ONUC operation which concerns the recruitment of troops for the Force. In this respect the United Nations relied upon voluntary contributions from Member states and its action was in effect recommendatory. This was also the case of the earlier Korean operation, although in that case the entire operation proceeded on the basis of recommendations from the Council. As indicated above, the Korean operation seems to be widely regarded as

⁴² Schachter, "The Place of Law in the United Nations," in 1950 Annual Review of United Nations Affairs 221 (Eagleton and Swift, editors, 1951). See also comment of Professor Hayton in Schachter, *loc. cit.* note 6 above, at 156.

founded upon the power of recommendation conferred upon the Council in Article 39.

It is believed that answers to such questions should be sought in terms of clear and substantive authorizations for the taking of collective measures, if this is at all possible. Pursuant to this proposition, the source of authority should be sought in Articles 1(1), 39, 41 and 42, which appear to contain the basic provisions defining collective measures and providing for their application.

Article 39, it will be observed, contains, side by side, substantive authorizations enabling the Council to "make recommendations" or to "decide what measures shall be taken" in order to deal with threats to the peace, breaches of the peace or acts of aggression. While the recommendatory power thus provided has been relied upon as the source of authority for United Nations action in the Korean case, it does not seem in fact designed to serve as the substantive Charter authority for collective measures. As far as its substantive (as contrasted with its procedural) aspect is concerned, the power of recommendation is very broad in scope, but its force and effect when applied to disputes and situations are limited to the application of moral pressure. "Collective measures" stand in contrast, since they involve the application of tangible pressures, and are correspondingly limited in scope to situations constituting threats to the peace, breaches of the peace and acts of aggression. This distinction appears to be made clear in the following interpretative comment incorporated in the report of Committee III/3 of the San Francisco Conference,⁴⁵ which drafted Article 39. The comment refers to Sections A and B of Chapter VIII of the Dumbarton Oaks Proposals; Section A became Chapter VI of the Charter and Section B became Chapter VII:

In using the word "recommendations" in Section B as already found in paragraph 5, Section A,⁴⁶ the Committee has intended to show that the action of the Council so far as it relates to the peaceful settlement of a dispute or to [of ?⁴⁵] situations giving rise to a threat of war, a breach of the peace, or aggression, should be considered as governed by the provisions contained in Section A. Under such an hypothesis, the Council would in reality pursue simultaneously two distinct actions, one having for its object the settlement of the dispute or the difficulty, and the other, the enforcement or provisional measures, each of which is governed by an appropriate section in Chapter VIII.⁴⁶

⁴⁵ 12 U.N.C.I.O. Docs. 507 (1945).

⁴⁶ The corresponding provision of the Charter is Art. 86(1), in Ch. VI (on "Pacific Settlement of Disputes"), which reads: "The Security Council may, at any stage of a dispute of the nature referred to in Article 83 or of a situation of like nature, recommend appropriate procedures or methods of adjustment."

⁴⁵ The original French text of the Committee's Rapporteur, M. Paul-Boncour, is: "règlement pacifique du différend ou de la situation." Doc. No. 881 (French), III/3/46, 12 U.N. C. I. O. Docs. 522 (1945).

⁴⁶ The ensuing paragraph of the comment, not reproduced here, makes it clear that the discretionary authority to resort to procedures of peaceful settlement or to invoke provisional measures in no way derogates from the duty of the Council to employ all necessary measures, including the possible use of force, in the event of actual aggression or other breach of the peace.

Once collective measures have been decided upon and it is merely a question of procedure for implementing them, it would seem entirely appropriate to utilize recommendations or any other procedures compatible with the Charter.

In this view the Council would have initiated both the Korean and Congolese armed operations pursuant to its authority to make decisions under Article 39. In the former case it would have adopted the procedure of recommendation for carrying out the decision; in the latter it would have exercised its option of acting partly by recommendation and partly by decision, the latter having the procedural aspect of instructions to the Secretary General.

UNCERTAIN CHARTER BASIS OF ONUC

Probably because of the identification of "collective measures" with "enforcement measures," as well as because of the prevailing notion that the Security Council can invoke such measures only by means of binding orders on states, ONUC has been held not to be a collective measure. Although several theories have been advanced to explain its basis in the Charter, none of these has appeared to be entirely satisfactory, and the force has continued to occupy a rather uncertain and unsatisfactory position in this respect.

ONUC was the first force similar to UNEF to be formed by the Security Council. Prior to its formation, however, and in anticipation of the possible need for such forces in the future, an effort had been made to establish that such forces would be linked with UNEF in a separate category apart from Chapter VII.⁴⁷ This concept of what may be called the "UNEF-type" force was partially abandoned when ONUC was established, since this force seems to have been recognized from the outset as finding its

⁴⁷ This line of thought was evidently precipitated by the proposal that the Council should establish an armed force to play a rôle in the Lebanese-Jordanian crisis of 1958. See note 23 above. In the Secretary General's report on UNEF of Oct. 9, 1958, the distinction is noted in par. 179 between UNEF-type operations and combat operations, and it is said that the latter "would require a decision under Chapter VII of the Charter and an explicit, more far-reaching delegation of authority to the Secretary-General than would be required for any of the operations discussed here." United Nations Emergency Force, note 19 above, at 31. A more affirmative description of the concept of the "UNEF-type" force is contained in the Secretary General's annual report on the work of the organization, 1957-1958:

"It should, of course, be clear that any such force, unless it were to be called into being by the Security Council under Chapter VII of the Charter, must constitutionally be a non-fighting force, operating on the territories of the countries concerned only with their consent and utilized only after a decision of the Security Council or the General Assembly, regarding a specific case, for those clearly international purposes relating to the pacific settlement of disputes which are authorized by the Charter. . . ." General Assembly, 13th Sess., Official Records, Supp. No. 1A at 2 (U.N. Doc. A/3844/Add. 1) (1958). In an oral statement to the Assembly on Nov. 5, 1958, the Secretary General confirmed the implication of this statement that a force of this type, formed by the Council, would find its Charter authority in Ch. VI. *Ibid.* Spec. Pol. Committee 63 (U.N. Doc. A/SPC/SR. 100) (1958).

Charter authority in Chapter VII.⁴⁸ While it was indicated at the same time that UNEF and ONUC might be regarded as a separate category of operation in sharing common rights and limitations with respect to the use of force,⁴⁹ this connection could not be continued in view of the necessity which developed of enlarging ONUC's powers in this respect.

However, these developments with respect to ONUC did not lead to the conclusion that it was a collective measure. Both before and after the Council's resolution of February 21, 1961, which authorized ONUC to use force if necessary to prevent civil war in the Congo, the Secretary General maintained that this was not an operation under Articles 41 and 42. A statement of his position in December, 1960, is thus summarized in his annual report on the work of the organization:

The Council had never invoked Articles 41 and 42 of the Charter, which provided for enforcement measures and would override the domestic jurisdiction limitation of Article 2(7). . . . [T]he Council's resolutions could be regarded as implicitly adopted under Article 40 and as based on an implicit finding under Article 39, but neither the Council nor the Assembly had ever supported that interpretation, much less endorsed it explicitly. . . .⁵⁰

The suggestion thus advanced that ONUC might have the nature of a "provisional measure" need not be gone into for purposes of present discussion. The present thesis is that this is a "collective measure." If it is, it is different from a "provisional measure" in much the same way as a police operation differs from a temporary injunction in domestic law. That some aspects of the Council's actions in the Congolese case may well have the character of provisional measures is in no way inconsistent with this view as to the essential character of ONUC.

The view of ONUC as an "essentially internal" operation has since been advanced in the following statement made by the Secretary General on April 17, 1961, to Committee 5 of the General Assembly:

. . . [O]ne must bear in mind the fundamental difference between the use of armed force under Article 43 or 42 of the Charter and the use of military personnel or contingents for essentially internal security functions in the territory of a Member State at the invitation of the Government of that State. The operation in the Congo is clearly of the

⁴⁸ This conclusion is derived from the official statement that it found its juridical basis, in part, in the existence of a threat to the peace in the Congo. Schachter holds that the operation is based on Ch. VII, basing this conclusion generally on the Council resolution of July 14, 1960, and subsequent resolutions, and mentioning particularly the Council's action in its resolution of Aug. 9, 1960 (U.N. Doc. S/4426, Aug. 9, 1960, Security Council, 15th Year, Official Records, Supp. July-Sept., 1960, at 91-92 (1960)), calling upon Member states to accept and carry out the decisions of the Council as required by Arts. 25 and 49 of the Charter. Schachter, *loc. cit.* note 6 above, at 143.

⁴⁹ First Report by the Secretary General on the Implementation of Security Council Resolution S/4387 of 14 July, 1960, note 28 above, at 19-20.

⁵⁰ Annual Report of the Secretary General on the Work of the Organization 16 June 1960-15 June 1961, General Assembly, 16th Sess., Official Records, Supp. No. 1 at 27 (U.N. Doc. A/4800) (1960).

latter type. The function of the United Nations force—as stated initially—was to assist in maintaining law and order; this was later expanded by the Security Council resolution of 21 February to include the objective of preventing civil war. The Security Council considered these measures necessary to counteract the threat to international peace, but the measures themselves did not constitute “sanctions” or enforcement action directed against a State as contemplated by Articles 42 and 43 of the Charter.⁵¹

Another indication of the view that ONUC is an “essentially internal” operation is found in a report of the United Nations Officer-in-Charge in the Congo, Dr. Linner, dated September 14, 1961.⁵² The report concerns clashes between United Nations and Katangese forces on August 28 and September 13, 1961, and states that these occurred when United Nations troops were attacked while enforcing, or preparing to enforce, United Nations policy favoring the withdrawal and evacuation of mercenaries as set forth in the Council resolution of February 21, 1961. The power of enforcement was not, however, conferred by this resolution, according to the report, but was derived from Congolese legislation providing for the expulsion of mercenaries, plus a request for United Nations assistance in carrying it out. This, the report states, “gave the United Nations legal rights within the Congo corresponding to the terms of the aforementioned resolution.” This interpretation may find its basis in the original Security Council resolution of July 14, 1960, under which ONUC was given the mission of maintaining law and order in the Congo. For this purpose it necessarily had the authority to enforce the ordinary criminal laws applicable in that country. The line of thought just referred to may have intended to place on the same footing the power to arrest and expel mercenaries. It is understood that the Congolese legislation in question has the effect of applying ordinary criminal laws to the activities of the mercenaries, thus facilitating this interpretation.

It would seem possible to conceive of a United Nations police force established under Charter authority other than that pertaining to collective measures and having the mission of maintaining internal order under the ordinary laws of a territory for which the United Nations had assumed responsibility. The necessary Charter authority might be held to derive as an incident of whatever authority had been invoked by the United Nations in assuming responsibility for the territory in question. A suggestion along this general line was made in a Secretariat memorandum of 1948 in connection with a proposed United Nations security force to maintain order in Palestine pending the implementation of the General Assembly’s Plan for Partition with Economic Union. The memorandum suggested that the Council might feel that it had a duty, inherent in Article 24 of the Charter

⁵¹ Statement made by the Secretary General at the 839th meeting of the Fifth Committee on 17 April 1961 (U.N. Doc. A/C.5/864).

⁵² Report of the Officer-in-Charge of the United Nations Operation in the Congo to the Secretary General Relating to the Implementation of Paragraph A-2 of the Security Council Resolution of 21 February 1961 (U.N. Doc. S/4940, Sept. 14, 1961).

as interpreted in the Trieste case,⁵³ to assist in the implementation of the Assembly's plan for Palestine, as a measure conducive to "general welfare or friendly relations among nations," and to this end to set up an international force.

An international armed force set up on this basis would not be one in the sense of Chapter VII of the Charter. It would have the character of an international police force for the maintenance of law and order in a territory for which the international society is still responsible.⁵⁴

According to the view upheld in the present paper, such a security force, in order to be justified by Charter authority other than that pertaining to collective measures, should not apply pressure in international situations and should not intervene in domestic conflicts within the country where it is serving. If the United Nations desired to deploy armed force for either of these purposes it should, in this view, confer its authorization in accordance with the provisions pertaining to collective measures. It could, of course, only do this in situations deemed to constitute threats to the peace, breaches of peace or acts of aggression.

If this point of view is valid, some questions would then arise as to the validity of the status claimed for ONUC as an "essentially internal" police operation. In the first place, can the arrest and expulsion of mercenaries of the Katanga regime be regarded as enforcement of the ordinary criminal laws of the Congo, or must it not be regarded as essentially designed to end the secession of Katanga and thus as an intervention in an internal conflict? A further question along this line is suggested by the fact that shortly after Dr. Linner's memorandum above referred to, the Security Council specifically authorized ONUC to make such arrests and deportations, and did so in the context of a resolution (that of November 24, 1961) which appears, in its over-all context, to be strongly directed against the continuance of secessionist activity by the Katanga regime.

Further questions as to ONUC's status as an essentially internal measure arise from the facts that it was established under Chapter VII of the Charter, that it was authorized from the outset to employ force in defense of assigned positions, and that it was later authorized to take initiative in the use of force for the purpose of preventing civil war in the Congo.

It is sufficient for present purposes to point out that such questions exist, without attempting to answer them. It is only necessary to observe that the constitutional position is rather uncertain and unsatisfactory with respect to this operation, which is of such importance as to involve the use of force in international relations and which has, indeed, been engaged in

⁵³ The Security Council based its acceptance of certain responsibilities vis-a-vis Trieste, as requested in the draft Peace Treaty with Italy, upon its responsibility for the maintenance of peace and security pursuant to Art. 24 of the Charter, notwithstanding that the functions in question seemed to go beyond Charter provisions specifically cited in Art. 24 as furnishing the Council's powers for the discharge of its duties in this respect. Security Council, 2nd Year, Official Records, 89th and 91st Meetings (1947).

⁵⁴ Relations between the United Nations Palestine Commission and the Security Council. *Ibid.*, 3d Year, Supp., Jan.-March, 1948, at 14, 23 (U.N. Doc. A/AC. 21/13) (1948).

combat. The constitutional difficulty is believed wholly due to the dilemma in which (a) prevailing Charter interpretations make it difficult for the responsible authorities to designate ONUC as a collective measure, and (b) there is no other satisfactory basis for the operation apparently to be found in the Charter.

NATURE OF GENERAL ASSEMBLY POWER TO INITIATE COLLECTIVE MEASURES

The opinions have been indicated above that UNEF possesses the basic characteristics of a United Nations collective measure pursuant to an objective view of the Charter, and that it should be given this designation, if possible, in order to avoid the dilemma of Charter interpretation to which such measures are subject under currently prevailing interpretations.

The question then arises as to the power of the Assembly, under the Charter, to initiate such measures. It is believed that the Assembly can be regarded as having this power under the basic authority of Article 1(1)⁵⁵ of the Charter and under a theory of interpretation generally consistent with the one outlined in the "Uniting for Peace" Resolution. Article 1(1), it will be recalled, declares it to be a major purpose of the Organization to maintain international peace and security, and to that end "to take effective collective measures" for the removal of threats to the peace and for the suppression of aggression or other breaches of the peace. By referring to the responsibility of the Organization as a whole, rather than the Security Council, and by stating that the measures are to be "effective" for the purpose of maintaining peace and security, it seems to be made clear that the Organization is to function in the peace-keeping area at all costs.

The preamble of the "Uniting for Peace" Resolution⁵⁶ begins by quoting Article 1 of the Charter and proceeds to outline a theory of Charter interpretation believed to be generally valid as delineating the Assembly's residual rôle in matters pertaining to the maintenance of peace and security. The resolution recognizes, in the first place, the "primary" responsibility of the Security Council for the maintenance of international peace and security as provided in Article 24 of the Charter, including the initiation of collective measures when they are deemed necessary to this end. However, in the event that the Council fails to fulfill its primary responsibility in a given case, the resolution recognizes that a residual power resides in the General Assembly.

The main operative provision of the resolution then follows to the effect that, if the Council should, by reason of lack of unanimity, fail to fulfill its primary responsibility in a case involving a threat to the peace, breach of the peace or act of aggression, the General Assembly should immediately consider the matter with a view to making recommendations to Members for collective measures, including the possible use of force. The Assembly was here unmistakably asserting the proposition, which is believed soundly

⁵⁵ A comparable interpretation of Art. 24 appears to have been made by the Security Council with respect to the Trieste case. See note 53 above. See also note 3 above.

⁵⁶ Res. 377 (V), Nov. 3, 1950, General Assembly, 5th Sess., Official Records, Supp. No. 20, at 10-12 (U.N. Doc. A/1775) (1950); 45 A.J.I.L. Supp. 1 (1951).

based in Article 1(1) of the Charter, that the United Nations is bound to take necessary action for the maintenance of peace, notwithstanding the possible failure of the Security Council, and that the Assembly is the proper body to exercise the residual power in this contingency. While the resolution contemplates only that the Assembly shall act by means of recommendations to Member states, the present thesis would hold this to be merely a self-imposed limitation not inherent in the Assembly's powers in such matters. The question again goes back to the location of substantive authority. Since this is believed to be found in Article 1(1), it does not seem to be limited to being exercised by means of recommendations.

Meanwhile it is necessary to observe that a quite different view of the matter was taken by delegations supporting the "Uniting for Peace" Resolution during the Assembly debate on the resolution. The view seemed to be fairly general that the action contemplated in the resolution would be pursuant to Charter provisions which may be referred to generically as Articles 10, 11(2) and 14, authorizing the Assembly to discuss, and make recommendations concerning, matters relating to the maintenance of peace and security, provided (a) that it does not make recommendations while the Council is seized of a given case (Article 12), and (b) that any matter requiring "action" is referred to the Security Council (Article 11(2)).⁵⁷ It was mainly in reply to a Soviet argument⁵⁸ based on the latter proviso that several delegations made it clear that they regarded the "collective measures" to be taken pursuant to the Assembly's recommendation as being essentially different from the kind of "action" which the Security Council is empowered to take under the Charter. The Canadian Delegation, for example, after strongly asserting the power of the General Assembly to take measures to safeguard peace and security when the Council was prevented from doing so,⁵⁹ went on immediately to say that "actions" under Article 11(2) are not to be confused with recommendations which the Assembly is empowered to make to Member states. The Philippine Delegation expressed the view that the resolution under consideration, in asserting the Assembly's authority under Articles 10, 11(2) and 14, "did not substitute one body for another, but established a second line of defense in case the first failed."⁶⁰ Several delegations expressed themselves along similar lines, and none seems to have asserted that the "collective measures" to be taken by the Assembly under the resolution would have the character of "collective measures" as contemplated in the Charter.⁶¹ It seems fair to

⁵⁷ This general view was exemplified in the statements of the United States, Chile, France, Peru and Cuba, General Assembly, 5th Sess., Official Records, 1st Committee 64, 67, 70, 75, 79-80 (U.N. Doc. A/C. 1/SR. 354-357) (1950).

⁵⁸ *Ibid.* 84-85.

⁵⁹ *Ibid.* 90.

⁶⁰ *Ibid.* 92. See also statement of Pakistani Delegation, *ibid.* 127.

⁶¹ A similar distinction is drawn in Vallat, "The General Assembly and the Security Council of the United Nations," 29 *Brit. Yr. Bk. of Int. Law* 63, 97-100 (1952); and in Woolsey, "The 'Uniting for Peace' Resolution of the United Nations," 45 *A.J.L.L.* 129, 184 (1951). Some authorities consider that the resolution properly contemplates "collective measures" under the Charter, though it is not always clear as to whether these are regarded as taken by the United Nations, or by Member states acting outside

say that the view just indicated represents the general consensus of the delegations who supported the resolution.⁶² The inference would seem permissible that these delegations regarded the measures authorized by the resolution as being taken by the Members essentially on their own decisions and outside the Organization.

This interpretation of the resolution appears to correspond closely to the prevailing view concerning the constitutional nature of the Korean operation and to be designed to serve the dual purpose of (a) enabling the Organization to act, notwithstanding the paralysis of the Security Council by the veto, while (b) leaving undisturbed the prevailing interpretation which holds that the Security Council has the monopoly of true United Nations collective measures as contemplated by the Charter.

While the point of view thus manifested by the delegations supporting the "Uniting for Peace" Resolution is readily understandable, it appears to have defects, once the prevailing interpretation is set aside and it becomes possible to take a more objective view of the problem in the light of the Charter. The opinion has been expressed in the present paper, in connection with the Korean operation, that United Nations actions of such importance as those involving the interposition of tangible pressures in international relations ought to be characterized according to their real nature and potential consequences. The Charter itself appears to take a corresponding view, and seems not to intend that the authority and prestige of the Organization should be lent to such measures except when undertaken within the appropriate framework provided by the Charter for their consideration and application.

There is here also applicable the proposition ventured above, in connection with the Security Council, that Charter authorizations pertaining to "recommendations" do not furnish satisfactory bases for measures involving the application of tangible pressures, since they seem designed for another purpose entirely. It is of considerable interest in this connection that, while delegations supporting the "Uniting for Peace" Resolution tended to place it on the basis of Articles 10, 11(2) and 14, which confer

the Organization. Bowett, "Collective Self-Defense under the Charter of the United Nations," 32 Brit. Yr. Bk. of Int. Law 130, 156, note 3 (1955-1956); Kelsen, *Recent Trends in the Law of the United Nations* 974-975 (1951); McDougal and Gardner, "The Veto and the Charter: An Interpretation for Survival," 60 Yale Law J. 258, 288-291 (1951); Sohn, note 18 above, at 234.

⁶² Some delegations thought that the measures contemplated in the resolution could best be classified as "collective self-defense" under Art. 51 of the Charter. General Assembly, 5th Sess., Official Records, 1st Committee 113 (Colombia), 130 (United Kingdom), 134 (Australia) (U.N. Docs. A/C.1/SR. 361-364). That this was the view of the Secretary General was indicated in his Annual Report on the Work of the Organization for 1956-1957, *ibid.*, 12th Sess., Supp. No. 1A at 2, 3 (U.N. Doc. A/3594/Add. 1) (1957). To similar effect see Verdross, "The Charter of the United Nations and General International Law," in *Law and Politics in the World Community* 153, 159-160 (Lipsky ed., 1953); Kunz, "Sanctions in International Law," 54 A.J.I.L. 324, 336 (1960). See also Stone, *op. cit.* note 7 above, at 273-275. *Contra*: Woolsey, note 61 above, at 135; Waldo, "The Regulation of the Use of Force by Individual States in International Law," 81 Hague Academy Recueil des Cours 451, 505 (1952, II).

upon the Assembly a recommendatory power, the resolution itself does not mention these articles, but, by quoting Article 1 at the beginning of the preamble, seems to place its reliance upon this provision.

The practical consideration may finally be noted that while the resort to the recommendatory power may serve as a convenient device for justifying certain types of measures, it does not have this effect with respect to operations like UNEF. Such measures are, on the contrary, hampered to the extent that the view becomes prevalent that the Assembly can act only by means of recommendations in matters pertaining to the maintenance of peace and security.

Once the Assembly is recognized as having a valid and substantive source of authority in the Charter—as it is believed to have in Article 1(1)—and decisions are taken pursuant to such authority, it would seem to be open to the Assembly to adopt any appropriate procedures for the implementation of such decisions, within the limits of its Charter powers. However, if no specific procedure were available under the Charter, there would seem to be no impediment to the devising of appropriate procedures by the Assembly or, in similar cases, the Security Council. The following rule laid down by the International Court of Justice would seem to be appropriate to such situations:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁶³

Pursuant to the view taken in the present paper, such actions as those taken by the Assembly in recommending embargoes in the Greek and Korean cases would be best regarded as having been based on the authority of Article 1, and then as having been brought into force by means of recommendatory *procedures*.

Turning to UNEF, the question as to this Force's Charter authority does not seem to be satisfactorily answered by the official view, stated in the agreement between the United Nations and Egypt on the status of the Force, that it is "an organ of the General Assembly of the United Nations established in accordance with Article 22 of the Charter."⁶⁴ Article 22 merely authorizes the General Assembly to establish such subsidiary organs as it deems necessary for the performance of its functions. It does not answer the question as to the location of the Assembly's substantive authority to deploy armed force. According to the present analysis, UNEF was initiated under the substantive authority of Article 1 and was then implemented partly by recommendation and partly by decision. Decisions

⁶³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174, at 182; 43 A.J.I.L. 589 (1949).

⁶⁴ See introductory sentence of Secretary General's letter of Feb. 8, 1957, included in Report of the Secretary General on Arrangements concerning the Status of the United Nations Emergency Force in Egypt, General Assembly, 11th Sess., Official Records, Annexes, Vol. II, Agenda Item No. 66, at 52-53.

took such forms as instructions to the Secretary General and the formation of a subsidiary organ under Article 22.

On the other hand, there would be some kinds of procedure not open to the Assembly, notably the power to make legally binding orders on Members that they participate in collective measures. It seems clear that the Member states have bound themselves to comply with such orders only when they emanate from the Security Council.

As a practical matter, this difference between the two bodies is, under today's world conditions, more apparent than real. It is true that the nature of the authority exercised by the General Assembly is such that it would require as an essential prerequisite the backing of a sufficient number and weight of Member states to assure the success of a given operation. With such backing the General Assembly would be able to initiate necessary measures by means of procedures normally available to it, such as the establishment of subsidiary organs and the issuing of instructions to officials subject to its jurisdiction. However, although the Security Council has the theoretical authority under the Charter to make binding orders, the "cold war" conflict has in effect made it impossible to use this power and has thus left the Security Council in substantially the same position as the Assembly. As a result, in both cases in which the Security Council has taken steps to apply force to international situations—the Korean and Congolese cases—it has obtained troops through voluntary contributions of Member states and has otherwise shown itself dependent upon the voluntary support and backing of states. This was strikingly manifested when several states withdrew their troop contributions in the midst of the Congolese operation.⁶⁵

If it is assumed that the General Assembly has the power to initiate collective measures, must its actions in such matters always be limited, like UNEF, to non-interventionist and defensive measures which require the permission of the states concerned? There is not believed to be any Charter provision which so limits the General Assembly, once the above-stated hypothesis is made. It would then seem to have open to it the full range of collective measures as these are defined and limited in the Charter.

The final clause of Article 2(7), although it could be interpreted as imposing such a limitation, is not believed to do so. This article provides that the United Nations is not entitled to intervene in the domestic affairs of states and concludes with the proviso that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Does this imply that enforcement measures—that is, measures directed against states as distinguished from "non-interventionist" measures such as UNEF—are regarded as legitimate exceptions to the rule of non-intervention only when taken pursuant to Chapter VII, and not when initiated by the General Assembly? It would be impossible to sustain such a contention. The proviso certainly has no such purpose, and it seems doubtful that it serves any purpose except to remove doubt on the point that the rule of non-

⁶⁵ New York Times, Feb. 1, 1961, p. 13, col. 3. See also Annual Report of the Secretary General on the Work of the Organization 16 June 1960–15 June 1961, *op. cit.* note 50 above, at 33, 37 (U.N. Doc. A/4800) (1961).

intervention in domestic affairs cannot hinder the application of collective measures. The specific reference to Chapter VII in the proviso is without significance, merely reflecting the general anticipation of the framers that collective measures would always take place under this chapter.

The Assembly has, in fact, initiated measures amounting to the application of tangible pressures in internal situations and these, it is believed, can only be accounted for as collective measures under the authority of Article 1(1). As the principal Charter article dealing with the subject, its authority would necessarily embrace the whole range of measures authorized by the Charter, including enforcement measures.

While it is thus concluded that the Council and, in a residual capacity, the Assembly are possessed of broad authority in the field of collective measures, it is appropriate to conclude the discussion by taking note of the corresponding limitations imposed upon both bodies by practical considerations and by principle—including other Charter principles that might be applicable legally or morally in particular situations. When the framers decided that the Charter should not specify particular kinds of measures to meet particular situations, they were, of course, placing the responsibility for such decisions upon the competent United Nations organs. Certainly they did not intend it to be exercised on the basis of pure political discretion, or even upon a basis of strictly legal considerations. If, for example, the principle of non-intervention did not seem to be legally applicable to a given situation, it might still have demands to make as a basic principle of the Charter having a bearing upon the equities of the case, and there would be a clear responsibility upon the competent authorities to take such considerations into account. Generally speaking, there can be no question that the framers intended the discretion conferred upon the United Nations in such matters to be exercised with all responsibility and concern for the potential consequences of applying tangible pressures to international situations.

EDITORIAL COMMENT

SOME THOUGHTS ON THE JOURNAL

Election as Editor-in-Chief of the JOURNAL and the assumption of the responsibilities of that post cause reflections on the distinguished history of this publication and upon our present objectives. Now closing its 56th year, the JOURNAL has sought to carry out the aims of the American Society of International Law, to "foster the study of international law and promote the establishment of international relations upon the basis of law and justice."¹ In the first issue it was stated that the Society had

established as an organ of progressive and scientific thought the AMERICAN JOURNAL OF INTERNATIONAL LAW which will, it is hoped, bring home to the English reader, layman or specialist, the theory and practice of international law. The journal is the handmaid of science and its pages will be closed to the language of prejudice and bias.²

These purposes still hold today, and for the years ahead.

Indeed, when we look back over the 56 years of the JOURNAL, we find marked continuity. The general form and central theme remain much the same.³ From Volume I until the present time we find articles, editorial comments, documents, book reviews, judicial decisions, and a listing of current periodical literature in our field. Some of the articles in the first volume would still be timely today, particularly the "lead-off" one by Secretary of State Elihu Root, then President of the Society, on "The Need of Popular Understanding of International Law." The first Board of Editors, headed by Dr. James Brown Scott (Solicitor of the Department of State and Professor at George Washington University), included Professor Charles N. Gregory of the State University of Iowa, Robert Lansing of Watertown, N. Y., Professor J. B. Moore of Columbia, Wm. W. Morrow of San Francisco, Professor Leo Rowe of the University of Pennsylvania, Honorable Oscar Straus of Washington, Professor George Grafton Wilson of Brown University, Professor Theodore Woolsey of Yale, and, as European Editor, Honorable David Jayne Hill (United States Minister to The Netherlands). This group, like more recent Boards of Editors, was composed of men of long experience in Government service, in law practice, and in teaching both law and political science. The writer feels privileged to have known, both in person and through their work, most of those who have served on the Board of Editors over the years, and in particular the suc-

¹ See Prospectus of the American Society of International Law, reproduced in 1907 Proceedings of the American Society of International Law 35, at 37; or in 1 A.J.I.L. 130, 131 (1907).

² Editorial comment, understood to be by James Brown Scott, 1 A.J.I.L. 129, 134-135 (1907).

³ See, in particular, George A. Finch, "The American Society of International Law, 1906-1956," 50 A.J.I.L. 293 (1956).

cessive Editors-in-Chief, commencing with Dr. Scott and continuing through George Grafton Wilson, then George A. Finch, and most recently Herbert W. Briggs.⁴ (Mention must also be made of the invaluable services to the JOURNAL of Pitman Potter as Managing Editor for a short time, and Eleanor H. Finch as Secretary of the Board of Editors.) Led by these persons, those responsible for the JOURNAL have established standards and patterns which we may well strive to follow in the years ahead. Guided by these ideals and standards, we hope the JOURNAL will move forward, adapting readily to the ever-changing conditions of modern international law and of the world of today and tomorrow.

In thinking about the JOURNAL we must bear in mind its diverse audience. Members of the Society, and readers in institutions subscribing to the JOURNAL, comprise widely divergent groups. Our largest single category of members might be described as lawyers interested in international law, whether as private practitioners or government officials or on corporate legal staffs. Some private businessmen who are not lawyers also follow the JOURNAL. A sizeable group of members are civilian and military personnel actively participating in the administration and conduct of foreign affairs and international relations, in capacities other than as lawyers. The Society includes many law teachers, and teachers of political science, history, international relations, and other aspects of the social sciences. Students at various academic levels read the JOURNAL. We also have many members of the Society and readers who are not vocationally connected with international law, but who are interested in, and seek to further, "the establishment of international relations upon the basis of law and justice." Our non-member subscribers include a large number of libraries and institutions, not only in the United States but throughout the world. Indeed, the number of foreign members of the Society and foreign subscribers to the JOURNAL requires us to remember that it has a dual function, both that of laying international law material before American readers, and that of placing American viewpoints on international law before the rest of the world.

What do the members of the JOURNAL's diverse audience have in common? At least an interest in current or controversial or fundamental problems of international law, professionally presented. Our primary concern is with international law, as that term is broadly conceived. The JOURNAL is the only one published in the United States which concentrates on international law. It does, and should, publish occasional articles and notes concerning comparative law, private international law or conflict of laws, the legal problems of international organizations, and the legal aspects of international transactions, both private and intergovernmental. We would indeed welcome more treatment of these topics, which may sometimes seem to be at the periphery of public international law. However, our primary emphasis should remain in the field of international law, defined as the law

⁴ One should also mention Prof. Leo Gross, the present Book Review Editor of the JOURNAL, who during the absence of Prof. Briggs in 1960-1961 shared with the undersigned the duties of Co-Editors of the JOURNAL.

created (by custom or treaty) through the action of more than a single state, and governing primarily the relations of independent states with other independent states, with aliens, and with international organizations. This would be true, if for no other reason than that adequate specialized journals, as well as the many law reviews in the United States, devote their attention to such fields as comparative law, conflict of laws, international organization and administration, international politics and foreign affairs, and the conduct of foreign business operations; ours remains the only one in this country with chief emphasis on international law. Nevertheless, the JOURNAL's scope is, and should be, broad enough to cover any material on the legal side of international affairs which, by a pragmatic test rather than an analytic one, appears to be of interest and value to our readers.

During the past year a committee of the Editors has been studying ways and means of improving the JOURNAL, and keeping it responsive to changing needs. In connection with the expanded program of activities of the American Society of International Law, the Consultative Committee received many suggestions, and put forward the following ideas concerning possible improvements in the JOURNAL:

(a) The inclusion of selected articles dealing with the various legal aspects (and not just the purely public international law aspects) of actions or events that transcend national frontiers, particularly those of current interest. The intention would be that, while maintaining public international law as the area of primary concern, the JOURNAL would also include articles which consider private international law and other related legal aspects of transnational problems and events.

(b) Expansion of the section of the JOURNAL devoted to digests of international law cases, perhaps supplementing it with comments on cases of particular significance and digests of other current international law materials such as diplomatic correspondence.

(c) Publication of selected articles on international law appearing in foreign law journals, or digests of such articles.

Many other suggestions have also been under consideration, and further expressions of views would be welcome. One may indeed comment that some of the suggestions of the Consultative Committee, such as broadening the scope of subject-matter interest and expansion of the coverage of judicial decisions, would indicate no marked departure from what the JOURNAL has done in the past, when suitable material has been available and space in its pages has permitted. Comment on cases has taken the form of editorials, notes, or occasional leading articles; while both the "Contemporary Practice" section and the Documents section have taken some steps toward the suggested supplementation of judicial decisions by other current international law materials. No decision has been reached as to the practicability or desirability of publishing articles, translations of articles, or digests of articles, which have appeared in foreign journals. Financial limitations, including the steadily increasing costs of printing, make it impracticable to take some of the suggested steps, unless additional means of financing the JOURNAL are found or we acquire a considerable increase in the Society's membership.

At the present stage, the Board of Editors, and in particular the undersigned, wish to know the readers' individual views on many of these points. For example, what kinds of articles do they want? What types of documents do they wish to see reprinted or digested, or at least listed, in the JOURNAL? Should it suffice that such documents are made available in a separate publication by the Society? What types of judicial decisions do they wish? (In particular, do they want a fuller coverage of decisions of American courts which may be readily available in large law libraries, or do they want more attention devoted to decisions which are hard to obtain even in large libraries? Do our readers wish merely listings of cases with citations, so that they may look up the original reports; or do they find it useful to have a digest, or occasionally the full text, of the opinion itself?) What sorts of books do they wish to have reviewed? Do they wish these book reviews to be chiefly descriptive, or critical? Do they want in the JOURNAL more, or less, coverage of international organization problems, history, legal problems of foreign trade and investment, legal theory, public or private law of foreign countries, etc.? Do the readers want translations of articles and documents from foreign periodicals, and if so, from what languages? In short, what suggestions have *you* for constant improvement of the JOURNAL in these rapidly changing times? Please write us *your* ideas.

Finally, we need far more than has been coming to the JOURNAL in the way of articles and briefer comments on international law questions from which to choose those which will be published. Readers are urged to submit manuscripts, in double-spaced typed form (including double-spaced footnotes) and conforming as closely as possible to the style followed in the JOURNAL, to the Secretary of the Board of Editors for consideration by the JOURNAL.

Only with the continuing co-operation of the Board of Editors, and the active help and participation of many of our readers, can the quality of the JOURNAL be maintained and improved.

WM. W. BISHOP, JR.

NOTES AND COMMENTS

WORLD PEACE THROUGH LAW CONFERENCES

Four Continental Conferences sponsored by the American Bar Association recently brought together within a period of ten months lawyers from more than 100 nations to consider ways in which lawyers could work together globally to strengthen international law and legal institutions to make them more of a factor in achieving and maintaining world peace. The conferees reached general conclusions that this goal could be accomplished if: (1) international law-making is modernized and speeded up; (2) international decision-making is improved by creating new regional or specialized courts, as well as by better use of existing decision-making institutions; and (3) the legal profession of the world mounts a collective and sustained program to further these goals which, when achieved, will make law a credible substitute for the use of force.

The great success of the continental meetings was an extraordinary accomplishment in awakening the legal profession to the needs and possibilities in this field. The World Conference which is to be held next year should crystallize the ideas and plans to further the objectives agreed upon at the continental meetings. General practitioners of the law composed the majority of those who attended the conferences, but many conferees were former ambassadors, professors of law, justices of courts, and lawyers with extensive international law experience. The experts in the field rendered a tremendous service in preparing an excellent working paper and by personal attendance at the meetings where their advice and assistance were of immeasurable value. But the capturing of the interest and active participation of the members of the legal profession who have not heretofore taken part in the essential work to strengthen international law was a major achievement of these meetings. The personal contacts and other efforts that surrounded the meetings have stirred the public service interests of the legal profession and brought the profession closer together for joint endeavors in this all-important task of improving law in the world community.

Through these meetings the World Peace Through Law movement, initiated by the American Bar Association in 1958, has now become a truly international project actively supported by lawyers the world over. Through correspondence, research, personal contacts, publications, and continental and other meetings, an ever-accelerating dialogue has started among the lawyers of the world on the vast challenge which development of urgently needed international law and legal institutions in the world community now presents to the legal profession. This dialogue has triggered an unprecedented focus of attention among laymen as well as lawyers upon the international rule of law. As one illustration, sixty heads of state

representing governments all over the world attested to their belief in and support for a world ruled by law by sending messages to the conferences.

The first meeting was held in June, 1961, in San José, the capital of Costa Rica, a country famed for its democratic way of life and dedication to peace, evidenced dramatically by the absence of a national army. Twenty-three nations from the Western Hemisphere, including the then-nascent Federation of the West Indies, joined in discussions at the former site of the Central American Court of Justice. In September of the same year, nineteen nations of Asia and Australasia participated in a second Continental Conference in Tokyo, Japan. The third conference was held in Lagos, Nigeria, in December of 1961, with thirty-three nations from Africa and the Middle East sending delegates. The final meeting, for European nations, was held in April of 1962 in Rome, Italy, with twenty-six nations sending delegates.

Why has there been such unprecedented enthusiasm both within and without the profession for this program? After a careful examination of the four Consensuses approved at these conferences, an answer to this question can readily be found. The Consensuses broke new ground in at least four areas, and the conferences themselves in a fifth.

First, the global agreement of these leading lawyers to support a World Conference at which a definitive plan for the World Peace Through Law Program will be drafted is a totally new approach among lawyers. *Second*, approval of the idea for a World Peace Through Law Co-ordination Center to encourage existing and prospective efforts towards the improvement and expansion of international law and legal institutions is significant. *Third*, the agreement to encourage worldwide co-operative efforts of lawyers through a *World Rule of Law Day* and a *World Rule of Law Year* promises to provide both an opportunity for concrete endeavors by the legal profession and for important moves in an effort to develop a public awareness of the potential and promise of the rule of law internationally. *Fourth*, agreement by the Consensuses on some of the basic principles necessary for the establishment of an international legal system is a step forward in a highly significant area. *Finally*, through the meetings themselves, that personal acquaintance, confidence and trust among lawyers which are necessary for the success of any endeavor have been broadened and strengthened on a global basis.

To move to a closer examination of the Consensuses, one finds that the first three follow a similar pattern. After a preamble, a statement of general principles of international law is followed by a brief set of resolutions, and finally by a longer group of recommendations.

The final Consensus, that of Rome, takes note of the agreement reached in the previous Consensuses and expresses general support for the principles and recommendations therein. Then, utilizing a different format from its predecessors, it sets out in four points the views of the delegates concerning international law, international machinery for the settlement of disputes, international economic development, and, finally, the rôle of lawyers in development of the international rule of law.

In examining the Consensuses, it should be kept in mind that they are not tightly worded specific agreements determined after long and detailed, word-by-word discussion. Rather, they are broad statements of general provisions expressing general agreement in those areas where such agreement was possible at this type of initial conference. They should be viewed therefore as the basic foundation upon which future work in detail might proceed, and a general framework within which the World Conference may be assumed to be likely to act.

CHARLES S. RHYNE

*Chairman, Special Committee on World Peace through Law,
American Bar Association*

ANNEX

CONSENSUS OF SAN JOSÉ*

[*Approved June 14, 1961*]

This conference of lawyers from the 23 nations of the Americas convened in San José, Costa Rica, in June 1961, to consider a program to promote world peace through a co-operative and sustained effort of the lawyers of the world to establish the international rule of law, and to formulate plans for a world conference of lawyers, hereby declares this consensus of views:

Modern weapons of destruction must be controlled through the enlightened rule of law and converted to instruments of peace.

Law has been the only means to an orderly society of individuals. It is the only hope for a peaceful society of nations. Judgments of international courts of justice must displace resort to war. This will assure a world order that is just and a realistic "Law of Nations" to replace force as the controlling factor in the world community.

Through the international rule of law the peoples of the world can achieve dignity for the individual, equality of opportunity and legitimate aspirations for economic and cultural progress in a dynamic social order of free men.

The rule of law puts what is righteous before expediency and wisdom above emotion, so that which is just and fair will rule the affairs of men and governments by reasonable persuasion and a minimum of force, itself controlled by law.

The need for law in the world community is the greatest gap in the growing structure of civilization. The broadest objectives of extending the rule of law to the international community are to develop an international legal system which will establish, *First*, law rules stating minimum standards of conduct for nations and individuals in international relations, *Second*, law rules to facilitate international social and economic contacts, transactions and development and, *Finally*, creative law to provide for new and adequate

* The Consensus of San José as the first, and that of Rome as the fourth and last, are reprinted here in full.—ED.

international institutions to achieve and maintain that order and stability which will insure rapid progress for the entire world community.

The achievement of the international rule of law requires the observance of basic concepts of morality, justice, equity and reason as tested by the centuries of legal experience of civilized men.

[UNIVERSAL LAW OF MANKIND]

In view of the foregoing, the lawyers of the Americas assembled at the American Conference on World Peace Through the Rule of Law at San José, Costa Rica in June, 1961, declare their dedication to the cause of extending the Rule of Law to the world community through the progressive development of a world legal system based upon a universal law of mankind containing, among others, the following general principles, the acceptance of which is essential to an effective international legal system:

[PARTIAL LISTING OF GENERAL PRINCIPLES]

1. International law is the supreme law of the world community.
2. Individual persons, private organizations, nations, international organizations and juridical persons are subjects of international law in international matters.
3. Founded upon the consent of its constituents, international law embodies fundamental concepts of justice and morality common to civilized societies and represents the universally accepted customs and agreements of nations and individuals throughout the world.
4. The international rule of law is founded on the eternal principle of equality of all persons before the law. This means that every right imposes a duty to respect the rights of others, and that no person, organization or nation is above the rule of law.
5. International law and courts have no authority in matters which are within the domestic jurisdiction of States; however, tribunals for the settlement of international disputes have the power to determine according to law and applicable agreements the scope and limitations of their jurisdiction.
6. All subjects of international law are bound to fulfill their international obligations and exercise their rights in good faith.
7. All subjects of international law are legally bound to settle all their international disputes by peaceful procedures. International disputes which cannot be settled in due course by negotiations or other peaceful means must be submitted to impartial third party judgment.
8. Judges who sit on international judicial institutions must be impartial, professionally competent and free from political and other improper pressures, so that they can with integrity and judicial independence decide cases impartially according to the facts and the law.
9. All nations must abstain from the unlawful use of armed force, political subversion, economic aggression or defamatory propaganda.
10. The foregoing principle does not preclude states from exercising their right of legitimate self-defense to the extent necessary to repel a threat to their national security.

11. International obligations, including decisions of international tribunals, are enforceable by appropriate international community action.
12. Subjects of international law shall be entitled to the benefit of third party adjudication before an impartial international tribunal, before any community sanctions are imposed because of an alleged violation of international law.
13. All representative government, local, national and international, is founded upon the consent of its constituents, while under all government based on the rule of law individual persons retain their inalienable human rights.
14. The effective protection of the fundamental human rights of the individual is the indispensable basis for the achievement of a sound legal order based on peace and justice.

[SUPPORT FOR WORLD RULE OF LAW]

RESOLVES:

- A. To support fully the Continental Conferences of the lawyers of Asia, Africa and Europe and the proposed World Conference on World Peace Through the Rule of Law; and
- B. To carry on the work of this Conference in each of the American nations, by pledges of the delegates to this Conference to undertake the formation of Committees on World Peace Through Law for their national bar associations, in cities of their respective nations, or activate those Committees already existing, to contribute to the new international cooperative organization which we propose that the World Conference create to stimulate the plans and programs recommended by this Conference and the World Conference on World Peace Through Law; and
- C. To participate to the fullest in the World Peace Through Law program by working toward world-wide acceptance and application of the rule of law in all international relations; and to that end
- D. To encourage individual lawyers and existing public and private international and national organizations and institutions to engage in a coordinated and sustained effort to seek agreement on the implementation of feasible ways of achieving world peace through the rule of law.

[RESEARCH, EDUCATION, ACTION PROGRAM TO ACHIEVE A
WORLD RULED BY LAW]

RECOMMENDS:

- I. That a World Conference of lawyers be convened in 1962 with delegates from all nations participating in the Continental Conferences invited to attend; and
- II. That the topics for discussion at the World Conference include:
 - (1) International Judicial Machinery for Peaceful Settlement of International Disputes.
 - (2) Arbitration and Other Means of Settlement of International Disputes.

- (3) The United Nations and Regional Organizations as Factors Encouraging the International Rule of Law.
- (4) Facilitation of International Commerce and Economic Development Through International Law.
- (5) The Role of Lawyers in Development of the International Rule of Law.

III. That the World Conference consider designating a World Rule of Law Year during which a concentrated global effort of the lawyers of the world to advance the international rule of law will be undertaken through a coordinated program of research, education and cooperative action utilizing all existing institutions and international and national organizations, and through establishing such new institutions and organizations as may be necessary to effectuate the objectives and purposes of the World Peace Through Law program; and

IV. That the World Conference approve a plan to establish on a permanent basis a "World Peace Through the Rule of Law Institute" which shall have the following purposes:

- (1) To organize and oversee a continuous series of programs and activities to be carried on during World Rule of Law Year.
- (2) To coordinate activities of lawyers and legal organizations in a co-operative effort to establish the international rule of law.
- (3) To effectuate decisions and recommendations of lawyers convened at the Continental Conferences and World Conference.
- (4) To undertake an intensive world-wide educational program designed to reach citizens of all nations to impress upon them the reality of their interdependence and the vital necessity of establishing the international rule of law.
- (5) To organize and administer a coordinated global research program designed to accomplish the following:
 - A. To expand existing knowledge of international law and its sources.
 - B. To identify areas of common agreement which may be the basis of needed international conventions, treaties or understandings.
 - C. To identify general principles of international law recognized by the community of nations which can form the basis and foundation for an improved international legal system.
 - D. To explore areas of possible agreement concerning principles and rules of international law on matters such as outer space, disarmament, peaceful uses of nuclear energy, and other areas of international concern.
 - E. To study and make recommendations in respect to development of international law rules regulating matters of aggression, including use of armed force, subversion, economic warfare and political propaganda, and on the other hand, organized community sanctions and the right of self-defense and reprisals.
 - F. To study existing national and international law with a view to developing recommendations desirable for the facilitation of international commerce and economic development.

- (6) To create new and expand existing systems for the continuous reporting and digesting of decisions of international tribunals, international agreements, and materials and research on international law in order to create a complete, accessible world-wide source of information essential to further development of the international rule of law.
- (7) To seek proper financing for all the above and other appropriate approved endeavors of the legal profession of the World needed to create and strengthen the legal system and law rules required to achieve and maintain world peace, and to make from said funds grants in aid of research and other projects undertaken by law schools and other bodies throughout the world.

[SOME SPECIFIC GOALS]

V. That there be created a World Court of Human Rights with a carefully drafted jurisdiction which will respect the domestic jurisdiction of nations yet provide a forum to correct existing deficiencies in this important field.

VI. That a Supreme Court of Justice for the Americas be created with jurisdiction over all subjects of international law in international matters.

VII. That, to insure uniformity on matters of international law, appeals from the Supreme Court of Justice for the Americas should be allowed to the International Court of Justice.

VIII. That the General Assembly of the United Nations be the sole body empowered to elect judges to the International Court of Justice.

IX. That a judge of the International Court of Justice, whose nationality is the same as that of a party to a dispute before the Court, must, upon the objection of any party, disqualify himself in said case.

X. That more importance should be given to basic principles of natural law as one of the foundations of international law.

XI. That in developing a program of world peace through law we must take into consideration the very serious social and economic problems and the discrepancies which exist in the standards of living among the different peoples of the World, all of which contribute to lack of harmony between nations: and such matters as unfair terms of trade for raw materials and the absence of a sufficient guarantee for investments abroad in certain parts of the globe.

XII. That arbitration procedures be unified and modernized, more effective means of enforcing decisions of arbitral tribunals be sought, and that ratification of the United Nations Convention on the recognition and enforcement of foreign arbitral awards and the Pact of Bogota be encouraged, and that a system of reporting and disseminating decisions of arbitral tribunals be established.

XIII. That other means for the pacific settlement of disputes such as mediation, conciliation, good offices and investigation should be resorted to when appropriate, and that the competency of the Inter-American Peace Committee should be expanded to allow it to act when requested by any American State.

XIV. That the governments of States should refrain from carrying out acts, be they of a physical, economic or moral character, contrary to the individual personality and the dignity of the human person; and noting with concern that in some States the rule of law does not exist because of the violation of these principles and lack of application and enforcement of existing covenants and treaties, all lawyers are urged to work toward increased respect for an effective application of the rule of law both nationally and internationally.

XV. That all nations should accept, on the basis of reciprocity, the compulsory jurisdiction of the International Court of Justice.

XVI. That efforts be made to effect changes in the structure of the United Nations to allow it more efficiently to contribute to the maintenance of world peace and security, keeping in mind the demonstrated weaknesses in the Security Council, the fact of the increase in size and change in geographic distribution of the membership of the United Nations, and the need to ensure strict adherence to the decisions made by the United Nations; and

XVII. That the International Law Commission be strengthened to better enable it to fulfill its assigned tasks of developing international law by having it become a permanent, adequately staffed organ meeting continually throughout the year.

XVIII. That programs of international educational exchange should include more law students, practicing lawyers, judges and professors of law.

[PLEDGE TO BUILD A WORLD LAW STRUCTURE]

CONCLUDES

That we lawyers of the Americas pledge wholeheartedly and completely to devote ourselves to the foregoing program of sustained effort necessary to the creation of a world of law to the end that the rule of law will govern all men and all nations and any man can then walk any place on the face of the earth, or travel through endless space, in freedom, in dignity and in peace.

CONSENSUS OF ROME

[Approved April 4, 1962]

We lawyers attending this European Conference, being aware of our professional responsibility to utilize and develop international law and institutions, and methods for the peaceful settlement of international disputes,

Recognizing the imperative obligation of the legal profession to promote world peace through the rule of law, and

Taking note of the wide measure of agreement reached at the previous Conferences at San José, Tokyo, and Lagos, and expressing general agreement with the principles and recommendations approved by those Conferences,

Hereby declare the following as the Consensus of Rome:

I. *Need to improve international law and make it universal.*

A. All nations must accept international law as the law of the world community. International law must embody fundamental concepts of justice and human dignity, principles relating to friendly relations and cooperation among States in accordance with the Charter of the United Nations, and the principles of law generally accepted by nations and legal systems throughout the world. It must be capable of expansion and development to meet the needs of a changing world.

B. To achieve this objective, this Conference particularly stresses the following recommendations: that the International Law Commission of the United Nations be strengthened; that the Sixth (Legal) Committee of the General Assembly assume greater responsibility for assuring consideration of legal aspects of matters before the General Assembly; that advisory opinions on legal questions be asked of the International Court of Justice in all appropriate situations; that research be encouraged by individuals and organizations to enrich the substance of international law by drawing upon all legal traditions and to adapt international law to contemporary problems; and that the study of public international law be broadened and deepened.

II. *Machinery for the peaceful settlement of disputes.*

A. *United Nations*: The United Nations is the world's best hope for international peace under the rule of law; it must be supported and strengthened by all possible means, and the obligations of its Charter must be scrupulously respected by all nations.

This Conference stresses in particular that fuller use should be made of the existing machinery of the United Nations, and that a concerted effort should be made to find new ways of utilizing present provisions of its Charter to the maximum extent possible.

B. *Adjudication and arbitration*: Legal disputes and legal aspects of other disputes should be settled by adjudication or arbitration.

The Conference emphasizes the following recommendations: that all nations accept, on the basis of reciprocity, the compulsory jurisdiction of the International Court of Justice; that treaties generally should include clauses providing that disputes as to their interpretation and execution should be referred to the International Court of Justice or other appropriate international tribunal; and that, where necessary, regional and specialized tribunals, or chambers of the International Court of Justice, be established.

III. *Facilitation of international economic development.*

A. The world legal order should provide a favorable climate for international economic development and the maximum possible freedom for international trade.

B. In particular, with respect to international investment and trade, means should be devised, by treaty or otherwise, to protect the legitimate interests of the nations and the nationals concerned.

In addition, present efforts should be supported and strengthened: (1) to achieve uniformity or harmonization of laws, notably in the fields of negotiable instruments, international sales, international transportation, and patents and copyrights; (2) to obtain agreement on uniform rules in the field of conflict of laws for internationally important areas of private law; (3) to secure more effective judicial assistance and recognition and enforcement of foreign judgements and arbitral awards; and (4) to obtain national legislation in harmony with these objectives.

IV. The role of lawyers in the development of the international rule of law.

This Conference specifically recommends the following actions by lawyers to aid in the development and effective observance of the international rule of law:

A. That a world community of legal scholars be developed through expanded programs of international exchanges, the community to include law students, practising lawyers, judges and professors of law, and that universities be encouraged to establish programmes devoted to studies concerned with the international rule of law.

B. That encouragement and support be given to the work undertaken by legal bodies and institutions working toward the same objectives as those stated in this Consensus, and that the maximum degree of cooperation among such bodies and institutions be sought.

C. That this Conference supports the proposed World Conference on World Peace Through Law and the preliminary action and agenda called for by previous Conferences.

D. That it should be a principal concern of the proposed World Conference to establish an organization through which the lawyers of the world can serve the cause of world peace through law, by creating a centre for research, education and action in promotion of its objectives, and also by encouraging and providing coordination of the related research and activities of others.

To facilitate the establishment of such an organization, a Committee should be set up for the purpose of conducting discussions with appropriate existing national and international organizations working toward the same goals in order to avoid duplication of effort and to encourage harmonious cooperation. On the basis of these discussions, the committee should prepare a draft statute for the proposed organization.

SETTLEMENT OF DUAL NATIONALITY IN EUROPEAN COMMUNIST COUNTRIES

A. INTRODUCTION

The establishment of a Communist regime in several European countries as a result of the Soviet military occupation and political influence shortly before and after the end of World War II (Albania, Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Rumania and

Yugoslavia)¹ caused these countries, as a rule, to follow the Soviet pattern or imitate each other in the field of legislation. However, these legislative techniques did not achieve much, if anything, with respect to nationality laws in general, and to the problem of dual nationality in particular. During the first decade after the establishment of Communist rule in these countries, their domestic legislation showed a tendency to include only provisions denying a citizen of one Communist country the possibility of being a citizen of another Communist or capitalist country. Later, this trend was abandoned. Of nine European Communist countries, six had legislation prohibiting a second citizenship; at present only four still have such a legal text. In this respect the European Communist countries may be divided into two major groups according to whether or not their domestic legislation contains specific provisions denying the possession of another nationality by their own citizens. While the nationality laws of the first group explicitly do not allow the possession of a second nationality of their respective citizens, similar laws of the second group are silent on this question.

The nationality laws and doctrine of the U.S.S.R. deny, as a rule, dual nationality to Soviet citizens.² In an article in 1936,³ analyzing the legal texts dealing with Soviet citizenship, the following interpretations were made:

Generally speaking, naturalization in a foreign country has no effect upon the status of a person as a Soviet citizen. Under the Law of April 22, 1931, apparently the only means of changing Soviet citizenship to that of a foreign country is by renunciation with the consent of the appropriate authorities. Therefore, aside from loss of citizenship under the provisions of certain special decrees, a person once a Soviet citizen is always a Soviet citizen unless he can obtain the consent of the authorities to his renunciation of that citizenship.

The Soviet point of view on this subject was clearly expressed by two studies in 1959 and 1961 in which the following was stated:

The Soviet legislation adopts a negative attitude towards [the problem of] having more than one citizenship; this was expressed in several acts, and in particular in the RSFSR Decree of August 22, 1921. . . .⁴

The U.S.S.R. Law on Citizenship of August 19, 1938, now in force does not provide the possibility of a case where a person would have a dual nationality—Soviet and foreign.⁵

¹ Official law gazettes cited are abbreviated as follows: BO—*Buletinul Oficial* (Romania); IPNS—*Ivestiia na Presidiuma na Narodnoto Subranie* (Bulgaria); MK—*Magyar Közlöny* (Hungary); DzU—*Dziennik Ustaw* (Poland); Vedomosti—*Vedomosti Verkhovnogo Soveta* (U.S.S.R.); SbZ—*Sbírka Zákonů* (Czechoslovakia).

² Walter Meder, *Das Staatsangehörigkeitsrecht der USSR und der Baltischen Staaten* 71 (Frankfurt am Main, 1950).

³ Durward V. Sandifer, "Soviet Citizenship," 30 A.J.I.L. 614-631 (1936).

⁴ G. E. Vil'kov, "Mezhdunarodno-pravovoe regulirovanie voprosov dvojnogo grazhdanstva" [Settlement of Questions of Dual Nationality under International Law], 1959 Soviet Yearbook of International Law 367.

⁵ *Ibid.*

Soviet legislation does not provide for a status of dual nationality. A Soviet citizen cannot claim the rights of an alien under the pretense that he simultaneously possesses the citizenship of another country. A Soviet citizen when staying abroad cannot refer to his duties with respect to another country which also considers him its own citizen.⁶

The possession of foreign nationality is also prohibited to citizens of Bulgaria,⁷ Poland,⁸ and Yugoslavia⁹ by explicit provisions. The nationality laws of these countries contain similar provisions, as is the case with Section 24 of the Bulgarian Law on Citizenship of March 26, 1948, which reads: "A Bulgarian citizen cannot be simultaneously a citizen of another country." The first postwar laws on nationality of Albania¹⁰ and Rumania¹¹ also contained provisions which expressly prohibited the acquisition of another nationality by citizens of these countries. However, the latter two Communist states, by virtue of new laws (Albania, in 1954; Rumania, in 1952), joined the legislation of Czechoslovakia¹² and Hungary,¹³ which does not deal with this problem directly. The German Democratic Republic¹⁴ may be placed in the second group, although it did not introduce new legislation in the field of nationality, since it still applies the laws of the former German Reich.

As a result of the diversity of their municipal legislation, dual nationality was the inevitable outcome even for the Soviet-bloc countries, which basically follow a general pattern or imitate each other. The proper solution of this situation was sought and found in international co-ordination.

Thus, since 1956, several bilateral international conventions¹⁵ have been

⁶ M. M. Boguslavsky and A. A. Rubanov, *Pravovoe polozenie Sovetskikh grazhdan za granitsei* [The Legal Status of Soviet Citizens Abroad] 22-23 (Moscow, Institute of International Relations, 1961).

⁷ Law of March 26, 1948.

⁸ Law of Jan. 8, 1951.

⁹ Law of Aug. 23, 1945 (July 1, 1946), in its version of 1948.

¹⁰ Law of Nov. 16, 1946.

¹¹ Law of July 7, 1948.

¹² Law of 1948.

¹³ Laws of 1948 and 1957.

¹⁴ Franz Massfeller, *Deutsches Staatsangehörigkeitsrecht* (2d ed., Berlin, 1955; *Ergänzungsband*, 1957).

¹⁵ The following is a complete list of the conventions known to this writer and discussed in this study:

Conventions for the Establishment of the Citizenship of Persons with Dual Nationality between:

(1) Albania and the U.S.S.R. Signed Sept. 18, 1957, in Tirana; ratified by the Albanian Government Nov. 27, 1958, by the Soviet Government Jan. 14, 1958; exchange of ratifications in Moscow, Jan. 14, 1958; in force April 29, 1958; text: *Vedomosti* No. 9 (904), May 28, 1958, item 205 (in Russian).

(2) Bulgaria and Hungary. Signed June 27, 1958 in Sofia; ratified by the Bulgarian Government Aug. 9, 1959, by the Hungarian Government, Edict 27/59, July 11, 1959; exchange of ratifications in Budapest, June 8, 1959; in force July 3, 1959; text: *IPNS* No. 81, Oct. 9, 1959 (in Bulgarian and Hungarian); *MK* No. 74, July 11, 1959 (in Hungarian).

(3) Bulgaria and Rumania. Signed Sept. 24, 1959, in Sofia; ratified by the Bulgarian Government Oct. 31, 1959, by the Rumanian Government Nov. 26, 1959; exchange

entered into by these countries with the main purpose of settling the questions of existing cases of dual nationality and avoiding possible cases of dual allegiance in the future. No doubt more conventions will follow. In this respect, the Soviet Union seemed to be most anxious to settle and prevent cases of dual nationality, since she concluded within three years (1956-1958) special conventions dealing with these matters with all the European Communist countries ¹⁶ (Albania, Bulgaria, Czechoslovakia, German Demo-

of ratifications in Bucharest, Dec. 24, 1959; in force Dec. 24, 1959; text: BO No. 29, Dec. 3, 1959 (in Rumanian); IPNS No. 17, Feb. 26, 1960 (in Bulgarian).

(4) Bulgaria and the U.S.S.R. Signed Dec. 12, 1957, in Sofia; ratified by the Bulgarian Government Feb. 8, 1958, by the Soviet Government March 15, 1958; exchange of ratifications in Moscow, March 28, 1958; in force March 28, 1958; text: Vedomosti, No. 7 (902), April 14, 1958, item 141 (in Russian); IPNS No. 33, April 25, 1958 (in Bulgarian and Russian); 302 U.N. Treaty Series 3 (in Bulgarian, Russian, English and French).

(5) Czechoslovakia and Hungary. Signed Nov. 4, 1960, in Prague; ratified by the Czechoslovak Government Dec. 31, 1960, by the Hungarian Government March 31, 1961; exchange of ratifications in Budapest, Feb. 17, 1961; in force March 19, 1961; text: MK No. 22, March 31, 1961 (in Hungarian); SbZ No. 37/1961 (in Czech), Proclamation of the Ministry of Foreign Affairs of April 8, 1961.

(6) Czechoslovakia and the U.S.S.R. Signed Oct. 5, 1957, in Prague; ratified by the Czechoslovak Government June 30, 1958, by the Soviet Government March 28, 1958; exchange of ratifications in Moscow, July 21, 1958; in force July 21, 1958; text: Vedomosti, No. 17 (912), Aug. 7, 1958, item 289 (in Russian); 320 U.N. Treaty Series 111 (in Czech, Russian, English and French).

(7) Hungary and Poland. Signed July 5, 1961, in Budapest; ratified by the Hungarian Government Feb. 11, 1962, by the Polish Government Nov. 25, 1961; exchange of ratifications in Warsaw, Jan. 4, 1962; in force Feb. 4, 1962; text: MK No. 74, Feb. 11, 1962 (in Hungarian); DzU No. 5, Jan. 25, 1962 (in Polish and Hungarian).

(8) Hungary and the U.S.S.R. Signed Aug. 24, 1957, in Budapest; ratified by the Hungarian Government Oct. 25, 1957, by the Soviet Government Dec. 12, 1957; exchange of ratifications in Moscow, Dec. 16, 1957; in force Jan. 15, 1958; text: Vedomosti, No. 1 (896), Jan. 13, 1958, item 2 (in Russian); 318 U.N. Treaty Series 35 (in Hungarian, Russian, English and French).

(9) Poland and the U.S.S.R. Signed Jan. 21, 1958, in Warsaw; ratified by the Polish Government April 15, 1958, by the Soviet Government, March 8, 1958; exchange of ratifications in Moscow, May 8, 1958; in force May 8, 1958; text: Vedomosti, No. 9 (904), May 28, 1958, item 209 (in Russian); 319 U.N. Treaty Series 277 (in Polish, Russian, English and French).

(10) Rumania and the U.S.S.R. Signed Sept. 4, 1957, in Bucharest; ratified by the Rumanian Government Nov. 6, 1957, by the Soviet Government Jan. 25, 1958; exchange of ratifications in Moscow, March 3, 1958; in force March 3, 1958; text: Vedomosti, No. 5 (900), March 19, 1958, item 103 (in Russian); 318 U.N. Treaty Series 89 (in Rumanian, Russian, English and French).

(11) Yugoslavia and the U.S.S.R. Signed May 22, 1956, in Moscow; ratified by the Yugoslav Government July 3, 1956, by the Soviet Government June 6, 1956; exchange of ratifications in Belgrade, July 31, 1956; in force July 31, 1956; text: Vedomosti, No. 16 (858), Aug. 17, 1956, item 353 (in Russian); 259 U.N. Treaty Series 155 (in Russian, Serbocroat, English and French).

¹⁶ According to Boguslavsky, *op. cit.* 23, the U.S.S.R. concluded such conventions with other European Communist countries; however, the writer was unable to locate the German Democratic Rep.-U.S.S.R. Convention, if existing.

cratic Republic, Hungary, Poland, Rumania), including Yugoslavia, despite the fact that the latter has been outside the Cominform since 1948.¹⁷ The first convention of this kind was, indeed, concluded between the U.S.S.R. and Yugoslavia in May, 1956. All these conventions show definite features of similarity in their contents with slight deviations in a few instances, the prototype being the agreements to which the Soviet Union is a party.

The preambles of all the conventions under discussion here admit that the latter are concluded because "there are a number of persons in the territory of the Contracting Parties whom both Parties, in accordance with their legislation, regard as their citizens," *i.e.*, the two contracting states make equal claims to the allegiance of an individual at the same time. Furthermore, the preambles suggest that existing cases of dual nationality be eliminated and such possible cases be avoided in the future. Only the Convention between the U.S.S.R. and Yugoslavia was entered into "in conformity with their joint declaration signed at Belgrade on June 2, 1955, and with a view to settling outstanding questions relating to citizenship and repatriation."

B. SETTLEMENT OF CASES OF DUAL NATIONALITY

A basic rule included in the cited conventions is that persons resident in the territory of one contracting party who are claimed as citizens by the domestic legislation of both contracting countries may choose, or opt for, the citizenship of either of these countries, *i.e.*, the conventions recognize the right of persons of dual nationality to choose one of them. While all the preambles indicate that the elimination of cases of dual nationality is to be made "on the basis of a free choice of citizenship by the persons concerned," three conventions contain, in addition, a special provision explicitly prescribing that the exercise of option must be "entirely voluntary" (Albania-U.S.S.R., Art. 5; Poland-U.S.S.R., Art. 5), or "expressed freely" (Yugoslavia-U.S.S.R., Art. 5). Thus, all conventions consider that the declaration of choice or option of nationality is a voluntary unilateral act of the person opting which establishes his legal status. The Yugoslav-Soviet Convention does not, however, apply to persons who, possessing the citizenship of one contracting party, have acquired that of the other contracting party without first obtaining permission to renounce their former citizenship, where such persons are resident in the territory of the contracting party whose citizenship they formerly possessed. Both countries shall regard such persons as citizens of the country in whose territory they are resident.

As regards the settlement of cases of dual nationality in which minors are involved, the conventions provide several solutions. The basic rule is that a minor follows the citizenship of his parents if both parents possess

¹⁷ The Soviet Union also entered into similar conventions with the Asian People's Democracies: Korea, signed on Dec. 16, 1957, in Phenjan; text in *Vedomosti*, No. 4 (899), 1958, p. 216; and Mongolia, signed on Aug. 25, 1958, in Ulan-Bator; text in *Vedomosti*, No. 35 (930), 1958, p. 426; also in 322 U.N. Treaty Series 201.

(i.e., choose, in compliance with the provisions of the conventions) the same citizenship (Albania-U.S.S.R.; Bulgaria-U.S.S.R.; Hungary-U.S.S.R.; Poland-U.S.S.R.; Rumania-U.S.S.R.; Yugoslavia-U.S.S.R.), or if only one parent is alive (Czechoslovakia-Hungary; Czechoslovakia-U.S.S.R.).

If the minor's parents have or choose different citizenships, his citizenship will be determined by an agreement between the parents (all conventions), which must take the form of a joint declaration by the parents (Czechoslovakia-U.S.S.R.; Hungary-Poland; Hungary-U.S.S.R.; Poland-U.S.S.R.). If the parents reach no agreement, the minor will have the citizenship of the country "in whose territory he is resident" (Bulgaria-Hungary; Bulgaria-Rumania; Bulgaria-U.S.S.R.; Hungary-Poland; Poland-U.S.S.R.; Rumania-U.S.S.R.), or "in whose territory the children are resident together with their parents or with one of them" (Yugoslavia-U.S.S.R.) "on the day of the expiry of one year" after the effective date of the convention (Czechoslovakia-U.S.S.R.), or "at the time of the parents' option for citizenship" (Hungary-U.S.S.R.).

If one parent has his residence in the territory of one contracting country, and the other parent, in the territory of the other, and there is no agreement between the parents to the contrary, children retain the citizenship of the parent who "supports and educates" them (Albania-U.S.S.R.; Bulgaria-Rumania; Bulgaria-U.S.S.R.; Poland-U.S.S.R.); or "in whose custody they are" (Czechoslovakia-U.S.S.R.; Hungary-U.S.S.R.; Rumania-U.S.S.R.); or who "exercise parental authority" over them (Bulgaria-Hungary; Czechoslovakia-Hungary; Hungary-Poland); or "permanently lives together with his parents" (Yugoslavia-U.S.S.R.).

A child with dual nationality, who lives in a third country, retains the citizenship of the country in which he or his parents had their last residence before their departure abroad, if there is no agreement between the parents concerning the child's citizenship. This provision is not included in the Albanian-Soviet and Czechoslovak-Soviet Conventions.

The Czechoslovak-Hungarian and Czechoslovak-Soviet Conventions prescribe that a child born in the territory of a third state will have, in case of no agreement between the parents, the citizenship of the contracting country in the territory in which his parents had permanent residence prior to going abroad. In case they have no residence in the territory of either of the contracting countries, the citizenship of the mother will decide the citizenship of the child (Hungary-Poland).

A child whose parents are dead or the whereabouts of whose parents are unknown shall become a citizen of the country in which he is residing one year from the effective date of the convention. The requirement of one year is not mentioned in the Yugoslav-Soviet Convention.

With only three exceptions (Czechoslovakia-Hungary; Hungary-U.S.S.R.; Yugoslavia-U.S.S.R.), all conventions grant a minor who has reached 14 years of age (16 years of age, Yugoslavia-U.S.S.R.) the right, by way of filing a declaration of his own, to choose a citizenship contrary to the above discussed principles. The Bulgarian-Hungarian Convention gives the following solution in this respect: children who have acquired citizenship as

a result of the basic principles described above may opt for the citizenship of the other country within one year after they have reached their majority.

The procedural rules for the choice of citizenship by dual nationals, as given by the conventions, are the following: in order to choose the citizenship of one of the contracting countries claiming them as their citizens they must file an application to that effect with the embassy of the country they select for citizenship (Albania-U.S.S.R.; Bulgaria-Hungary; Bulgaria-U.S.S.R.; Hungary-U.S.S.R.; Poland-U.S.S.R.; Rumania-U.S.S.R.; Yugoslavia-U.S.S.R.), or with its diplomatic or consular representatives (Bulgaria-Rumania; Czechoslovakia-Hungary; Czechoslovakia-U.S.S.R.), or with the embassy or consular office (Hungary-Poland), if they reside (Bulgaria-Hungary; Czechoslovakia-Hungary; Bulgaria-Rumania; Bulgaria-U.S.S.R.; Hungary-Poland; Yugoslavia-U.S.S.R.) or live (Albania-U.S.S.R.; Czechoslovakia-U.S.S.R.; Hungary-U.S.S.R.; Poland-U.S.S.R.; Rumania-U.S.S.R.) in the territory of the other country. They must file such application with the diplomatic or consular representatives of the country of their choice if they reside or live in a third state. The latter provision is not included in the Albanian-Soviet, Bulgarian-Rumanian, and Hungarian-Soviet Conventions.

Applications for choice of citizenship may be filed only by persons who have reached their majority, *i.e.*, unmarried persons who have attained the age of eighteen years; married persons may be younger.

All the conventions require that applications for choice of citizenship be filed (free from any taxes, stamp duties and fees) within one year from the effective date of the convention. Each country must then furnish to the other country a list of the names of the persons who have chosen its citizenship within six months (Albania-U.S.S.R.; Bulgaria-U.S.S.R.; Czechoslovakia-Hungary; Czechoslovakia-U.S.S.R.; Hungary-U.S.S.R.; Poland-U.S.S.R.; Yugoslav-U.S.S.R., *i.e.*, the conventions to which the Soviet Union is a party), one year (Bulgaria-Rumania), or 18 months (Bulgaria-Hungary; Hungary-Poland; Hungary-U.S.S.R.) from the end of the year granted for filing such applications. The Albanian, Rumanian, and Yugoslav Conventions with the U.S.S.R., however, distinguish two kinds of lists to be submitted: a list of the names of the persons whose applications for citizenship have been granted and a list of rejected applications. The latter will be considered as citizens of the country in which they reside.

C. AVOIDANCE OF CASES OF DUAL NATIONALITY

In order to avoid cases of dual nationality in the future, all conventions include the rule that the citizenship of a new-born child who could have a dual nationality shall be determined by an agreement between its parents. This agreement must be communicated to the proper authorities (civil status registry offices, and the like) in the form of a joint declaration at the time of registering the birth of the child. If the parents reach no agreement, the child shall acquire the citizenship of the country in whose territory it was born. These provisions are not contained in the Albanian-Soviet, Bulgarian-Rumanian, Rumanian-Soviet, and Yugoslav-Soviet Conventions. If

the child was born in a third country, it will be a citizen of the country in which its parents had permanent residence before they went abroad.

The Bulgarian-Hungarian, Czechoslovak-Hungarian, and Hungarian-Polish Conventions offer the following solution for avoidance of cases of dual nationality: Parents who are citizens of two different countries may file a written application (certified by a notary public or diplomatic representative) with the proper authorities within three months (Bulgaria-Hungary; Hungary-Poland), or one year (Czechoslovakia-Hungary), after the birth of the child for its registration as a citizen of the country in which they live. If there is no agreement, the child shall be a citizen of the country of the parent who exercises parental authority, in case the parents live apart. Each country is under obligation to inform the other as to the citizenship of such children every January (Hungary-Poland); or every December (Bulgaria-Hungary); or by March 31 of every year (Czechoslovakia-Hungary).

D. CONSEQUENCES RESULTING FROM CHOICE OF, OR FAILURE TO CHOOSE, A NATIONALITY

The conventions attach several consequences as a result of the choice, renouncement, or failure to choose one of the nationalities which a person possesses. Thus, if a dual national chooses the citizenship of one contracting country, he shall be considered a citizen of this country solely. In case he fails to file a declaration of choice of citizenship (all conventions), or the contracting country decides not to grant the applicant the citizenship for which he opted (for instance, Hungary-U.S.S.R.; Rumania-U.S.S.R.; Yugoslavia-U.S.S.R.), he is considered a citizen of the country in which he resides. If such a person lives in a third country, he will be treated as a citizen of the country in which he had permanent residence before his departure to the third country. This last provision is not included in the Albanian, Polish and Rumanian Conventions with the Soviet Union.

A person who has chosen the citizenship of a country other than the one in which he resides may retain his former place of residence, but will have the status of an alien (foreign citizen). The Bulgarian-Hungarian Convention states that such person may stay in this country "if he is duly registered with the population registration office" (*adresna sluzhba*). The Yugoslav-U.S.S.R. Convention adds to this provision that "no restriction may be placed on the freedom of repatriation of such persons." That convention further provides that the filing of an application for the retention of the citizenship of the other contracting country should not of itself be ground for the imposition of special measures on the person concerned.

Choice of citizenship of one contracting country, according to the provisions of the convention, does not relieve a person from the fiscal obligations which he has toward the other country prior to his choice.

E. FINAL PROVISIONS

With the exception of four conventions (Bulgaria-Hungary; Czechoslovakia-Hungary; Hungary-Poland; and Hungary-U.S.S.R., *i.e.*, the conven-

tions to which Hungary is a party), which state that they will go into effect 30 days after the exchange of the ratification documents, all the conventions prescribe that they will become effective on the date of the exchange of the instruments of ratification.

The majority of the conventions are silent on the question of their expiration; only the Bulgarian-Hungarian and Hungarian-Polish Conventions were concluded for a five-year period with the possibility of prolongation, and the Bulgarian-Rumanian Convention is valid for an indefinite period of time and can be renounced upon six months' notice.

Without exception, all these conventions, upon their entry into force (not later than thirty days thereafter, Yugoslavia-U.S.S.R.), are supposed to be published in the daily press of each of the contracting parties for the information of the persons concerned, or "by other suitable means" (*ibid.*).

Questions concerning the implementation and interpretation of the conventions shall be resolved through diplomatic channels. This provision is not contained in the conventions between Albania-U.S.S.R.; Czechoslovakia-Hungary; Czechoslovakia-U.S.S.R.; Hungary-U.S.S.R.; and Yugoslavia-U.S.S.R.

F. GENERAL APPRAISAL

The survey of the municipal laws on nationality in force in the Soviet Union and the European People's Democracies, as well as their international conventions dealing with dual nationality, may be summed up in the following:

1. Despite the fact that the Communist countries, as a rule, adopted laws patterned after those of the Soviet Union, or imitated each other in the field of legislation, and although several of these countries by way of domestic laws did not recognize another nationality for their citizens, dual nationality was the inevitable outcome of the diversity of municipal legislation in the Soviet bloc.

2. The removal of the principal causes of dual nationality was sought and found by way of international agreements: through international conventions the existing cases of dual nationality were liquidated and measures were introduced for preventing the occurrence of such cases in the future.

3. The basic principles which were suggested by the conventions for settling problems of dual nationality are the following:

- (a) Voluntary and free choice or option of nationality as a unilateral act of the person opting.

- (b) A minor follows the citizenship of his parents if both possess or choose the same citizenship; if they have or choose different citizenship, then an agreement between them will decide upon the minor's citizenship; if no agreement is reached, the minor's residence is decisive; if parents live in different countries and no agreement is reached, the child is to be granted the citizenship of the parent who supports or educates him. A child without parents becomes a citizen of the country in which it resides.

(c) A minor who has attained a certain age (14 or 16 years of age or has reached the majority) may opt for the citizenship of his own choice contrary to the provisions of the conventions.

(d) A newborn child, who could have dual nationality, becomes a citizen of the country as decided upon agreement of the parents.

(e) If no agreement is reached, the place of birth determines the child's citizenship.

Thus, the foregoing observations make it clear that the Communist countries, led by the Soviet Union, pursue by way of bilateral international agreements a general policy to rid the Communist area in Europe (as well as in Asia) of citizens with dual nationality belonging to a Communist state.

IVAN SIPKOV

European Law Division, Law Library, Library of Congress

A JUSTICIABLE CONTROVERSY CONCERNING WATER RIGHTS

Sharing the waters of the Rio Grande and the Colorado Rivers, the United States and Mexico enjoy a natural resource of considerable economic significance. Since the last decade of the nineteenth century, they have sought an equitable distribution of these waters. Allocation of the waters of the Colorado River was difficult, involving a half-century of study and negotiation.¹ Distribution of the waters of the mentioned river was finally agreed upon in the Water Utilization Treaty of 1944. Under this treaty, Mexico receives 1,500,000 acre-feet of water annually in the limitrophe section of the Colorado River.² Agreement on the delivery of a specific quantity of water was to preclude future Mexican claims.³ Recently, however, questions have arisen concerning the quality of the Colorado River water being delivered to Mexico. Within the past year, water with a high saline content has drained into the Gila River from the Welton-Mohawk Irrigation and Drainage District in southwestern Arizona. The Gila River joins the Colorado River near the Mexican border. Flowing into Mexico, this saline water constitutes part of that country's annual allot-

¹*Ad hoc* joint commissions were established during the first decade of this century to study each of the rivers. In 1927 the International Water Commission, United States and Mexico, was created to study water distribution. Both of these efforts failed to produce a treaty. See 1 Hackworth, *Digest of International Law* 585-586 (Washington: Government Printing Office, 1940); 44 Stat. 1403; and U. S. House of Representatives, Report of the American Section of the International Water Commission, United States and Mexico, 71st Cong., 2d Sess., 1930, Doc. 359.

²Feb. 3, 1944, Art. X. 59 Stat. 1219. The Colorado River meanders for more than 1400 miles. For twenty miles it forms part of the international boundary between the two countries. Before it empties into the Gulf of California, it travels one hundred miles through Mexico. The entire run-off of the river comes from the United States.

³The treaty is terminable only by mutual consent. It continues in force until terminated by another treaty concluded for that purpose. Art. XXVIII.

ment. Farmers in the Mexicali area claim that the excessive saline content of the water threatens their crops.⁴

The current dispute fundamentally concerns United States obligations with regard to the quality of water that is being delivered to Mexico.⁵ The 1944 Treaty contains no specific provision regarding water quality. The preambular declaration of the parties' desire "to obtain the most complete and satisfactory utilization" of the shared waters has no substantive content. Specific references to the Colorado River provide that the Mexican allotment will come "from any and all sources" of the river.⁶ Waters of the mentioned river, "whatever their origin," will be delivered in the limitrophe section of the river.⁷ The record of testimony of officials of the State Department and the International Boundary Commission, United States and Mexico, before the Senate Committee on Foreign Relations, discloses a unanimous conviction that the United States assumed no obligation regarding water quality.⁸ The then Assistant Secretary of State (Dean Acheson) unequivocally informed Senator Downey of California that the plain terms of the treaty required Mexico to accept the delivered water regardless of its quality.⁹ Officials frequently emphasized that, under conditions of ultimate development in the United States, more than one-half of

⁴ Water from the Colorado River irrigates nearly 500,000 acres of farm land in the Mexicali area. *New York Times*, March 11, 1962, p. 70; *The Evening Star* (Washington, D. C.), Dec. 26, 1961, p. B-20; 46 *Dept. of State Bulletin* 144 (1962).

⁵ Interest of legal scholars in the water quality of international rivers is apparently a recent development. Neither H. A. Smith, in his *The Economic Uses of International Rivers* (1931), nor F. J. Berber, in his *Rivers in International Law* (1959), discusses in any detail the problem of water quality. With increased consumptive uses of international rivers, water quality will assume greater importance. Recent instruments attest to this importance. Art. IV(10) of the *Indus Waters Treaty* (India-Pakistan, 1960) sets forth the intention of each party to prevent, as far as practicable, undue pollution of the mentioned waters. 55 *A.J.I.L.* 802 (1961). At its 1956 meeting, the International Law Association adopted as a general principle governing the use of international rivers the declaration that preventable pollution of water in one state, which does substantial injury to another state, renders the former state liable for damages. International Law Association, *Report of the Forty-Seventh Conference*, Dubrovnik, 1956, p. 242.

⁶ Art. X.

⁷ Art. XI(a).

⁸ See the statements of L. M. Lawson, U. S. Commissioner for the International Boundary Commission, in the hearings before the Senate Committee on Foreign Relations. U. S. Senate, Committee on Foreign Relations, *Hearings, Water Treaty with Mexico*, 79th Cong., 1st Sess., 1945, p. 944. Mr. Lawson was one of the three officials who signed the treaty on behalf of the United States. With regard to water quality, he declared: "In negotiating the treaty . . . we had difficulty in persuading the Mexican representatives to accept this kind of water that is recovered flow, drainage water, and return flow which would require in the future probably some dilution with fresher water of a less alkaline quality. We had no expression from the Mexicans in the negotiations except that at the beginning of the negotiations they insisted that the full amount of it be upstream water." See *ibid.* 84. See also the statement of Frank Clayton, Counsel to the American Section of the International Boundary Commission, in *ibid.* 108-110.

⁹ See *ibid.* 1764-1765. Mr. Acheson rejected a suggestion of a reservation to the treaty providing that Mexico would accept the delivered water regardless of its quality. He explained that it was unwise to add to the plain words of the treaty additional words and phrases which were wholly unnecessary. The document, he said, was clear beyond any peradventure of a doubt. *Ibid.* 1777.

the water allotted to Mexico would consist of return and drainage flow and other waste water. Less than one-half of Mexico's allocation would come from natural Colorado River water.¹⁰ This official interpretation has been recently reiterated in an announcement by the State Department. Insisting that the United States was fulfilling its obligations under the treaty, the Department pointed out that it was known in 1944 that part of the water to be delivered to Mexico would consist of saline drainage.¹¹

An entirely different understanding of the treaty was expressed to the Mexican Senate by Adolfo Orive Alba, Executive Chairman of the National Irrigation Commission of Mexico, and a participant in the treaty negotiations. The Chairman assured the Senators that Mexico had an "undeniable right to receive waters of good quality" from the Colorado River. For reasons of a legal and technical nature, there was no danger that the water would be of poor or unusable quality. He went on to assert that:

... in this treaty, as in any other of its kind, it is understood that the water must be of good quality. Mexico has the right to have the water that is assigned to it from the Colorado River proceed entirely from the virgin volume of the current, but knowing that this is physically impossible to obtain for any use of the water downstream on any river fully utilized, as is the Colorado River, our country had no objection to receiving these waters the same as the other American users of the lower portion of the Colorado River, as long as they were of good quality for irrigation.¹²

There can be no doubt that the delivery of the saline water has excited Mexican agricultural interests. In a recent message to the "People of the United States of America," the "People of the State of Baja California" declared that the delivery of the saline water constituted "an aggression that belies the most well meaning of policies." In addition, they accused the American Government of deliberately attempting "to cause through chemical means the annihilation of the closest and, possibly as of a short time ago, the friendliest neighbor you have."¹³ This use of the term "aggression" is unfortunate. It would certainly seem to complicate the prompt and effective solution of the problem.¹⁴

In accordance with Articles II and XXIV of the 1944 Treaty, the governments have instructed the International Boundary and Water Commission, United States and Mexico, to investigate the situation and recommend remedial measures. It is possible that the Commission may offer a prompt

¹⁰ See the statement of Secretary of State Stettinius in hearings cited in note 8 above, p. 20. See also Mr. Lawson's statement, *ibid.* 84, and the summary on p. 1806.

¹¹ 46 Dept. of State Bulletin 144 (1962).

¹² See U. S. Senate, Water Treaty of the Colorado River and Rio Grande Favors Mexico, 79th Cong., 1st Sess., 1945, Doc. 98, pp. 15-17.

¹³ This message appeared as a full-page advertisement in *The Evening Star* (Washington, D. C.), Dec. 26, 1961, p. B-20.

¹⁴ Fluvial or saline aggression is certainly not within the traditional concept of aggression as the use of, or threat to use, armed force. See Quincy Wright, "The Prevention of Aggression," 50 A.J.I.L. 526 (1956). The Inter-American Treaty of Reciprocal Assistance (1947) cites as illustrative examples of aggression an unprovoked armed attack or an armed invasion.

solution that will not prejudice the legal rights of either country.¹⁵ If the Commission is unable to suggest an effective solution, the matter must, under the terms of the treaty, be considered at the diplomatic level. In view of the element of urgency, it is to be hoped that the Commission will recommend an effective solution.¹⁶

If a settlement of the dispute requires the clarification of United States obligations under the treaty, submission to the International Court of Justice under the terms of Article 36(2) of the Court's Statute would seem to be in order. Since the dispute clearly involves a matter of treaty interpretation, there would be no reason for either country's interposing its self-judging reservation to deny the Court's jurisdiction.¹⁷ If the dispute is referred to the Court, Mexico would doubtless consider the appropriateness of an application to the Court for interim measures of protection to prevent any additional delivery of saline water. It would, of course, be rash to predict the Court's decision. In the determination of American obligations, neither the maxim *sic utere tuo ut alienum non laedas* nor the doctrine of the Canadian-American Tribunal in the *Trail Smelter* Case can be ignored.¹⁸ Whatever the result of reference, reference of the question to the Court might have a salutary effect in the Western Hemisphere. It would dramatically illustrate American willingness to submit international disputes to third-party adjudication.

DON C. PIPER
Duke University

¹⁵ Press reports following President Kennedy's recent visit to Mexico disclose that the United States and Mexico have concluded an interim agreement to alleviate the salinity of the Colorado River. This agreement will remain in force until October, 1963, at which time a permanent agreement will take effect. Apparently the agreement is predicated on good neighborliness, without prejudice to the legal rights of either government under the 1944 Treaty. This interim agreement does not, of course, gainsay the author's point that the dispute is susceptible of judicial settlement. See New York Times, July 1, 1962, pp. 1-2.

¹⁶ On March 16, 1962, the Presidents of the United States and of Mexico announced that the International Boundary and Water Commission would appoint a team of Mexican-American water and soil scientists to study the salinity problem. The scientists will submit their recommendations to the Commission. 46 Dept. of State Bulletin 650 (1962).

¹⁷ Both the United States and Mexico have accepted the Optional Clause with similar self-judging reservations. 1960-1961 I.C.J. Yearbook 207-208, 217-218.

¹⁸ The Tribunal declared: "... under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." See Department of State, *Trail Smelter Arbitration between the United States and Canada under Convention of April 15, 1935*. Decision of the Tribunal Reported March 11, 1941 (Arbitration Series, No. 8), p. 36; reprinted in 35 A.J.I.L. 684 (1941). Lauterpacht asserts that the maxim is a general principle of law recognized by civilized states which the Court is bound to apply by virtue of Art. 38 of its Statute. 1 Lauterpacht, *Oppenheim's International Law* 346 (8th ed., 1955). At the 1956 meeting of the International Law Association, some of the participants found this maxim to be vague and of little use with regard to the utilization of international rivers. See the comments of Professor P. Geiseke and A. M. Atabani, *International Law Association, op. cit.* 219-220, 228-229.

THE HAGUE ACADEMY OF INTERNATIONAL LAW—1963 SESSIONS

LECTURES, JULY–AUGUST, 1963

Two sessions of lectures at the Hague Academy of International Law will take place in 1963. The first session, from July 8 to 26, 1963, will consist of the following courses: The Function of Arbitration Today, by Professor Louis B. Sohn (United States); Conflicts of Law in Air and Outer Space, by Professor D. Goedhuis (Netherlands); Conflict of Laws concerning International Arbitration in Private Law, by Professor B. Goldman (France); English Private International Law Relating to the Family, by Professor G. Cheshire (Great Britain); Capacity in Private International Law, by Professor F. Capotorti (Italy); General Course by Professor R. H. Graveson (Great Britain); The Influence of the Internal Regime of States upon the Structure of International Organizations, by Professor G. Ténékidès (Greece); Public and Semi-Public Enterprises (in Particular, Nationalized Enterprises) in Private International Law, by Professor F. Riad (Egypt).

The second session, from July 29 to August 16, 1963, will consist of the following courses: The Confiscation of Foreign Property and Claims to Which it May Give Rise, by Mr. S. Petren (Sweden); The Implementation of the International Protection of Human Rights, by Mr. H. Golsong (Germany); General Course by Professor E. Giraud (France); The Regime of Special Missions (*ad hoc* Diplomacy), by Professor M. Bartoš (Yugoslavia); Constitutional Limitations in the Law of European Organizations, by Mr. H. J. Hahn (Germany); The Delimitation of Jurisdiction in the United Nations, by Mr. R. Bindschedler (Switzerland); The Relation of Law, Politics and Action in the United Nations, by Mr. Oscar Schachter (United States).

Application forms, as well as information about scholarships, may be obtained from the Secretary General, Hague Academy of International Law, Peace Palace, The Hague.

RESEARCH CENTER, AUGUST–SEPTEMBER, 1963

The seventh annual session of the Research Center of the Hague Academy of International Law will be held at The Hague between August 20 and September 28, 1963. The subject for research will be "The Relations between Universal International Organizations and Regional Organizations." The Directors of Research will be Professor J. Dupuy, of the Faculty of Law of the University of Aix-en-Provence (French-speaking section), and Professor B. Bontros-Ghali, of the Faculty of Law of the University of Cairo (English-speaking section).

The purpose of the Center is to enable persons who have already reached an advanced stage of study, or who are engaged in research or teaching in the field of international law to spend six weeks in research and seminar discussion at the Academy. The extensive facilities of the Peace Palace Library are at the disposal of participants.

Most of the expenses of attendance are borne by the Academy out of a special grant made by the Rockefeller Foundation. Participants will receive a contribution towards their traveling expenses and a living allowance of 20 guilders per day during their stay.

There are no age limits for participants, but the general level ranges between 25 and 40 years of age.

Requests for application forms should be made to the Secretary General, Hague Academy of International Law, Peace Palace, The Hague, and completed forms should reach the Academy not later than March 1, 1963.

E. H. F.

ANNUAL MEETING OF THE SOCIETY, 1963

The Fifty-Seventh Annual Meeting of the American Society of International Law will take place at the Statler Hilton Hotel in Washington, D. C., from April 25 to 27, 1963. The program for the meeting is being arranged by the Committee on Annual Meeting, under the chairmanship of Professor Richard A. Falk, of the Center of International Studies, Princeton University. The meeting will open on Thursday, April 25, and conclude with the annual dinner on the evening of April 27.

The Statler Hilton has set aside a block of rooms for out-of-town members attending the meeting. Reservations should be received by the Front Office Manager, Mr. Sanford Towart, at least two weeks in advance of arrival.

E. H. F.

INTERNATIONAL LEGAL MATERIALS—CURRENT DOCUMENTS

The Society has made available to members and subscribers to the JOURNAL, and others, a compilation in mimeographed form of current official documents entitled "International Legal Materials." This is in the nature of an experimental venture designed to meet the needs for up-to-date information of scholars, practicing lawyers, legal advisers to government agencies and corporations, government officials, and others concerned with the legal aspects of public and private international dealings. Documents have been selected which are likely to be of interest to a broad group of members and which are not readily available elsewhere or will not become available in more permanent collections until a later date.

The first issue, Volume 1, Number 1, dated August, 1962, contains the decision of July 6, 1962, of the U. S. Court of Appeals for the Second Circuit in the case of *Banco Nacional de Cuba v. Sabbatino et al.* (reported on p. 1085 of this JOURNAL), the decision of July 7, 1961, of the New York Court of Appeals in the case of *Ingres Steamship Co. Ltd. v. International Maritime Workers Union et al.* (reported in the January, 1962, issue of this JOURNAL, p. 215), together with the brief filed with the United States Supreme Court by the United Kingdom as amicus curiae, on the petition for certiorari in the *Ingres* case. The volume also contains a report by the Department of State to the Senate Foreign Relations Committee on major

instances of expropriation of American-owned property since World War II, a report by the Administrator of the Agency for International Development on the United States' investment guarantee program, and a statement and list by the Department of State of the U. S. treaties of friendship, commerce and navigation concluded since 1945. Also included in the collection is the report by the Legal Subcommittee of the U.N. Committee on the Peaceful Uses of Outer Space on the work of its first session from May 28 to June 20, 1962.

Among national legislation and regulations included in the collection are the U. S. Department of Defense Directive of May 5, 1962, relative to Status of Forces Policies and Information, U. S. Sugar Act Amendments of 1962 and Foreign Assistance Act provisions relating to expropriation and discriminatory treatment of American-owned property, Brazilian Decree No. 1106 of 1962 expropriating public utilities companies, the Ceylon Petroleum Corporation Act No. 28 of 1961, providing for expropriation of oil properties, and Kuwait Decree No. 35 of 1961 establishing the Kuwait Fund for Arab Economic Development. A supplement to the volume contains the text of the Advisory Opinion of the International Court of Justice concerning the financial obligations of Members of the United Nations in connection with the U.N. operations in the Congo and the Middle East (reported below, p. 1053).

The first issue, comprising 196 pages, has been exhausted. A second number in an offset-printed volume was issued in October. It is available to members of the Society and subscribers to the JOURNAL at \$3.00. Non-members and non-subscribers to the JOURNAL may purchase the volume at \$4.00. The supply is limited, and preference will be given to the orders of JOURNAL subscribers and Society members. Orders, accompanied by a check or money order, may be placed by writing to "International Legal Materials" at 2223 Massachusetts Avenue, N.W., Washington 8, D. C. The Society cannot supply copies of individual documents separately from the whole collection.

As pointed out above, the issuance of this collection of current legal materials is experimental, with a view to ascertaining whether there is a great enough demand for such material to justify consideration of establishing a more systematic and continuing service.

E. H. F.

PRIZES INSTITUTED BY JAMES BROWN SCOTT IN MEMORY OF HIS
MOTHER AND HIS SISTER JEANNETTE SCOTT

The Institute of International Law announces the subject for the G. Rolin-Jaequemyns Prize (1200 Swiss francs) to be awarded in 1965. The subject chosen is: "The Capacity of International Organizations to Conclude Treaties, and the Legal Aspects Peculiar to the Treaties So Concluded."

The contest is open to anyone except members or associates, or former members or associates of the Institute. The essays submitted should be

unpublished manuscripts of not less than 150 nor more than 500 pages, corresponding to a printed page of octavo format. Essays may be written in English, French, German, Italian or Spanish. They should be sent anonymously and in three copies. Each copy must be supplied with a double motto. The same mottoes should be inscribed on an envelope containing the surname, the Christian names, the date and the place of birth, the nationality and the address of the author. The essays must be in the hands of the Treasurer of the Institute of International Law, Professor Paul Guggenheim, 1 Route du Bout-du-Monde, Geneva, Switzerland, not later than December 31, 1964.

The detailed rules of the competition will be found in the *Annuaire de l'Institut de Droit International*, Vol. 48 (1959), Tome II, p. 493.

E. H. F.

CATALOGUE OF FILES AND MICROFILMS OF THE GERMAN FOREIGN
MINISTRY ARCHIVES, 1920-1945

The United States Department of State and the Hoover Institution at Stanford University are jointly publishing "A Catalog of Files and Microfilms of the German Foreign Ministry Archives, 1920-1945." This Catalogue, consisting of three volumes, will list for the period 1920 to 1945 all files from the political archives of the German Foreign Ministry that were seized by the American and British armies at the end of World War II. It will continue and complete the work of the Catalog of German Foreign Ministry Files and Microfilms, 1867-1920, which was published by the American Historical Association in 1959.

The Catalog will include the title, number, and date of all files contained in the archives, and the corresponding serial and frame numbers of those files that were microfilmed. It was compiled and prepared for printing by Dr. George O. Kent of the Historical Office of the Department of State, and its publication and distribution will be financed by the Hoover Institution. Volume I was published in September, 1962. The remaining volumes are scheduled to appear in 1963.

CONTRIBUTIONS TO THE SOCIETY'S LIBRARY

Attention is invited to the policy of the Society's library to acquire briefs of international law interest submitted to courts and arbitral tribunals in the United States and abroad. While briefs to the Supreme Court and the International Court of Justice are readily available, others are not. The Society would be grateful if members would be good enough to send copies of international legal briefs to the library, in the hope that it will acquire a specialized collection in this sphere which, to our knowledge, few other libraries possess.

E. H. F.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of RICHARD B. BILDER, GORDON A. CHRISTENSON, STANLEY L. COHEN, THOMAS T. F. HUANG, SYLVIA E. NILSEN, HERBERT K. REIS, and ALFRED P. RUBIN, under the Chairmanship of ERNEST L. KERLEY, all of the Office of the Legal Adviser, Department of State, with the exception of Mr. Rubin, who is in the Department of Defense.

TERRITORIAL SOVEREIGNTY

Polar Regions—non-recognition of claims in Antarctica

Pursuant to §123 of the Atomic Energy Act of 1954, 68 Stat. 940 (1954), as amended, 42 U.S.C. 2153 (1959), the Agreement with the Government of the Argentine Republic Concerning the Civil Uses of Atomic Energy, June 22, 1962, T.I.A.S., No. 5125, required that materials transferred pursuant to that Agreement remain within the jurisdiction of the Government of the Argentine Republic or of a country with which the United States has an Agreement for co-operation. Since the Government of the Argentine Republic intended to locate in Antarctica material transferred pursuant to this Agreement, and since the United States does not recognize any claims or rights of territorial sovereignty in Antarctica, the signing of the Agreement was accompanied by an exchange of notes in order to preclude any possibility of an implied recognition of Argentine claims or rights in Antarctica.

In a note to the Ambassador of the Argentine Republic, the Secretary of State stated in part:

The Secretary of State understands that the Government of the Argentine Republic may decide to transfer materials, including equipment and devices, received pursuant to this Agreement to a location within Antarctica. In this connection, the Secretary of State wishes to point out that the Government of the United States does not recognize any rights or claims of territorial sovereignty within Antarctica. The Secretary of State also wishes to refer to Article IV of the Antarctic Treaty* and to point out that it is the understanding of the Government of the United States that nothing in the present Agreement bears upon the traditional position of each Government with respect to claims of territorial sovereignty in Antarctica. Further, the Government of the United States will consider that the requirements of Articles VII and X of this Agreement relating to jurisdiction have been satisfied so long as the Government of the Argentine Republic retains exclusive custody and control of the materials, including equipment and devices, in Antarctica.

The Secretary of State would appreciate receiving confirmation that the Government of the Argentine Republic has the same understanding with respect to the matters stated above.

* T.I.A.S., No. 4780; 41 Dept. of State Bulletin 912 (1959); 54 A.J.I.L. 477 (1960).

In reply, the Ambassador stated in part:

In this connection, the Ambassador wishes to point out that the Argentine Republic reaffirms its sovereignty over the Argentine Sector of the Antarctic.

At the same time the Ambassador is pleased to inform His Excellency the Secretary of State that the Government of the Argentine Republic, bearing in mind Article IV of the Antarctic Treaty, is also of the understanding that nothing in the Agreement . . . bears upon the traditional position of each Government with respect to territorial sovereignty in Antarctica, and further, that it has taken note of the view of the Government of the United States with respect to the requirements of Articles VII and X relating to jurisdiction.

EXPROPRIATION IN INTERNATIONAL LAW

Promotion of economic development—Alliance for Progress

On July 5, 1962, The Honorable Abram Chayes, The Legal Adviser, Department of State, addressed the State Junior Bar of Texas, San Antonio, Texas, on the subject of "The Lawyer and the Alliance for Progress." After discussing the general importance of the Alliance for Progress, the Legal Adviser discussed the lawyer's rôle in the program in the following terms:

. . . I believe the lawyer has a special professional role to play in the Alliance to which I would like to direct your attention.

In the first place most of the institutional reforms projected by the Alliance have a major legal component. Land reform, tax reform, the financial instruments to tap private capital resources—all of these depend heavily on lawyers' experience and lawyers' skills.

. . .

In this work of bringing our accumulated legal experience to bear on the problems of Latin America, the organized bar—associations like this one—and the law schools have a major role to play. The bar and the schools are beginning to shoulder the burden. The American Bar Foundation has begun a major study of land reform in Latin America. The University of Wisconsin is also embarking on work in this field. Some of my former colleagues at the Harvard Law School have long been engaged in research on problems of urban land use in the hemisphere, research which they are broadening to cover land use planning in general. The World Tax Center at Harvard has already made a significant contribution to the development of adequate tax systems in Latin America, codifying existing laws, consulting on drafts of new ones, and, perhaps most important of all, training fiscal officers in effective techniques of tax collection and administration. Closer here to home, many of you may know of the work in Latin American law at Tulane Law School. And the Inter-American Bar Association offers a vehicle for professional communication and collaboration with our colleagues to the South.

But not all the bar's service to the Alliance for Progress will be in a corporate capacity. A large proportion of the needed outside capital must come from private investors. In fact, if the Alliance is to succeed U. S. private investment must flow south at the rate of at least \$300 million annually—a 50 percent increase over the 1961 rate. I need not point out to you gentlemen that private investors are clients.

... What can you do for these clients to help them insure the safety and profitability of their investment?

In the first place, you can make sure that in their operations abroad, they are good corporate citizens, just as they would be at home. In many cases, there should be a local capital component in the enterprise. There is no better insurance against adverse political action than local investors with a stake in the welfare of their corporation. In all cases, there should be a program for using, educating, training, and especially upgrading local personnel. Successful United States firms often provide clinics, hospitals, schools, or recreational facilities in Latin American communities where they are located. It should go without saying, though unfortunately it sometimes doesn't, that local laws and customs are to be respected.

Second, you can help your client with his financing. Washington lending agencies are giving special emphasis to private development investment in Latin America. The Export-Import Bank has long served in this field. The Inter-American Development Bank is a new instrumentality designed especially for the Alliance for Progress. Finally AID's investment guaranty program can provide insurance protection at low cost against the special non-business risks of doing business in developing countries—inconvertibility, expropriation and confiscation, war, revolution or insurrection.

Guarantee authority may now be used to insure not only United States corporations but wholly owned foreign subsidiaries as well. Furthermore, the Act now makes it clear that expropriation includes a breach of contract by the foreign government where the breach materially adversely affects continued operations of the investor's project.

In addition to this specific risk authority, the Foreign Assistance Act provides for insurance on up to 75 percent of the value of the investment against losses from any risks whatsoever. And Congress has authorized a special Latin American program to encourage private housing by means of all-risk guarantees for projects similar to those insured by the FHA and suitable for conditions in Latin America.

Third, if the investor is threatened with expropriation—certainly if he actually suffers it—he will obviously call upon his lawyer. It is important that you know the position of the United States Government on this matter.

The right to take private property is implicit in sovereignty. Our own Constitution recognizes it. And the United States has long conceded that other countries have the right to expropriate property, including that of Americans, provided they offer just compensation, that is, compensation that is reasonably adequate and reasonably prompt.

This does not mean that we think expropriation is a good thing. In most cases it is clearly not a useful policy for less-developed countries. Such countries characteristically are starved for capital and the take-over of existing properties is often an unwise way to employ these limited resources. We make known to these nations our views on the disadvantages inherent in expropriation.

We react similarly toward forms of government interference with American business that may be more sophisticated but are no less lethal. Of course, we do not wish to discourage Latin American countries from adopting such measures as fair labor standards, social security systems, progressive taxation, and the regulation of utilities. Quite the reverse: an objective of the Alliance is to encourage these countries, within limits appropriate to their economic strength, to adopt sound and progressive tax and labor laws and other measures to assure

an increased sense of social justice and broader participation in the fruits of economic progress. But when such measures are, in fact or in form, applied so as to discriminate against and harass foreign business enterprise, they can amount to what has been often called "creeping expropriation."

If, in the face of American advice, a government proceeds with expropriation, creeping or otherwise, I can assure you that the full diplomatic resources of the United States Government will be made available to see that fair treatment is accorded to the American business involved. Obviously, the embassies of the United States cannot be expected to make a strong presentation where an American national may not himself have clean hands, where he may have been guilty of policies which are manifestly inconsistent with legitimate requirements of the host country. But any American national who has comported himself properly will receive the full and vigorous assistance of the State Department and our embassies abroad. When this happens, perhaps more often than you think we get results. (Department of State Press Release No. 436; 47 Dept. of State Bulletin 192 at 194 (1962).)

STATE RESPONSIBILITY

United States responsibility for French Panama Canal Company Bonds

The American Embassy at Cairo requested instructions whether the United States was in any way liable for the bonds issued by the old French Panama Canal Company in connection with its attempt to construct the Panama Canal prior to the construction of the Canal by the United States. This request arose in connection with the inquiry of a private citizen in the United Arab Republic, who had been informed by a local bank that such bonds held by him were to be paid by the United States, since it had taken over the liabilities as well as the rights of the French Panama Canal Company.

In reply, the Department expressed the view that the United States Government did not assume the liabilities of the French Panama Canal Company. It stated that:

The old French Panama Canal Company (the de Lesseps Company) went into receivership in 1889. Its bondholders received distribution out of \$40,000,000 paid by the U.S. in 1904 to the new French Panama Canal Company for its "rights, privileges, franchises, concessions" and other assets. The new company had acquired certain assets of the old company. The U.S. purchase was made under authority of the Spooner Act of 1902 by which the President was empowered to acquire rights to the Panama Canal and to resume construction which had stopped at the time of the de Lesseps failure. No authority was provided in that Act for the U.S. to assume any indebtedness. Moreover, the bonds in question appear to be liabilities of the old company which was in receivership when the U.S. purchased rights from the new company. Consequently, no bond liabilities of the old company have been assumed.

The assets of the corporations were probably distributed to the stockholders, bondholders and creditors and the corporation liquidated before 1924 when the bonds in question were purchased, although that information is not available. Specific information regarding liquidation and distribution is a matter of public record in the courts at Paris. Unclassified Instruction W-129, May 17, 1962.

The Department also furnished the Embassy a copy of the following standard letter used by the Panama Canal Company, which is chartered by Congress to operate the Canal, in replying to questions regarding liability for the bonds of the old French Panama Canal Company:

I have your letter requesting information concerning bearer bonds in your possession issued by the Compania Universal del Canal Inter-oceanic de Panama.

When the assets of the New French Canal Company were acquired by the United States Government no responsibility was assumed for the outstanding obligations of that Company. In past years we have been advised that information as to such obligations may be obtained from one of the following:

Societe Civile des Obligations a lots du Canal Inter-oceanique de Panama, 2 Place de l'Opera, Paris, France (Bonds of June 1888)

Credit Lyonnais, 19 Boulevard des Italiens, Paris, France, making reference to "Ste. Civile des Obligations a lots du Canal Inter-oceanique de Panama" (Bonds of March 1888)

Cie. Nouvelle du Canal Inter-oceanique de Panama Caisse des Depots et Consignations, 56 Rue de Lille, Paris 7, France.

DIPLOMATIC MISSIONS

Ambassadors and ministers—use of title "Minister Plenipotentiary"

On May 29, 1962, the Department of State sent to chiefs of mission in Washington a circular note stating in part as follows:

Henceforth, the Department of State will not carry the name of a diplomatic officer on the "Diplomatic List" with the title "Minister Plenipotentiary" unless some further indication of that officer's functional rank is also given. The reason for this is that in international practice the title "Minister Plenipotentiary" has normally been used together with the term "Envoy Extraordinary" to designate persons accredited by the head of one state to that of another; if used alone and without modification, it could be misleading.

The rank of "Minister Plenipotentiary," except in the case of an "Envoy Extraordinary and Minister Plenipotentiary," is regarded by the Department of State as a personal one having no relation to the functions of the diplomatic officer who holds it and, as stated in the foregoing paragraph, will only be carried in the "Diplomatic List" when some further designation of the officer's functional rank is given.

CONSULAR CONVENTIONS

United Kingdom—right of consular officer to refuse to respond to subpoena or other legal process

In an Instruction to the Consulate General in Salisbury, Southern Rhodesia, dated April 6, 1962, the Department took the position that Article 11(1)(a) of the Consular Convention with the United Kingdom, June 6, 1951, 3 U.S.T. 3426, T.I.A.S., No. 2494, which grants a consular officer or employee immunity from jurisdiction "in respect of acts performed in his official capacity, falling within the functions of a consular officer under this Convention," did not authorize the Consulate General to ask the

Ministry of Foreign Affairs to quash action of a local court on the ground that the employee's conduct was within the meaning of Article 11(1)(a). The Department reasoned that to rule otherwise would be tantamount to prejudging the applicability of Article 11(1)(a) to the facts and circumstances of a particular case, when this function should be reserved to the courts. It accordingly concluded that the Convention did not confer upon a consular officer the right to refuse to appear in court in response to a subpoena, summons, or other appropriately served legal document. (Unclassified Instruction No. W-71, April 6, 1962.)

SOVEREIGN IMMUNITY

State taxation of Canadian property in Vermont—international comity

In response to a request from the Canadian Government, dated February 27, 1962, that land owned by the Canadian Government as a site for a proposed new customs house in Quebec Province, but which extended over the border into Vermont in order to provide a pedestrian freeway leading to the new customs house, be exempted from taxation by the town of Derby, Vermont, the Department requested the Governor of Vermont, in a letter dated February 28, 1962, to grant the Canadian request inasmuch as the United States Government is generally granted exemption in Canada from taxes on its property which do not represent charges for specific services rendered. In a note to the Canadian Embassy in Washington, D. C., dated April 27, 1962, the Department informed the Canadian Government that the substance of its request had been granted by the State of Vermont. (Correspondence on file in the Office of the Legal Adviser, Department of State.)

TREATIES

Continuation of United States' depositary functions during break in diplomatic relations—Cuba

The Permanent Representative of Cuba to the United Nations signed the International Wheat Agreement, 1962, T.I.A.S., No. 5115, at Washington on May 15, 1962, on behalf of Cuba. The Agreement, formulated at the United Nations Wheat Conference which concluded at Geneva on March 10, 1962, was open for signature at the Department of State from April 19 through May 15, 1962, the Government of the United States of America having been named the depositary for the Agreement. A circular diplomatic note, announcing the opening of the Agreement for signature and including other pertinent information, had been sent by the Department of State to the Embassies in Washington of those governments, eligible to sign the Agreement, having diplomatic representation here. Among the forty-one countries eligible to sign was Cuba. Although diplomatic relations between the United States of America and Cuba had been broken, the United States, in its international capacity as depositary, had communicated to the Cuban Foreign Office, through the intermediary of the Swiss Embassy at Havana, a copy of this circular note.

JUDICIAL DECISIONS

BY COVEY OLIVER

Of the Board of Editors

Territorial sovereignty—treaty interpretation—maps—preclusion or estoppel

CASE CONCERNING THE TEMPLE OF PREAH VIHEAR (CAMBODIA *v.* THAILAND), MERITS. I.C.J. Reports, 1962, p. 6.¹
International Court of Justice.² Judgment of June 15, 1962.

In its Judgment of 26 May 1961, by which it upheld its jurisdiction to adjudicate upon the dispute submitted to it by the Application filed by the Government of Cambodia on 6 October 1959, the Court described in the following terms the subject of the dispute:

“In the present case, Cambodia alleges a violation on the part of Thailand of Cambodia’s territorial sovereignty over the region of the Temple of Preah Vihear and its precincts. Thailand replies by affirming that the area in question lies on the Thai side of the common frontier between the two countries, and is under the sovereignty of Thailand. This is a dispute about territorial sovereignty.”

Accordingly, the subject of the dispute submitted to the Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear. To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector. Maps have been submitted to it and various considerations have been advanced in this connection. The Court will have regard to each of these only to such extent as it may find in them reasons for the decision it has to give in order to settle the sole dispute submitted to it, the subject of which has just been stated.

The Temple of Preah Vihear is an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia. Although now partially in ruins, this Temple has considerable artistic and archaeological interest, and is still used as a place of pilgrimage. It stands on a promontory of the same name, belonging to the eastern sector of the Dangrek range of mountains which, in a general way, constitutes the boundary between the two countries in this region—Cambodia to the south and Thailand to the north. Considerable portions of this range consist of a high cliff-like escarpment rising abruptly above the Cambodian plain. This is the situation at Preah

¹ Excerpted text of opinion prepared by Wm. W. Bishop, Jr.

² Composed for this case of President Winiarski; Vice President Alfaro; and Judges Basdevant, Badawi, Moreno Quintana, Wellington Koo, Sir Percy Spender, Sir Gerald Fitzmaurice, Korotky, Tanaka, Bustamante y Rivero, and Morelli.

Vihear itself, where the main Temple buildings stand in the apex of a triangular piece of high ground jutting out into the plain. From the edge of the escarpment, the general inclination of the ground in the northerly direction is downwards to the Nam Moun river, which is in Thailand.

It will be apparent from the description just given that a frontier line which ran along the edge of the escarpment, or which at any rate ran to the south and east of the Temple area, would leave this area in Thailand; whereas a line running to the north, or to the north and west, would place it in Cambodia.

Thailand has urged that the edge of this escarpment constitutes the natural and obvious line for a frontier in this region. In support of this view Thailand has referred to the documentary evidence indicative of the desire of the Parties to establish frontiers which would not only be "natural", but visible and unmistakable—such as rivers, mountain ranges, and hence escarpments, where they exist.

The desire of the Parties for a natural and visible frontier could have been met by almost any line which followed a recognizable course along the main chain of the Dangrek range. It could have been a crest line, a watershed line or an escarpment line (where an escarpment existed, which was far from always being the case). As will be seen presently, the Parties provided for a watershed line. In so doing, they must be presumed to have realized that such a line would not necessarily, in any particular locality, be the same line as the line of the crest or escarpment. They cannot therefore be presumed to have intended that, wherever an escarpment existed, the frontier must lie along it, irrespective of all other considerations.

The Parties have also relied on other arguments of a physical, historical, religious and archaeological character, but the Court is unable to regard them as legally decisive.

As concerns the burden of proof, it must be pointed out that though, from the formal standpoint, Cambodia is the plaintiff, having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her in the second Submission of the Counter-Memorial and which relates to the sovereignty over the same piece of territory. Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one Party or the other. The burden of proof in respect of these will of course lie on the Party asserting or putting them forward.

Until Cambodia attained her independence in 1953 she was part of French Indo-China, and her foreign relations—like those of the rest of French Indo-China—were conducted by France as the protecting Power. It is common ground between the Parties that the present dispute has its *fons et origo* in the boundary settlements made in the period 1904–1908, between France and Siam (as Thailand was then called) and, in particular, that the sovereignty over Preah Vihear depends upon a boundary treaty dated 13 February 1904, and upon events subsequent to that date. The Court is therefore not called upon to go into the situation that existed between the Parties prior to the Treaty of 1904.

The relevant provisions of the Treaty of 13 February 1904, which regulated *inter alia* the frontier in the eastern Dangrek region, were as follows:

[*Translation by the Registry*]

“Article 1

The frontier between Siam and Cambodia starts, on the left shore of the Great Lake, from the mouth of the river Stung Roluos, it follows the parallel from that point in an easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as the Pnom Dang Rek mountain chain. From there it follows the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun, on the other hand, and joins the Pnom Padang chain the crest of which it follows eastwards as far as the Mekong. Upstream from that point, the Mekong remains the frontier of the Kingdom of Siam, in accordance with Article 1 of the Treaty of 3 October 1893.”

“Article 3

There shall be a delimitation of the frontiers between the Kingdom of Siam and the territories making up French Indo-China. This delimitation will be carried out by Mixed Commissions composed of officers appointed by the two contracting countries. The work will relate to the frontier determined by Articles 1 and 2, and the region lying between the Great Lake and the sea.”

It will be seen, in the first place, that these articles make no mention of Preah Vihear as such. It is for this reason that the Court can only give a decision as to the sovereignty over the Temple area after having examined what the frontier line is. Secondly, whereas the general character of the frontier established by Article 1 was, along the Dangrek range, to be a watershed line, the exact course of this frontier was, by virtue of Article 3, to be delimited by a Franco-Siamese Mixed Commission. It is to be observed, moreover, that what had to be delimited was “the frontiers” between Siam and French Indo-China; and although this delimitation had, *prima facie*, to be carried out by reference to the criterion indicated in Article 1, the purpose of it was to establish the actual line of the frontier. In consequence, the line of the frontier would, to all intents and purposes, be the line resulting from the work of delimitation, unless the delimitation were shown to be invalid.

In due course, a Mixed Commission composed of French and Siamese members was set up, charged with the task of delimiting the frontier in various districts, including the eastern sector of the Dangrek range in which Preah Vihear is situated. This Mixed Commission was composed of two sections, one French and one Siamese, sitting together—one consisting of French topographical and administrative officers under a French president, and the other of Siamese members under a Siamese president. So far as the frontier in the Dangrek range was concerned, the task of this Mixed Commission was confined to the eastern sector (roughly east of the Pass of Kel) in which Preah Vihear is situated. At this time the western sector of the Dangrek lay wholly in Thailand. It was only when a further boundary settlement, under a treaty dated 23 March 1907, brought within Cambodia

various districts abutting on the western Dangrek sector, that the latter became a frontier region. The task of delimiting the frontier in this latter region was given to a second Mixed Commission set up under the 1907 Treaty.

The Mixed Commission set up under the Treaty of 1904 held its first meeting in January 1905, but did not reach that part of its operations that concerned the frontier along the eastern sector of the Dangrek range until December 1906, although it appears from the minutes of the Commission's meeting of 2 December 1906 that one of the French members of the Commission, Captain Tixier, had passed along the Dangrek in February 1905. At the meeting of 2 December 1906, held at Angkor-Wat, it was agreed that the Commission should ascend the Dangrek from the Cambodian plain by the Pass of Kel, which lies westwards of Preah Vihear, and travel eastwards along the range by the same route (or along the same line) as had been reconnoitred by Captain Tixier in 1905 (*"le tracé qu'a reconnu . . . le capitaine Tixier"*). It was stated that all the necessary reconnaissance between this route and the crest line (to which it ran roughly parallel) could be carried out by this method, since the route was, at the most, only ten to fifteen kilometres from the crest, on the Siamese side. It has not been contested that the Presidents of the French and Siamese sections of the Commission, as representing it, duly made this journey, and that in the course of it they visited the Temple of Preah Vihear. But there is no record of any decision that they may have taken.

At this same meeting of 2 December 1906, it was also agreed that another of the members of the French section of the Commission, Captain Oum, should, starting at the eastern end, survey the whole of the eastern part of the Dangrek range, in which Preah Vihear is situated, and that he would leave for this purpose the next day.

It is thus clear that the Mixed Commission fully intended to delimit the frontier in this sector of the Dangrek and that it took all the necessary steps to put the work of delimitation in hand. The work must have been accomplished, for at the end of January 1907 the French Minister at Bangkok reported to the Minister of Foreign Affairs in Paris that he had been formally notified by the President of the French section of the Mixed Commission that the whole work of delimitation had been finished without incident, and that the frontier line had been definitely established, except in the region of Siem Reap. Furthermore, in a report on the whole work of delimitation, dated 20 February 1907, destined for his own Government, the President said that: "All along the Dangrek and as far as the Mekong, the fixing of the frontier could not have involved any difficulty." Mention may also be made of a map produced by Thailand, recently prepared by the Royal Thai Survey Department, Bangkok, tracing in the Dangrek the "Route followed by the Mixed Commission of 1904".

It seems clear therefore that a frontier was surveyed and fixed; but the question is what was that frontier (in particular in the region of Preah Vihear), by whom was it fixed, in what way, and upon whose instructions? The difficulty in answering these questions lies in the fact that, after the

minutes of the meeting of the First Commission on 2 December 1906, there is no further reference whatever, in any minutes of later meetings, to the question of the frontier in the Dangrek region.

It appears that at about this time the Commission had in substance finished its work on the ground and was awaiting the reports and provisional maps of the survey officers (Captain Oum and others). These reports and maps would not be available until February-March 1907 when, in normal circumstances, another meeting of the Commission would have been held to consider them. It appears that a meeting had been provisionally fixed for 8 March. That it was certainly the intention to call one, can be seen from a despatch from the French Minister in Bangkok to the Minister of Foreign Affairs in Paris, dated 23 February 1907, covering the report from Colonel Bernard, President of the French section of the Commission. The Minister, in his despatch, said: "The maps indicating the frontier can be brought up to date in a fairly short time and the plenary meeting of the French and Siamese Commissioners will probably be held before 15 March." No meeting apparently ever took place. In the meantime the two Governments had entered into negotiations for a further boundary treaty. This treaty was signed on 23 March 1907, and provided for exchanges of territory and a comprehensive regulation of all those frontiers not covered by the previous treaty settlement of 1904.

A second Mixed Commission of Delimitation was then set up under the Treaty of 1907. As already mentioned, part of its task was to delimit that sector of the Dangrek region not having come within the ambit of the First Commission, namely from the Pass of Kel westwards, and therefore not including Preah Vihear which lay to the east. There was in fact some overlapping of the work of the two Commissions in the Kel region, but this overlapping did not extend to Preah Vihear. There is, however, evidence in the records of the Second Commission that, at or near the Pass of Kel, the line drawn by this Commission joined up with an already existing line proceeding eastwards to the Temple area and beyond. There is no definite indication as to what this line was, or how it had come to be established; but the presumption that it was in some manner or other the outcome of the survey work which the First Commission had put in hand, and which the President of its French section, in his report of 20 February 1907, stated to have been accomplished without difficulty is, in the circumstances, overwhelmingly strong. The Court has noted that although, under Article IV of the Treaty of 1907, the task of the Second Mixed Commission was to delimit the "new frontiers" established by that Treaty, the Commission also had the task, under Clause III of the Protocol attached to the Treaty, of delimiting all that part of the frontier defined in Clause I of the Protocol. This latter provision related to the entire Dangrek range from a point in its western half to the eastern continuation of the Dangrek, the Pnom Padang range, as far as the River Mekong. Therefore, had the eastern Dangrek and Pnom Padang sectors not already been delimited by the first (1904) Mixed Commission, it would have been the duty of the second (1907) Commission to do this work. This Commission did not do it, apart from the overlap (not

extending to Preah Vihear) already mentioned, and therefore the presumption must be that it had already been done.

The First Mixed Commission apparently did not hold any formal meeting after 19 January 1907. It must not be forgotten that, at the time when such a meeting might have been held for the purpose of winding up the work of the Commission, attention in both countries, on the part of those who were specially qualified to act and speak on their behalf in these matters, was directed towards the conclusion of the Treaty of 23 March 1907. Their chief concern, particularly in the case of Colonel Bernard, could hardly have been the formal completion of the results of the delimitation they had carried out.

The final stage of the operation of delimitation was the preparation and publication of maps. For the execution of this technical work, the Siamese Government, which at that time did not dispose of adequate means, had officially requested that French topographical officers should map the frontier region. It is clear from the opening paragraph of the minutes of the meeting of the First Mixed Commission on 29 November 1905 that this request had the approval of the Siamese section of the Commission, which may indeed have inspired it, for in the letter of 20 August 1908 in which the Siamese Minister in Paris communicated to his Government the eventual results of this work of mapping, he referred to "the Mixed Commission of Delimitation of the frontiers and the Siamese Commissioners' request that the French Commissioners prepare maps of various frontiers". That this was the deliberate policy of the Siamese authorities is also shown by the fact that in the Second (1907) Mixed Commission, the French members of the Commission were equally requested by their Siamese colleagues to carry out cartographical work, as can be seen from the minutes of the meeting of 6 June 1908.

The French Government duly arranged for the work to be done by a team of four French officers, three of whom, Captains Tixier, Kerler and de Batz, had been members of the First Mixed Commission. This team worked under the general direction of Colonel Bernard, and in the late autumn of 1907 it completed a series of eleven maps covering a large part of the frontiers between Siam and French Indo-China, including those portions that are material in the present case. The maps were printed and published by a well-known French cartographical firm, H. Barrère.

The eleven maps were in due course communicated to the Siamese Government, as being the maps requested by the latter, and the Court will consider later the circumstances of that communication and the deductions to be drawn from it. Three of the maps had been overtaken by events, inasmuch as the former frontier areas they showed had, by virtue of the Treaty of March 1907, now become situated wholly in Cambodia. Siam was not therefore called upon either to accept or reject them. Her interest in the other maps remained. Amongst these was one of that part of the Dangrek range in which the Temple is situated, and on it was traced a frontier line purporting to be the outcome of the work of delimitation and showing the whole Preah Vihear promontory, with the Temple area, as being on the

Cambodian side. If therefore the delimitation carried out in respect of the eastern Dangrek sector established or was intended to establish a watershed line, this map purported to show such a line. This map was filed by Cambodia as Annex I to its Memorial, and has become known in the case (and will be referred to herein) as the Annex I map.

It is on this map that Cambodia principally relies in support of her claim to sovereignty over the Temple. Thailand, on the other hand, contests any claim based on this map, on the following grounds: first, that the map was not the work of the Mixed Commission, and had therefore no binding character; secondly, that at Preah Vihear the map embodied a material error, not explicable on the basis of any exercise of discretionary powers of adaptation which the Commission may have possessed. This error, according to Thailand's contention, was that the frontier line indicated on the map was not the true watershed line in this vicinity, and that a line drawn in accordance with the true watershed line would have placed, and would now place, the Temple area in Thailand. It is further contended by Thailand that she never accepted this map or the frontier line indicated on it, at any rate so far as Preah Vihear is concerned, in such a way as to become bound thereby; or, alternatively that, if she did accept the map, she did so only under, and because of, a mistaken belief (upon which she relied) that the map line was correctly drawn to correspond with the watershed line.

The Court will, for the moment, confine itself to the first of these contentions, based on an argument which the Court considers to be correct, namely that the map was never formally approved by the First Mixed Commission as such, since that Commission had ceased to function some months before the production of the map. The record does not show whether the map and the line were based on any decisions or instructions given by the Commission to the surveying officers while it was still functioning. What is certain is that the map must have had a basis of some sort, and the Court thinks there can be no reasonable doubt that it was based on the work of the surveying officers in the Dangrek sector. Being one of the series of maps of the frontier areas produced by French Government topographical experts in response to a request made by the Siamese authorities, printed and published by a Paris firm of repute, all of which was clear from the map itself, it was thus invested with an official standing; it had its own inherent technical authority; and its provenance was open and obvious. The Court must nevertheless conclude that, in its inception, and at the moment of its production, it had no binding character.

Thailand has argued that in the absence of any delimitation approved and adopted by the Mixed Commission, or based on its instructions, the line of the frontier must necessarily—by virtue of Article 1 of the Treaty of 1904—follow strictly the line of the true watershed, and that this line, at Preah Vihear, would place the Temple in Thailand. While admitting that the Mixed Commission had a certain discretion to depart from the watershed line in order to avoid anomalies, and to take account of certain purely local considerations, Thailand contends that any departure such as to place Preah Vihear in Cambodia would have far exceeded the scope of any dis-

cretionary powers the Mixed Commission could have had authority to exercise without specific reference to the Governments.

Whatever substance these contentions may have, taken by themselves, the Court considers that they do not meet the real issues here involved. Even if there was no delimitation of the frontier in the eastern sector of the Dangrek approved and adopted by the Mixed Commission, it was obviously open to the Governments themselves to adopt a delimitation for that region, making use of the work of the technical members of the Mixed Commission. As regards any departures from the watershed line which any such delimitation embodied—since, according to Thailand's own contention, the delimitation indicated on the Annex I map was not the Mixed Commission's—there is no point in discussing whether such departures as may have occurred at Preah Vihear fell within the Commission's discretionary powers or not. The point is that it was certainly within the power of the Governments to adopt such departures.

The real question, therefore, which is the essential one in this case, is whether the Parties did adopt the Annex I map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character.

Thailand denies this so far as she is concerned, representing herself as having adopted a merely passive attitude in what ensued. She maintains also that a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party to a departure at Preah Vihear from the watershed line specified by Article 1 of the Treaty of 1904, so great as to affect the sovereignty over the Temple area.

The Court sees the matter differently. It is clear from the record that the publication and communication of the eleven maps referred to earlier, including the Annex I map, was something of an occasion. This was no mere interchange between the French and Siamese Governments, though, even if it had been, it could have sufficed in law. On the contrary, the maps were given wide publicity in all technically interested quarters by being also communicated to the leading geographical societies in important countries, and to other circles regionally interested; to the Siamese legations accredited to the British, German, Russian and United States Governments; and to all the members of the Mixed Commission, French and Siamese. The full original distribution consisted of about one hundred and sixty sets of eleven maps each. Fifty sets of this distribution were allocated to the Siamese Government. That the Annex I map was communicated as purporting to represent the outcome of the work of delimitation is clear from the letter from the Siamese Minister in Paris to the Minister of Foreign Affairs in Bangkok, dated 20 August 1908, in which he said that "regarding the Mixed Commission of Delimitation of the frontiers and the Siamese Commissioners' request that the French Commissioners prepare maps of various frontiers, the French Commissioners have now finished their work". He added that a series of maps had been brought to him in order that he might forward them to the Siamese Minister of Foreign Affairs. He went on to give a list of the eleven maps, including the map of the Dangrek re-

gion—fifty sheets of each. He ended by saying that he was keeping two sheets of each map for his Legation and was sending one sheet of each to the Legations in London, Berlin, Russia and the United States of America.

It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*

So far as the Annex I map is concerned, it was not merely the circumstances of the communication of this and the other maps that called for some reaction from the Siamese side, if reaction there was to be; there were also indications on the face of the map sheet which required a reaction if the Siamese authorities had any reason to contend that the map did not represent the outcome of the work of delimitation. The map—together with the other maps—was, as already stated, communicated to the Siamese members of the Mixed Commission. These must necessarily have known (and through them the Siamese Government must have known) that this map could not have represented anything formally adopted by the Mixed Commission, and therefore they could not possibly have been deceived by the title of the map, namely, “Dangrek—Commission of Delimitation between Indo-China and Siam” into supposing that it was purporting to be a production of the Mixed Commission as such. Alternatively, if the Siamese members of the Commission did suppose otherwise, this could only have been because, though without recording them, the Mixed Commission had in fact taken some decisions on which the map was based; and of any such decisions the Siamese members of the Commission would of course have been aware.

The Siamese members of the Commission must also have seen the notice appearing in the top left-hand corner of the map sheet to the effect that the work on the ground had been carried out by Captains Kerler and Oum. They would have known, since they were present at the meeting of the Commission held on 2 December 1906, that Captain Oum had then been instructed to carry out the survey of the eastern sector of the Dangrek range, covering Preah Vihear, and that he was to leave the next day to take up this assignment. They said nothing—either then or later—to suggest that the map did not represent the outcome of the work of delimitation or that it was in any way inaccurate.

That the Siamese authorities by their conduct acknowledged the receipt, and recognized the character, of these maps, and what they purported to represent, is shown by the action of the Minister of the Interior, Prince

Damrong, in thanking the French Minister in Bangkok for the maps, and in asking him for another fifteen copies of each of them for transmission to the Siamese provincial Governors.

Further evidence is afforded by the proceedings of the subsequent Commission of Transcription which met in Bangkok in March of the following year, 1909, and for some months thereafter. This was a mixed Franco-Siamese Commission set up by the Parties with the object of getting an official Siamese geographical service started, through a consolidation of all the work of the two Mixed Commissions of 1904 and 1907. A primary aim was to convert the existing maps into handy atlas form, and to give the French and Siamese terms used in them their proper equivalents in the other languages. No suggestion that the Annex I map or line was unacceptable was made in the course of the work of this Commission.

It was claimed on behalf of Thailand that the maps received from Paris were only seen by minor officials who had no experience in cartography, and would know nothing about the Temple of Preah Vihear. Indeed it was suggested during the oral proceedings that no one in Siam at that time knew anything about the Temple or would be troubling about it.

The Court cannot accept these contentions either on the facts or the law. If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim of Thailand could not, on the international plane, derive any assistance from that fact. But the history of the matter, as set out above, shows clearly that the maps were seen by such persons as Prince Devawongse, the Foreign Minister, Prince Damrong, the Minister of the Interior, the Siamese members of the First Mixed Commission, the Siamese members of the Commission of Transcription; and it must also be assumed that the Annex I map was seen by the Governor of Khukhan province, the Siamese province adjoining the Preah Vihear region on the northern side, who must have been amongst those for whom extra copies were requested by Prince Damrong. None of these persons was a minor official. All or most had local knowledge. Some must have had knowledge of the Dangrek region. It is clear from the documentation in the case that Prince Damrong took a keen personal interest in the work of delimitation, and had a profound knowledge of archaeological monuments. It is not conceivable that the Governor of Khukhan province, of which Preah Vihear formed part up to the 1904 settlement, was ignorant of its existence.

In any case this particular contention of Thailand's is decisively disproved by a document deposited by Thailand herself, according to which the Temple was in 1899 "re-discovered" by the Siamese Prince Sanphasit, accompanied by some fifteen to twenty officials and local dignitaries, including, it seems, the then Governor and Deputy-Governor of Khukhan. It thus appears that only nine years previous to the receipt of the Annex I map by the Siamese authorities, a considerable number of persons having high official standing in Siam knew of Preah Vihear.

The Court moreover considers that there is no legal foundation for the consequence it is attempted to deduce from the fact that no one in Thailand at that time may have known of the importance of the Temple or have been

troubling about it. Frontier rectifications cannot in law be claimed on the ground that a frontier area has turned out to have an importance not known or suspected when the frontier was established.

It follows from the preceding findings that the Siamese authorities in due course received the Annex I map and that they accepted it. Now, however, it is contended on behalf of Thailand, so far as the disputed area of Preah Vihear is concerned, that an error was committed, an error of which the Siamese authorities were unaware at the time when they accepted the map.

It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error. The Court considers that the character and qualifications of the persons who saw the Annex I map on the Siamese side would alone make it difficult for Thailand to plead error in law. These persons included the members of the very Commission of Delimitation within whose competence this sector of the frontier had lain. But even apart from this, the Court thinks that there were other circumstances relating to the Annex I map which make the plea of error difficult to receive.

An inspection indicates that the map itself drew such pointed attention to the Preah Vihear region that no interested person, nor anyone charged with the duty of scrutinizing it, could have failed to see what the map was purporting to do in respect of that region. If, as Thailand has argued, the geographical configuration of the place is such as to make it obvious to anyone who has been there that the watershed must lie along the line of the escarpment (a fact which, if true, must have been no less evident in 1908), then the map made it quite plain that the Annex I line did not follow the escarpment in this region since it was plainly drawn appreciably to the north of the whole Preah Vihear promontory. Nobody looking at the map could be under any misapprehension about that.

Next, the map marked Preah Vihear itself quite clearly as lying on the Cambodian side of the line, using for the Temple a symbol which seems to indicate a rough plan of the building and its stairways.

It would thus seem that, to anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment, or whose duty it was to scrutinize the map, there was everything in the Annex I map to put him upon enquiry. Furthermore, as has already been pointed out, the Siamese Government knew or must be presumed to have known, through the Siamese members of the Mixed Commission, that the Annex I map had never been formally adopted by the Commission. The Siamese authorities knew it was the work of French topographical officers to whom they had themselves entrusted the work of producing the maps. They accepted it without any independent investigation, and cannot therefore now plead any error vitiating the reality of their consent. The Court concludes therefore that the plea of error has not been made out.

The Court will now consider the events subsequent to the period 1904-1909.

The Siamese authorities did not raise any query about the Annex I map

as between themselves and France or Cambodia, or expressly repudiate it as such, until the 1958 negotiations in Bangkok, when, *inter alia*, the question of Preah Vihear came under discussion between Thailand and Cambodia. Nor was any question raised even after 1934-1935, when Thailand carried out a survey of her own in this region, and this survey had, in Thailand's view, established a divergence between the map line and the true line of the watershed—a divergence having the effect of placing the Temple in Cambodia. Although, after this date, Thailand eventually produced some maps of her own showing Preah Vihear as being in Thailand, she continued, even for public and official purposes, to use the Annex I map, or other maps showing Preah Vihear as lying in Cambodia, without raising any query about the matter (her explanations as to this will be considered presently). Moreover, the Court finds it difficult to overlook such a fact as, for instance, that in 1937, even after Thailand's own survey in 1934-1935, and in the same year as the conclusion of a treaty with France in which, as will be seen, the established common frontiers were reaffirmed, the Siamese Royal Survey Department produced a map showing Preah Vihear as lying in Cambodia.

Thailand had several opportunities of raising with the French authorities the question of the Annex I map. There were first of all the negotiations for the 1925 and 1937 Treaties of Friendship, Commerce and Navigation between France, on behalf of Indo-China, and Siam. These Treaties, although they provided for a general process of revision or replacement of previous Agreements, excluded from this process the existing frontiers as they had been established under the Boundary Settlements of 1893, 1904 and 1907. Thereby, and in certain more positive provisions, the Parties confirmed the existing frontiers, whatever they were. These were occasions (particularly in regard to the negotiations for the 1937 Treaty, which occurred only two years after Thailand's own survey of the frontier regions had disclosed, in her belief, a serious divergence between the map line and the watershed line at Preah Vihear) on which it would have been natural for Thailand to raise the matter, if she considered the map indicating the frontier at Preah Vihear to be incorrect—occasions on which she could and should have done so if that was her belief. She did not do so and she even, as has been seen, produced a map of her own in 1937 showing Preah Vihear as being in Cambodia. That this map may have been intended for internal military use does not seem to the Court to make it any less evidence of Thailand's state of mind. The inference must be—particularly in regard to the 1937 occasion—that she accepted or still accepted the Annex I map, and the line it indicated, even if she believed it incorrect, even if, after her own survey of 1934-1935, she thought she knew it was incorrect.

Thailand having temporarily come into possession of certain parts of Cambodia, including Preah Vihear, in 1941, the Ministry of Information of Thailand published a work entitled "Thailand during national reconstruction" in which it was stated in relation to Preah Vihear that it had now been "retaken" for Thailand. This has been represented by Thailand as being an error on the part of a minor official. Nevertheless, similar lan-

guage, suggesting that Thailand had been in possession of Preah Vihear only since about 1940, was used by representatives of Thailand in the territorial negotiations that took place between Thailand and Cambodia at Bangkok in 1958.

After the war, by a Settlement Agreement of November 1946 with France, Thailand accepted a reversion to the *status quo ante* 1941. It is Thailand's contention that this reversion to the *status quo* did not affect Preah Vihear because Thailand already had sovereignty over it before the war. The Court need not discuss this contention, for whether Thailand did have such sovereignty is precisely what is in issue in these proceedings. The important point is that, in consequence of the war events, France agreed to set up a Franco-Siamese Conciliation Commission consisting of the two representatives of the Parties and three neutral Commissioners, whose terms of reference were specifically to go into, and make recommendations on an equitable basis in regard to, any complaints or proposals for revision which Thailand might wish to make as to, *inter alia*, the frontier settlements of 1904 and 1907. The Commission met in 1947 in Washington, and here therefore was an outstanding opportunity for Thailand to claim a rectification of the frontier at Preah Vihear on the ground that the delimitation embodied a serious error which would have caused Thailand to reject it had she known of the error in 1908-1909. In fact, although Thailand made complaints about the frontier line in a considerable number of regions, she made none about Preah Vihear. She even (12 May 1947) filed with the Commission a map showing Preah Vihear as lying in Cambodia. Thailand contends that this involved no adverse implications as regards her claim to the Temple, because the Temple area was not in issue before the Commission, that it was other regions that were under discussion, and that it was in relation to these that the map was used. But it is precisely the fact that Thailand had raised these other questions, but not that of Preah Vihear, which requires explanation; for, everything else apart, Thailand was by this time well aware, from certain local happenings in relation to the Temple, to be mentioned presently, that France regarded Preah Vihear as being in Cambodian territory—even if this had not already and long since been obvious from the frontier line itself, as mapped by the French authorities and communicated to the Siamese Government in 1908. The natural inference from Thailand's failure to mention Preah Vihear on this occasion is, again, that she did not do so because she accepted the frontier at this point as it was drawn on the map, irrespective of its correspondence with the watershed line.

As regards the use of a map showing Preah Vihear as lying in Cambodia, Thailand maintains that this was for purely cartographical reasons, that there were no other maps, or none that were so convenient, or none of the right scale for the occasion. The Court does not find this explanation convincing. Thailand could have used the map but could also have entered some kind of reservation with France as to its correctness. This she did not do.

As regards her failure even to raise the question of the map as such until 1958, Thailand states that this was because she was, at all material times,

in possession of Preah Vihear; therefore she had no need to raise the matter. She indeed instances her acts on the ground as evidence that she never accepted the Annex I line at Preah Vihear at all, and contends that if she never accepted it she clearly had no need to repudiate it, and that no adverse conclusions can be drawn from her failure to do so. The acceptability of this explanation must obviously depend on whether in fact it is the case that Thailand's conduct on the ground affords *ex post facto* evidence sufficient to show that she never accepted the Annex I line in 1908 in respect of Preah Vihear, and considered herself at all material times to have the sovereignty over the Temple area.

The Court has considered the evidence furnished by Thailand of acts of an administrative character performed by her officials at or relative to Preah Vihear. France, and subsequently Cambodia, in view of her title founded on the Treaty of 1904, performed only a very few routine acts of administration in this small, deserted area. It was specifically admitted by Thailand in the course of the oral hearing that if Cambodia acquired sovereignty over the Temple area by virtue of the frontier settlement of 1904, she did not subsequently abandon it, nor did Thailand subsequently obtain it by any process of acquisitive prescription. Thailand's acts on the ground were therefore put forward as evidence of conduct as sovereign, sufficient to negative any suggestion that, under the 1904 Treaty settlement, Thailand accepted a delimitation having the effect of attributing the sovereignty over Preah Vihear to Cambodia. It is therefore from this standpoint that the Court must consider and evaluate these acts. The real question is whether they sufficed to efface or cancel out the clear impression of acceptance of the frontier line at Preah Vihear to be derived from the various considerations already discussed.

With one or two important exceptions to be mentioned presently, the acts concerned were exclusively the acts of local, provincial, authorities. To the extent that these activities took place, it is not clear that they had reference to the summit of Mount Preah Vihear and the Temple area itself, rather than to places somewhere in the vicinity. But however that may be, the Court finds it difficult to regard such local acts as overriding and negating the consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped.

In this connection, much the most significant episode consisted of the visit paid to the Temple in 1930 by Prince Damrong, formerly Minister of the Interior, and at this time President of the Royal Institute of Siam, charged with duties in connection with the National Library and with archaeological monuments. The visit was part of an archaeological tour made by the Prince with the permission of the King of Siam, and it clearly had a quasi-official character. When the Prince arrived at Preah Vihear, he was officially received there by the French Resident for the adjoining Cambodian province, on behalf of the Resident Superior, with the French flag flying. The Prince could not possibly have failed to see the implications of a reception of this character. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined. It demanded a reac-

tion. Thailand did nothing. Furthermore, when Prince Damrong on his return to Bangkok sent the French Resident some photographs of the occasion, he used language which seems to admit that France, through her Resident, had acted as the host country.

The explanations regarding Prince Damrong's visit given on behalf of Thailand have not been found convincing by the Court. Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe she had any title—and this would be wholly consistent with her attitude all along, and thereafter, to the Annex I map and line—or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map.

The remaining relevant facts must now be stated. In February 1949, not long after the conclusion of the proceedings of the Franco-Siamese Conciliation Commission, in the course of which, as has been seen, Thailand did not raise the question of Preah Vihear, France addressed a Note to the Government of Thailand stating that a report had been received of the stationing of four Siamese keepers at the Temple, and asking for information. There was no reply to this note, nor to a follow-up Note of March 1949. In May 1949, France sent a further Note, setting out briefly, but quite explicitly, the grounds on which she considered Preah Vihear to be in Cambodia, and pointing out that a map produced by Thailand herself had recognized this fact. The withdrawal of the keepers was requested. Although there was an error in this Note, the significance of the latter was that it contained an unequivocal assertion of sovereignty. This French Note also received no reply. In July 1950, a further Note was sent. This too remained unanswered.

In these circumstances Cambodia, on attaining her independence in 1953, proposed, for her part, to send keepers or guards to the Temple, in the assertion or maintenance of her position. However, finding that Thai keepers were already there, the Cambodian keepers withdrew, and Cambodia sent a Note dated January 1954 to the Government of Thailand asking for information. This received a mere acknowledgment, but no explanation. Nor was there, even then, any formal affirmation of Thailand's claim. At the end of March 1954, the Government of Cambodia, drawing attention to the fact that no substantive reply to its previous Note had been received, notified the Government of Thailand that it now proposed to replace the previously withdrawn Cambodian keepers or guards by some Cambodian troops. In this Note Cambodia specifically referred to the justification of the Cambodian claim contained in the French Note of May 1949. This Cambodian Note also was not answered. However, the Cambodian troops were not in fact sent; and in June 1954, Cambodia addressed to Thailand a further Note stating that, as information had been received to the effect that Thai troops were already in occupation, the despatch of the Cambodian

troops had been suspended in order not to aggravate the situation. The Note went on to ask that Thailand should either withdraw her troops or furnish Cambodia with her views on the matter. This Note equally received no reply. But the Thai "troops" (the Court understands that they are in fact a police force) remained. Again, therefore, it would seem that Thailand, while taking certain local action, was not prepared to deny the French and Cambodian claim at the diplomatic level.

No further diplomatic correspondence was produced to the Court; but eventually, in 1958, a conference was held at Bangkok between Thailand and Cambodia, to discuss various territorial matters in dispute between the Parties, including that of Preah Vihear. The representative of Thailand having declined to discuss the legal aspects of the matter, the negotiations broke down and Cambodia instituted the present proceedings.

The Court will now state the conclusions it draws from the facts as above set out.

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.

The Court however considers that Thailand in 1908-1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory. The Court considers further that, looked at as a whole, Thailand's subsequent conduct confirms and bears out her original acceptance, and that Thailand's acts on the ground do not suffice to negative this. Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line.

The Court must now consider two further matters. Thailand contends that since 1908, and at any rate up to her own 1934-1935 survey, she believed that the map line and watershed line coincided, and therefore that if she accepted the map line, she did so only in that belief. It is evident that such a contention would be quite inconsistent with Thailand's equally strongly advanced contention that these acts in the concrete exercise of sovereignty evidenced her belief that she had sovereignty over the Temple area: for if Thailand was truly under a misapprehension about the Annex I line—if she really believed it indicated the correct watershed line—then she must have believed that, on the basis of the map and her acceptance of it, the Temple area lay rightfully in Cambodia. If she had such a belief—and such a belief is implicit in any plea that she had accepted the Annex I

map only because she thought it was correct—then her acts on the ground would have to be regarded as deliberate violations of the sovereignty which (on the basis of the assumptions above stated) she must be presumed to have thought Cambodia to possess. The conclusion is that Thailand cannot allege that she was under any misapprehension in accepting the Annex I line, for this is wholly inconsistent with the reason she gives for her acts on the ground, namely that she believed herself to possess sovereignty in this area.

It may be added that even if Thailand's plea of misapprehension could, in principle, be accepted, it should have been advanced shortly after Thailand's own survey of the disputed region was carried out in 1934–1935. Since then Thailand could not have been under any misapprehension.

There is finally one further aspect of the case with which the Court feels it necessary to deal. The Court considers that the acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it. It cannot be said that this process involved a departure from, and even a violation of, the terms of the Treaty of 1904, wherever the map line diverged from the line of the watershed, for, as the Court sees the matter, the map (whether in all respects accurate by reference to the true watershed line or not) was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two Governments to the delimitation which the Treaty itself required. In other words, the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty. Even if, however, the Court were called upon to deal with the matter now as one solely of ordinary treaty interpretation, it considers that the interpretation to be given would be the same, for the following reasons.

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious. It must be asked why the Parties in this case provided for a delimitation, instead of relying on the Treaty clause indicating that the frontier line in this region would be the watershed. There are boundary treaties which do no more than refer to a watershed line, or to a crest line, and which make no provision for any delimitation in addition. The Parties in the present case must have had a reason for taking this further step. This could only have been because they regarded a watershed indication as insufficient by itself to achieve certainty and finality. It is precisely to achieve this that delimitations and map lines are resorted to.

Various factors support the view that the primary object of the Parties in the frontier settlements of 1904–1908 was to achieve certainty and fi-

nality. From the evidence furnished to the Court, and from the statements of the Parties themselves, it is clear that the whole question of Siam's very long frontiers with French Indo-China had, in the period prior to 1904, been a cause of uncertainty, trouble and friction, engendering what was described in one contemporary document placed before the Court as a state of "growing tension" in the relations between Siam and France. The Court thinks it legitimate to conclude that an important, not to say a paramount object of the settlements of the 1904-1908 period (which brought about a comprehensive regulation of all outstanding frontier questions between the two countries), was to put an end to this state of tension and to achieve frontier stability on a basis of certainty and finality.

In the Franco-Siamese Boundary Treaty of 23 March 1907, the Parties recited in the preamble that they were desirous "of ensuring the final regulation of all questions relating to the common frontiers of Indo-China and Siam". A further token of the same object is to be found in the desire, of which the documentation contains ample evidence, and which was evinced by both Parties, for natural and visible frontiers. Even if, as the Court stated earlier, this is not in itself a reason for holding that the frontier must follow a natural and visible line, it does support the view that the Parties wanted certainty and finality by means of natural and visible lines.

The same view is strongly supported by the Parties' attitude over frontiers in the 1925 and 1937 Treaties. By specifically excluding frontiers from the process of revision of previous treaties, which the 1925 and 1937 Treaties otherwise effected, the Parties bore witness to the paramount importance they attached to finality in this field. Their attitude in 1925 and 1937 can properly be taken as evidence that they equally desired finality in the 1904-1908 period.

The indication of the line of the watershed in Article 1 of the 1904 Treaty was itself no more than an obvious and convenient way of describing a frontier line objectively, though in general terms. There is, however, no reason to think that the Parties attached any special importance to the line of the watershed as such, as compared with the overriding importance, in the interests of finality, of adhering to the map line as eventually delimited and as accepted by them. The Court, therefore, feels bound, as a matter of treaty interpretation, to pronounce in favour of the line as mapped in the disputed area.

Given the grounds on which the Court bases its decision, it becomes unnecessary to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity, or did so correspond in 1904-1908, or, if not, how the watershed line in fact runs.

Referring finally to the Submissions presented at the end of the oral proceedings, the Court, for the reasons indicated at the beginning of the present Judgment, finds that Cambodia's first and second Submissions, calling for pronouncements on the legal status of the Annex I map and on the frontier line in the disputed region, can be entertained only to the extent that they give expression to grounds, and not as claims to be dealt with in the operative provisions of the Judgment. It finds on the other hand that

Thailand, after having stated her own claim concerning sovereignty over Preah Vihear, confined herself in her Submissions at the end of the oral proceedings to arguments and denials opposing the contentions of the other Party, leaving it to the Court to word as it sees fit the reasons on which its Judgment is based.

In the presence of the claims submitted to the Court by Cambodia and Thailand, respectively, concerning the sovereignty over Preah Vihear thus in dispute between these two States, the Court finds in favour of Cambodia in accordance with her third Submission. It also finds in favour of Cambodia as regards the fourth Submission concerning the withdrawal of the detachments of armed forces.

As regards the fifth Submission of Cambodia concerning restitution, the Court considers that the request made in it does not represent any extension of Cambodia's original claim (in which case it would have been irreceivable at the stage at which it was first advanced). Rather is it, like the fourth Submission, implicit in, and consequential on, the claim of sovereignty itself. On the other hand, no concrete evidence has been placed before the Court showing in any positive way that objects of the kind mentioned in this Submission have in fact been removed by Thailand from the Temple or Temple area since Thailand's occupation of it in 1954. It is true that Thailand has not so much denied the allegation as contended that it is irreceivable. In the circumstances, however, the question of restitution is one on which the Court can only give a finding of principle in favour of Cambodia, without relating it to any particular objects.

For these reasons,

THE COURT,

by nine votes to three,

finds that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia;

finds in consequence,

by nine votes to three,

that Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory;

by seven votes to five,³

that Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission⁴ which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

³ On this point Judges Tanaka and Morelli joined the dissenting Judges (Moreno Quintana, Wellington Koo, and Sir Percy Spender), on the ground that the Court should not pass upon the Fifth Submission by Cambodia, since it was not put forward until during the course of the hearings.

⁴ The Fifth Submission, put forward by Cambodia on March 20, 1962, asked the Court "to adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to the Government of the Kingdom of Cambodia by the Government of Thailand."

[Concurring in the result, Judges Alfaro and Fitzmaurice gave individual opinions. Judge Alfaro discussed at length the principle of "estoppel" or "preclusion" "that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation." Pointing out the difference of this principle from the Anglo-American law of estoppel, he declared that "Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State," and said: "Failure of a State to assert its right when that right is openly challenged by another State can only mean abandonment to [of] that right." Judge Fitzmaurice wished to discuss certain points of the case more fully.

In his dissenting opinion Judge Moreno Quintana held the treaty text more important than maps, that the interpretation of the treaty called for a watershed boundary, and that the watershed followed the edge of the cliff of the promontory on which the Temple is situated, thus placing the Temple in Thailand. Judge Wellington Koo's dissenting opinion concluded that the "Annex map" did not have the character of an international agreement; that Thailand's conduct did not show acquiescence in any line placing the Temple in Cambodia; that there was no ground to hold Thailand accountable for acquiescence or for the application of the idea of preclusion or estoppel; urged that independent experts should have found the actual watershed, and concluded that he could not reach a satisfactory conclusion as to the exact boundary without knowing the answers to technical questions concerning the watershed line in the disputed area. Sir Percy Spender gave a lengthy dissenting opinion in which he found no agreement to deviate from the treaty line of the watershed, and that the Annex I map did not in the vicinity of the Temple indicate the real agreement of the parties, although neither France nor Thailand was aware of this discrepancy until long after the map was published. He did not find any basis for holding that acquiescence had precluded Thailand from asserting the true treaty-boundary line. He stated:

There is however, in my view, no foundation in international law for the proposition that an act of recognition by a State of or acquiescence by a State in a situation of fact or law is a unilateral juridical act which, operating of its own force, has the legal consequence of precluding a party giving or making it from thereafter challenging the situation which is the subject of recognition or acquiescence.

...

The principle of preclusion is a beneficent and powerful instrument of substantive international law. Based as it is upon the necessity for good faith between States in their relations one with another, it is not to be hedged in by artificial rules. It should not however be permitted to become so indefinite as to acquire the somewhat formless content of a maxim. And since the principle, when it is applicable to any given set of facts, substitutes relative truth for the judicial search for the truth, it should be applied with caution.

In my opinion the principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.

Unless the elements so stated can, in any particular case, be shown to exist, the principle has no application.

...

I greatly doubt whether any of the elements of preclusion have been established by Cambodia. Even were it established that Thailand's conduct did amount to some clear and unequivocal representation, and that France relied upon it and was entitled to do so, I do not think there is any evidence that France—or Cambodia—suffered any prejudice.]

*Resolution 1731 (XVI) of General Assembly requesting advisory opinion—objections to giving opinion based on proceedings in General Assembly—interpretation of meaning of “expenses of the Organization”—Article 17, paragraphs 1 and 2 of Charter—lack of justification for limiting terms “budget” and “expenses”—Article 17 in context of Charter—respective functions of Security Council and General Assembly—Article 11, paragraph 2, in relation to budgetary powers of General Assembly—role of General Assembly in maintenance of international peace and security—agreements under Article 43—expenses incurred for purposes of United Nations—obligations incurred by Secretary-General acting under authority of Security Council or General Assembly—nature of operations of UNEF and ONUC—financing of UNEF and ONUC based on Article 17, paragraph 2—implementation by Secretary-General of Security Council resolutions—expenditures for UNEF and ONUC and Article 17, paragraph 2, of Charter*¹

CERTAIN EXPENSES OF THE UNITED NATIONS (ARTICLE 17, PARAGRAPH 2, OF THE CHARTER).² I.C.J. Reports, 1962, p. 151.

International Court of Justice,³ Advisory Opinion of July 20, 1962.

[Resolution 1731 (XVI), adopted December 20, 1961, by the General Assembly, read:

The General Assembly,

Recognizing its need for authoritative legal guidance as to obligations of Member States under the Charter of the United Nations in the matter of financing the United Nations operations in the Congo and in the Middle East,

1. *Decides* to submit the following question to the International Court of Justice for an advisory opinion:

“Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV), and 1601 (XV) of 15

¹ Caption by the Court.

² Full text of majority opinion, except for introductory matter, and digests of remainder, by Wm. W. Bishop, Jr.

³ Composed for this case of President Winiarski, Vice President Alfaro, and Judges Basdevant, Badawi, Moreno Quintana, Wellington Koo, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Koretsky, Tanaka, Bustamante y Rivero, Jessup, and Morelli.

April 1961, and the expenditures authorized in General Assembly resolutions 1122(XI) of 26 November 1956, 1089(XI) of 21 December 1956, 1090(XI) of 27 February 1957, 1151(XII) of 22 November 1957, 1204(XII) of 13 December 1957, 1337(XIII) of 13 December 1958, 1441(XIV) of 5 December 1959 and 1575(XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997(ES-I) of 2 November 1956, 998(ES-I) and 999(ES-I) of 4 November 1956, 1000(ES-I) of 5 November 1956, 1001(ES-I) of 7 November 1956, 1121(XI) of 24 November 1956 and 1263(XIII) of 14 November 1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations!''

The second paragraph of the resolution asked the Secretary General to transmit the resolution, and "all documents likely to throw light on the question," to the Court.]

Before proceeding to give its opinion on the question put to it, the Court considers it necessary to make the following preliminary remarks: *

The power of the Court to give an advisory opinion is derived from Article 65 of the Statute. The power granted is of a discretionary character. In exercising its discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923: "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court" (P.C.I.J., Series B, No. 5, p. 29). Therefore, and in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As this Court said in its Opinion of 30 March 1950, the permissive character of Article 65 "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, I.C.J. Reports 1950, p. 72). But, as the Court also said in the same Opinion, "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Ibid.*, p. 71). Still more emphatically, in its Opinion of 23 October 1956, the Court said that only "compelling reasons" should lead it to refuse to give a requested advisory opinion (*Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the Unesco*, I.C.J. Reports 1956, p. 86).

The Court finds no "compelling reason" why it should not give the advisory opinion which the General Assembly requested by its resolution 1731

* The English text of the majority opinion is authoritative.

(XVI). It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.

In the preamble to the resolution requesting this opinion, the General Assembly expressed its recognition of "its need for authoritative legal guidance." In its search for such guidance it has put to the Court a legal question—a question of the interpretation of Article 17, paragraph 2, of the Charter of the United Nations. In its Opinion of 28 May 1948, the Court made it clear that as "the principal judicial organ of the United Nations", it was entitled to exercise in regard to an article of the Charter, "a multi-lateral treaty, an interpretative function which falls within the normal exercise of its judicial powers" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, *I.C.J. Reports 1947-1948*, p. 61).

The Court, therefore, having been asked to give an advisory opinion upon a concrete legal question, will proceed to give its opinion.

The question on which the Court is asked to give its opinion is whether certain expenditures which were authorized by the General Assembly to cover the costs of the United Nations operations in the Congo (hereinafter referred to as ONUC) and of the operations of the United Nations Emergency Force in the Middle East (hereinafter referred to as UNEF), "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations".

Before entering upon the detailed aspects of this question, the Court will examine the view that it should take into consideration the circumstance that at the 1086th Plenary Meeting of the General Assembly on 20 December 1961, an amendment was proposed, by the representative of France, to the draft resolution requesting the advisory opinion, and that this amendment was rejected. The amendment would have asked the Court to give an opinion on the question whether the expenditures relating to the indicated operations were "decided on in conformity with the provisions of the Charter"; if that question were answered in the affirmative, the Court would have been asked to proceed to answer the question which the resolution as adopted actually poses.

If the amendment had been adopted, the Court would have been asked to consider whether the resolutions *authorizing the expenditures* were decided on in conformity with the Charter; the French amendment did not propose to ask the Court whether the resolutions *in pursuance of which the operations in the Middle East and in the Congo were undertaken*, were adopted in conformity with the Charter.

The Court does not find it necessary to expound the extent to which the proceedings of the General Assembly, antecedent to the adoption of a reso-

lution, should be taken into account in interpreting that resolution, but it makes the following comments on the argument based upon the rejection of the French amendment.

The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were "decided on in conformity with the Charter", if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion. Nor can the Court agree that the rejection of the French amendment has any bearing upon the question whether the General Assembly sought to preclude the Court from interpreting Article 17 in the light of other articles of the Charter, that is, in the whole context of the treaty. If any deduction is to be made from the debates on this point, the opposite conclusion would be drawn from the clear statements of sponsoring delegations that they took it for granted the Court would consider the Charter as a whole.

Turning to the question which has been posed, the Court observes that it involves an interpretation of Article 17, paragraph 2, of the Charter. On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics. In interpreting Article 4 of the Charter, the Court was led to consider "the structure of the Charter" and "the relations established by it between the General Assembly and the Security Council"; a comparable problem confronts the Court in the instant matter. The Court sustained its interpretation of Article 4 by considering the manner in which the organs concerned "have consistently interpreted the text" in their practice (*Competence of the General Assembly for the Admission of a State to the United Nations*, I.C.J. Reports 1950, pp. 8-9).

The text of Article 17 is in part as follows:

"1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."

Although the Court will examine Article 17 in itself and in its relation to the rest of the Charter, it should be noted that at least three separate questions might arise in the interpretation of paragraph 2 of this Article. One question is that of identifying what are "the expenses of the Organization"; a second question might concern apportionment by the General Assembly; while a third question might involve the interpretation of the phrase "shall be borne by the Members". It is the second and third questions which directly involve "the financial obligations of the Members", but it is only the first question which is posed by the request for the advisory opinion. The

question put to the Court has to do with a moment logically anterior to apportionment, just as a question of apportionment would be anterior to a question of Members' obligation to pay.

It is true that, as already noted, the preamble of the resolution containing the request refers to the General Assembly's "need for authoritative legal guidance as to obligations of Member States", but it is to be assumed that in the understanding of the General Assembly, it would find such guidance in the advisory opinion which the Court would give on the question whether certain identified expenditures "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter". If the Court finds that the indicated expenditures are such "expenses", it is not called upon to consider the manner in which, or the scale by which, they may be apportioned. The amount of what are unquestionably "expenses of the Organization within the meaning of Article 17, paragraph 2" is not in its entirety apportioned by the General Assembly and paid for by the contributions of Member States, since the Organization has other sources of income. A Member State, accordingly, is under no obligation to pay more than the amount apportioned to it; the expenses of the Organization and the total amount in money of the obligations of the Member States may not, in practice, necessarily be identical.

The text of Article 17, paragraph 2, refers to "the expenses of the Organization" without any further explicit definition of such expenses. It would be possible to begin with a general proposition to the effect that the "expenses" of any organization are the amounts paid out to defray the costs of carrying out its purposes, in this case, the political, economic, social, humanitarian and other purposes of the United Nations. The next step would be to examine, as the Court will, whether the resolutions authorizing the operations here in question were intended to carry out the purposes of the United Nations and whether the expenditures were incurred in furthering these operations. Or, it might simply be said that the "expenses" of an organization are those which are provided for in its budget. But the Court has not been asked to give an abstract definition of the words "expenses of the Organization". It has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked.

It is perhaps the simple identification of "expenses" with the items included in a budget, which has led certain arguments to link the interpretation of the word "expenses" in paragraph 2 of Article 17, with the word "budget" in paragraph 1 of that Article; in both cases, it is contended, the qualifying adjective "regular" or "administrative" should be understood to be implied. Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter.

In the first place, concerning the word "budget" in paragraph 1 of Article 17, it is clear that the existence of the distinction between "administrative budgets" and "operational budgets" was not absent from the minds of the drafters of the Charter, nor from the consciousness of the Organization even in the early days of its history. In drafting Article 17, the drafters found it suitable to provide in paragraph 1 that "The General Assembly shall consider and approve *the budget of the Organization*". But in dealing with the function of the General Assembly in relation to the specialized agencies, they provided in paragraph 3 that the General Assembly "shall examine the *administrative budgets* of such specialized agencies". If it had been intended that paragraph 1 should be limited to the administrative budget of the United Nations organization itself, the word "administrative" would have been inserted in paragraph 1 as it was in paragraph 3. Moreover, had it been contemplated that the Organization would also have had another budget, different from the one which was to be approved by the General Assembly, the Charter would have included some reference to such other budget and to the organ which was to approve it.

Similarly, at its first session, the General Assembly in drawing up and approving the Constitution of the International Refugee Organization, provided that the budget of that Organization was to be divided under the headings "administrative", "operational" and "large-scale resettlement"; but no such distinctions were introduced into the Financial Regulations of the United Nations which were adopted by unanimous vote in 1950, and which, in this respect, remain unchanged. These regulations speak only of "the budget" and do not provide any distinction between "administrative" and "operational".

In subsequent sessions of the General Assembly, including the sixteenth, there have been numerous references to the idea of distinguishing an "operational" budget; some speakers have advocated such a distinction as a useful book-keeping device; some considered it in connection with the possibility of differing scales of assessment or apportionment; others believed it should mark a differentiation of activities to be financed by voluntary contributions. But these discussions have not resulted in the adoption of two separate budgets based upon such a distinction.

Actually, the practice of the Organization is entirely consistent with the plain meaning of the text. The budget of the Organization has from the outset included items which would not fall within any of the definitions of "administrative budget" which have been advanced in this connection. Thus, for example, prior to the establishment of, and now in addition to, the "Expanded Programme of Technical Assistance" and the "Special Fund", both of which are nourished by voluntary contributions, the annual budget of the Organization contains provision for funds for technical assistance; in the budget for the financial year 1962, the sum of \$6,400,000 is included for the technical programmes of economic development, social activities, human rights activities, public administration and narcotic drugs control. Although during the Fifth Committee discussions there was a suggestion that all technical assistance costs should be excluded from the

regular budget, the items under these heads were all adopted on second reading in the Fifth Committee without a dissenting vote. The "operational" nature of such activities so budgeted is indicated by the explanations in the budget estimates, e.g. the requests "for the continuation of the operational programme in the field of economic development contemplated in General Assembly resolutions 200 (III) of 4 December 1948 and 304 (IV) of 16 November 1949"; and "for the continuation of the operational programme in the field of advisory social welfare services as contemplated in General Assembly resolution 418 (V) of 1 December 1950".

It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security. Annually, since 1947, the General Assembly has made anticipatory provision for "unforeseen and extraordinary expenses" arising in relation to the "maintenance of peace and security". In a Note submitted to the Court by the Controller on the budgetary and financial practices of the United Nations, "extraordinary expenses" are defined as "obligations and expenditures arising as a result of the approval by a council, commission or other competent United Nations body of new programmes and activities not contemplated when the budget appropriations were approved".

The annual resolution designed to provide for extraordinary expenses authorizes the Secretary-General to enter into commitments to meet such expenses with the prior concurrence of the Advisory Committee on Administrative and Budgetary Questions, except that such concurrence is not necessary if the Secretary-General certifies that such commitments relate to the subjects mentioned and the amount does not exceed \$2 million. At its fifteenth and sixteenth sessions, the General Assembly resolved "that if, as a result of a decision of the Security Council, commitments relating to the maintenance of peace and security should arise in an estimated total exceeding \$10 million" before the General Assembly was due to meet again, a special session should be convened by the Secretary-General to consider the matter. The Secretary-General is regularly authorized to draw on the Working Capital Fund for such expenses but is required to submit supplementary budget estimates to cover amounts so advanced. These annual resolutions on unforeseen and extraordinary expenses were adopted without a dissenting vote in every year from 1947 through 1959, except for 1952, 1953 and 1954, when the adverse votes are attributable to the fact that the resolution included the specification of a controversial item—United Nations Korean war decorations.

It is notable that the 1961 Report of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations, while revealing wide differences of opinion on a variety of propositions, records that the following statement was adopted without opposition:

"22. Investigations and observation operations undertaken by the Organization to prevent possible aggression should be financed as part of the regular budget of the United Nations."

In the light of what has been stated, the Court concludes that there is no justification for reading into the text of Article 17, paragraph 1, any limiting or qualifying word before the word "budget".

Turning to paragraph 2 of Article 17, the Court observes that, on its face, the term "expenses of the Organization" means all the expenses and not just certain types of expenses which might be referred to as "regular expenses". An examination of other parts of the Charter shows the variety of expenses which must inevitably be included within the "expenses of the Organization" just as much as the salaries of staff or the maintenance of buildings.

For example, the text of Chapters IX and X of the Charter with reference to international economic and social cooperation, especially the wording of those articles which specify the functions and powers of the Economic and Social Council, anticipated the numerous and varied circumstances under which expenses of the Organization could be incurred and which have indeed eventuated in practice.

Furthermore, by Article 98 of the Charter, the Secretary-General is obligated to perform such functions as are entrusted to him by the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council. Whether or not expenses incurred in his discharge of this obligation become "expenses of the Organization" cannot depend on whether they be administrative or some other kind of expenses.

The Court does not perceive any basis for challenging the legality of the settled practice of including such expenses as these in the budgetary amounts which the General Assembly apportions among the Members in accordance with the authority which is given to it by Article 17, paragraph 2.

Passing from the text of Article 17 to its place in the general structure and scheme of the Charter, the Court will consider whether in that broad context one finds any basis for implying a limitation upon the budgetary authority of the General Assembly which in turn might limit the meaning of "expenses" in paragraph 2 of that Article.

The general purposes of Article 17 are the vesting of control over the finances of the Organization, and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established under the authority of Article 22 or Article 29.

Article 17 is the only article in the Charter which refers to budgetary authority or to the power to apportion expenses, or otherwise to raise revenue, except for Articles 33 and 35, paragraph 3, of the Statute of the Court which have no bearing on the point here under discussion. Nevertheless, it has been argued before the Court that one type of expenses, namely those resulting from operations for the maintenance of international peace and security, are not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fall to be dealt with exclusively by the Security Council, and more especially

through agreements negotiated in accordance with Article 43 of the Charter.

The argument rests in part upon the view that when the maintenance of international peace and security is involved, it is only the Security Council which is authorized to decide on any action relative thereto. It is argued further that since the General Assembly's power is limited to discussing, considering, studying and recommending, it cannot impose an obligation to pay the expenses which result from the implementation of its recommendations. This argument leads to an examination of the respective functions of the General Assembly and of the Security Council under the Charter, particularly with respect to the maintenance of international peace and security.

Article 24 of the Charter provides:

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security . . ."

The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action". To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.

The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations". The word "measures" implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "*decisions*" of the General Assembly "on important questions". These "*decisions*" do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, "and budgetary questions". In connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the Security Council which has only the power

to recommend and it is the General Assembly which decides and whose decision determines status; but there is a close collaboration between the two organs. Moreover, these powers of decision of the General Assembly under Articles 5 and 6 are specifically related to preventive or enforcement measures.

By Article 17, paragraph 1, the General Assembly is given the power not only to "consider" the budget of the Organization, but also to "approve" it. The decision to "approve" the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specifically stated in Article 17, paragraph 2, of each Member to bear that part of the expenses which is apportioned to it by the General Assembly. When those expenses include expenditures for the maintenance of peace and security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.

The argument supporting a limitation on the budgetary authority of the General Assembly with respect to the maintenance of international peace and security relies especially on the reference to "action" in the last sentence of Article 11, paragraph 2. This paragraph reads as follows:

"The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the State or States concerned or to the Security Council, or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not merely to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35, in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organize peace-keeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Article 10 or Article 14, except as limited by the last sentence of Article 11, paragraph 2. This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word "action" must mean such action as is solely within the province of the Security

Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the word "action" in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.

The practice of the Organization throughout its history bears out the foregoing elucidation of the term "action" in the last sentence of Article 11, paragraph 2. Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity—action—in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.

The Court accordingly finds that the argument which seeks, by reference to Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security, is unfounded.

It has further been argued before the Court that Article 43 of the Charter constitutes a particular rule, a *lex specialis*, which derogates from the general rule in Article 17, whenever an expenditure for the maintenance of international peace and security is involved. Article 43 provides that Members shall negotiate agreements with the Security Council on its initiative, stipulating what "armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security", the Member State will make available to the Security Council on its call. According to paragraph 2 of the Article:

"Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided."

The argument is that such agreements were intended to include specifications concerning the allocation of costs of such enforcement actions as

might be taken by direction of the Security Council, and that it is only the Security Council which has the authority to arrange for meeting such costs.

With reference to this argument, the Court will state at the outset that, for reasons fully expounded later in this Opinion, the operations known as UNEF and ONUC were not *enforcement* actions within the compass of Chapter VII of the Charter and that therefore Article 43 could not have any applicability to the cases with which the Court is here concerned. However, even if Article 43 were applicable, the Court could not accept this interpretation of its text for the following reasons.

There is nothing in the text of Article 43 which would limit the discretion of the Security Council in negotiating such agreements. It cannot be assumed that in every such agreement the Security Council would insist, or that any Member State would be bound to agree, that such State would bear the entire cost of the "assistance" which it would make available including, for example, transport of forces to the point of operation, complete logistical maintenance in the field, supplies, arms and ammunition, etc. If, during negotiations under the terms of Article 43, a Member State would be entitled (as it would be) to insist, and the Security Council would be entitled (as it would be) to agree, that some part of the expense should be borne by the Organization, then such expense would form part of the expenses of the Organization and would fall to be apportioned by the General Assembly under Article 17. It is difficult to see how it could have been contemplated that all potential expenses could be envisaged in such agreements concluded perhaps long in advance. Indeed, the difficulty or impossibility of anticipating the entire financial impact of enforcement measures on Member States is brought out by the terms of Article 50 which provides that a State, whether a Member of the United Nations or not, "which finds itself confronted with special economic problems arising from the carrying out of these [preventive or enforcement] measures, shall have the right to consult the Security Council with regard to a solution of those problems". Presumably in such a case the Security Council might determine that the overburdened State was entitled to some financial assistance; such financial assistance, if afforded by the Organization, as it might be, would clearly constitute part of the "expenses of the Organization". The economic problems could not have been covered in advance by a negotiated agreement since they would be unknown until after the event and in the case of non-Member States, which are also included in Article 50, no agreement at all would have been negotiated under Article 43.

Moreover, an argument which insists that all measures taken for the maintenance of international peace and security must be financed through agreements concluded under Article 43, would seem to exclude the possibility that the Security Council might act under some other Article of the Charter. The Court cannot accept so limited a view of the powers of the Security Council under the Charter. It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.

Articles of Chapter VII of the Charter speak of "situations" as well as

disputes, and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a State. The costs of actions which the Security Council is authorized to take constitute "expenses of the Organization within the meaning of Article 17, paragraph 2".

The Court has considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions assigned by the Charter to the General Assembly and to the Security Council, with a view to determining the meaning of the phrase "the expenses of the Organization". The Court does not find it necessary to go further in giving a more detailed definition of such expenses. The Court will, therefore, proceed to examine the expenditures enumerated in the request for the advisory opinion. In determining whether the actual expenditures authorized constitute "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter", the Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an "expense of the Organization".

The purposes of the United Nations are set forth in Article 1 of the Charter. The first two purposes as stated in paragraphs 1 and 2, may be summarily described as pointing to the goal of international peace and security and friendly relations. The third purpose is the achievement of economic, social, cultural and humanitarian goals and respect for human rights. The fourth and last purpose is: "To be a center for harmonizing the actions of nations in the attainment of these common ends."

The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.

If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".

The Financial Regulations and Rules of the United Nations, adopted by the General Assembly, provide:

"Regulation 4.1: The appropriations voted by the General Assembly shall constitute an authorization to the Secretary-General to incur obligations and make payments for the purposes for which the appropriations were voted and up to the amounts so voted."

Thus, for example, when the General Assembly in resolution 1619 (XV) included a paragraph reading:

"3. *Decides* to appropriate an amount of \$100 million for the operations of the United Nations in the Congo from 1 January to 31 October 1961",

this constituted an authorization to the Secretary-General to incur certain obligations of the United Nations just as clearly as when in resolution 1590 (XV) the General Assembly used this language:

"3. *Authorizes* the Secretary-General . . . to incur commitments in 1961 for the United Nations operations in the Congo up to the total of \$24 million . . ."

On the previous occasion when the Court was called upon to consider Article 17 of the Charter, the Court found that an award of the Administrative Tribunal of the United Nations created an obligation of the Organization and with relation thereto the Court said that:

"the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements". (*Effects of awards of compensation made by the United Nations Administrative Tribunal, I.C.J. Reports 1954*, p. 59.)

Similarly, obligations of the Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly "has no alternative but to honour these engagements".

The obligation is one thing: the way in which the obligation is met—that is from what source the funds are secured—is another. The General Assembly may follow any one of several alternatives: it may apportion the cost of the item according to the ordinary scale of assessment; it may apportion the cost according to some special scale of assessment; it may utilize funds which are voluntarily contributed to the Organization; or it may find some other method or combination of methods for providing the necessary funds. In this context, it is of no legal significance whether, as a matter of book-keeping or accounting, the General Assembly chooses to have the item in question included under one of the standard established sections of the “regular” budget or whether it is separately listed in some special account or fund. The significant fact is that the item is an expense of the Organization and under Article 17, paragraph 2, the General Assembly therefore has authority to apportion it.

The reasoning which has just been developed, applied to the resolutions mentioned in the request for the advisory opinion, might suffice as a basis for the opinion of the Court. The Court finds it appropriate, however, to take into consideration other arguments which have been advanced.

The expenditures enumerated in the request for an advisory opinion may conveniently be examined first with reference to UNEF and then to ONUC. In each case, attention will be paid first to the operations and then to the financing of the operations.

In considering the operations in the Middle East, the Court must analyze the functions of UNEF as set forth in resolutions of the General Assembly. Resolution 998 (ES-I) of 4 November 1956 requested the Secretary-General to submit a plan “for the setting up, with the consent of the nations concerned, of an emergency international United Nations Force to secure and supervise the cessation of hostilities in accordance with all the terms of” the General Assembly’s previous resolution 997 (ES-I) of 2 November 1956. The verb “secure” as applied to such matters as halting the movement of military forces and arms into the area and the conclusion of a cease-fire, might suggest measures of enforcement, were it not that the Force was to be set up “with the consent of the nations concerned”.

In his first report on the plan for an emergency international Force the Secretary-General used the language of resolution 998 (ES-I) in submitting his proposals. The same terms are used in General Assembly resolution 1000 (ES-I) of 5 November in which operative paragraph 1 reads:

“*Establishes* a United Nations Command for an emergency international Force to secure and supervise the cessation of hostilities in accordance with all the terms of General Assembly resolution 997 (ES-I) of 2 November 1956.”

This resolution was adopted without a dissenting vote. In his second and final report on the plan for an emergency international Force of 6 November, the Secretary-General, in paragraphs 9 and 10, stated:

“While the General Assembly is enabled to *establish* the Force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed* or *operate* on the territory

of a given country without the consent of the Government of that country. This does not exclude the possibility that the Security Council could use such a Force within the wider margins provided under Chapter VII of the United Nations Charter. I would not for the present consider it necessary to elaborate this point further, since no use of the Force under Chapter VII, with the rights in relation to Member States that this would entail, has been envisaged.

10. The point just made permits the conclusion that the setting up of the Force should not be guided by the needs which would have existed had the measure been considered as part of an enforcement action directed against a Member country. There is an obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces."

Paragraph 12 of the Report is particularly important because in resolution 1001 (ES-I) the General Assembly, again without a dissenting vote, "*Concurs* in the definition of the functions of the Force as stated in paragraph 12 of the Secretary-General's report". Paragraph 12 reads in part as follows:

"the functions of the United Nations Force would be, when a cease-fire is being established, to enter Egyptian territory with the consent of the Egyptian Government, in order to help maintain quiet during and after the withdrawal of non-Egyptian troops, and to secure compliance with the other terms established in the resolution of 2 November 1956. The Force obviously should have no rights other than those necessary for the execution of its functions, in co-operation with local authorities. It would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor, moreover, should the Force have military functions exceeding those necessary to secure peaceful conditions on the assumption that the parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly."

It is not possible to find in this description of the functions of UNEF, as outlined by the Secretary-General and concurred in by the General Assembly without a dissenting vote, any evidence that the Force was to be used for purposes of enforcement. Nor can such evidence be found in the subsequent operations of the Force, operations which did not exceed the scope of the functions ascribed to it.

It could not therefore have been patent on the face of the resolution that the establishment of UNEF was in effect "enforcement action" under Chapter VII which, in accordance with the Charter, could be authorized only by the Security Council.

On the other hand, it is apparent that the operations were undertaken to fulfil a prime purpose of the United Nations, that is, to promote and to maintain a peaceful settlement of the situation. This being true, the Secretary-General properly exercised the authority given him to incur financial obligations of the Organization and expenses resulting from such obligations must be considered "expenses of the Organization within the meaning of Article 17, paragraph 2".

Ap[ro]pos what has already been said about the meaning of the word "action" in Article 11 of the Charter, attention may be called to the fact that resolution 997 (ES-I), which is chronologically the first of the resolutions concerning the operations in the Middle East mentioned in the request for the advisory opinion, provides in paragraph 5:

"Requests the Secretary-General to observe and report promptly on the compliance with the present resolution to the Security Council and to the General Assembly, for such further action as they may deem appropriate in accordance with the Charter."

The italicized words reveal an understanding that either of the two organs might take "action" in the premises. Actually, as one knows, the "action" was taken by the General Assembly in adopting two days later without a dissenting vote, resolution 998 (ES-I) and, also without a dissenting vote, within another three days, resolutions 1000 (ES-I) and 1001 (ES-I), all providing for UNEF.

The Court notes that these "actions" may be considered "measures" recommended under Article 14, rather than "action" recommended under Article 11. The powers of the General Assembly stated in Article 14 are not made subject to the provisions of Article 11, but only of Article 12. Furthermore, as the Court has already noted, the word "measures" implies some kind of action. So far as concerns the nature of the situations in the Middle East in 1956, they could be described as "likely to impair . . . friendly relations among nations", just as well as they could be considered to involve "the maintenance of international peace and security". Since the resolutions of the General Assembly in question do not mention upon which article they are based, and since the language used in most of them might imply reference to either Article 14 or Article 11, it cannot be excluded that they were based upon the former rather than the latter article.

The financing of UNEF presented perplexing problems and the debates on these problems have even led to the view that the General Assembly never, either directly or indirectly, regarded the expenses of UNEF as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter". With this interpretation the Court cannot agree. In paragraph 15 of his second and final report on the plan for an emergency international Force of 6 November 1956, the Secretary-General said that this problem required further study. Provisionally, certain costs might be absorbed by a nation providing a unit, "while all other costs should be financed outside the normal budget of the United Nations". Since it was "obviously impossible to make any estimate of the costs without a knowledge of the size of the corps and the length of its assignment", the "only practical course . . . would be for the General Assembly to vote a general authorization for the cost of the Force on the basis of general principles such as those here suggested".

Paragraph 5 of resolution 1001 (ES-I) of 7 November 1956 states that the General Assembly "*Approves provisionally* the basic rule concerning the financing of the Force laid down in paragraph 15 of the Secretary-General's report".

In an oral statement to the plenary meeting of the General Assembly on 26 November 1956, the Secretary-General said:

"... I wish to make it equally clear that while funds received and payments made with respect to the Force are to be considered as coming outside the regular budget of the Organization, the operation is essentially a United Nations responsibility, and the Special Account to be established must, therefore, be construed as coming within the meaning of Article 17 of the Charter".

At this same meeting, after hearing this statement, the General Assembly in resolution 1122 (XI) noted that it had "*provisionally approved* the recommendations made by the Secretary-General concerning the financing of the Force". It then authorized the Secretary-General "to establish a United Nations Emergency Force Special Account to which funds received by the United Nations, outside the regular budget, for the purpose of meeting the expenses of the Force shall be credited and from which payments for this purpose shall be made". The resolution then provided that the initial amount in the Special Account should be \$10 million and authorized the Secretary-General "pending the receipt of funds for the Special Account, to advance from the Working Capital Fund such sums as the Special Account may require to meet any expenses chargeable to it". The establishment of a Special Account does not necessarily mean that the funds in it are not to be derived from contributions of Members as apportioned by the General Assembly.

The next of the resolutions of the General Assembly to be considered is 1089 (XI) of 21 December 1956, which reflects the uncertainties and the conflicting views about financing UNEF. The divergencies are duly noted and there is ample reservation concerning possible future action, but operative paragraph 1 follows the recommendation of the Secretary-General "that the expenses relating to the Force should be apportioned in the same manner as the expenses of the Organization". The language of this paragraph is clearly drawn from Article 17:

"1. *Decides* that the expenses of the United Nations Emergency Force, other than for such pay, equipment, supplies and services as may be furnished without charge by Governments of Member States, shall be borne by the United Nations and shall be apportioned among the Member States, to the extent of \$10 million, in accordance with the scale of assessments adopted by the General Assembly for contributions to the annual budget of the Organization for the financial year 1957;"

This resolution, which was adopted by the requisite two-thirds majority, must have rested upon the conclusion that the expenses of UNEF were "expenses of the Organization" since otherwise the General Assembly would have had no authority to decide that they "shall be borne by the United Nations" or to apportion them among the Members. It is further significant that paragraph 3 of this resolution, which established a study committee, charges this committee with the task of examining "the question of the *apportionment* of the expenses of the Force in excess of \$10 million ... and the principle or the formulation of *scales of contributions different*

from the scale of contributions by Member States to the ordinary budget for 1957". The italicized words show that it was not contemplated that the committee would consider any method of meeting these expenses except through some form of apportionment although it was understood that a different *scale* might be suggested.

The report of this study committee again records differences of opinion but the draft resolution which it recommended authorized further expenditures and authorized the Secretary-General to advance funds from the Working Capital Fund and to borrow from other funds if necessary; it was adopted as resolution 1090 (XI) by the requisite two-thirds majority on 27 February 1957. In paragraph 4 of that resolution, the General Assembly decided that it would at its twelfth session "consider the basis for financing any costs of the Force in excess of \$10 million not covered by voluntary contributions".

Resolution 1151 (XII) of 22 November 1957, while contemplating the receipt of more voluntary contributions, decided in paragraph 4 that the expenses authorized "shall be borne by the Members of the United Nations in accordance with the scales of assessments adopted by the General Assembly for the financial years 1957 and 1958 respectively".

Almost a year later, on 14 November 1958, in resolution 1263 (XIII) the General Assembly, while "*Noting with satisfaction* the effective way in which the Force continues to carry out its function", requested the Fifth Committee "to recommend such action as may be necessary to finance this continuing operation of the United Nations Emergency Force".

After further study, the provision contained in paragraph 4 of the resolution of 22 November 1957 was adopted in paragraph 4 of resolution 1337 (XIII) of 13 December 1958. Paragraph 5 of that resolution requested "the Secretary-General to consult with the Governments of Member States with respect to their views concerning the manner of financing the Force in the future, and to submit a report together with the replies to the General Assembly at its fourteenth session". Thereafter a new plan was worked out for the utilization of any voluntary contributions, but resolution 1441 (XIV) of 5 December 1959, in paragraph 2: "*Decides* to assess the amount of \$20 million against all Members of the United Nations on the basis of the regular scale of assessments" subject to the use of credits drawn from voluntary contributions. Resolution 1575 (XV) of 20 December 1960 is practically identical.

The Court concludes that, from year to year, the expenses of UNEF have been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter.

The operations in the Congo were initially authorized by the Security Council in the resolution of 14 July 1960 which was adopted without a dissenting vote. The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, was clearly adopted with a view to maintaining international peace and security. However, it is argued that that resolution has been implemented in violation of provisions of the Charter inasmuch

as under the Charter it is the Security Council that determines which States are to participate in carrying out decisions involving the maintenance of international peace and security, whereas in the case of the Congo the Secretary-General himself determined which States were to participate with their armed forces or otherwise.

By paragraph 2 of the resolution of 14 July 1960 the Security Council "*Decides* to authorize the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary". Paragraph 3 requested the Secretary-General "to report to the Security Council as appropriate". The Secretary-General made his first report on 18 July and in it informed the Security Council which States he had asked to contribute forces or matériel, which ones had complied, the size of the units which had already arrived in the Congo (a total of some 3,500 troops), and some detail about further units expected.

On 22 July the Security Council by unanimous vote adopted a further resolution in which the preamble states that it had considered this report of the Secretary-General and appreciated "the work of the Secretary-General and the support so readily and so speedily given to him by all Member States invited by him to give assistance". In operative paragraph 3, the Security Council "*Commends* the Secretary-General for the prompt action he has taken to carry out resolution S/4387 of the Security Council, and for his first report".

On 9 August the Security Council adopted a further resolution without a dissenting vote in which it took note of the second report and of an oral statement of the Secretary-General and in operative paragraph 1: "*Confirms* the authority given to the Secretary-General by the Security Council resolutions of 14 July and 22 July 1960 and requests him to continue to carry out the responsibility placed on him thereby". This emphatic ratification is further supported by operative paragraphs 5 and 6 by which all Member States were called upon "to afford mutual assistance" and the Secretary-General was requested "to implement this resolution and to report further to the Council as appropriate".

The Security Council resolutions of 14 July, 22 July and 9 August 1960 were noted by the General Assembly in its resolution 1474 (ES-IV) of 20 September, adopted without a dissenting vote, in which it "fully supports" these resolutions. Again without a dissenting vote, on 21 February 1961 the Security Council reaffirmed its three previous resolutions "and the General Assembly resolution 1474 (ES-IV) of 20 September 1960" and reminded "all States of their obligations under these resolutions".

Again without a dissenting vote on 24 November 1961 the Security Council, once more recalling the previous resolutions, reaffirmed "the policies and purposes of the United Nations with respect to the Congo (Leopoldville) as set out" in those resolutions. Operative paragraphs 4 and 5 of this resolution renew the authority to the Secretary-General to continue the activities in the Congo.

In the light of such a record of reiterated consideration, confirmation, ap-

proval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General in implementing the resolution of 14 July 1960, it is impossible to reach the conclusion that the operations in question usurped or impinged upon the prerogatives conferred by the Charter on the Security Council. The Charter does not forbid the Security Council to act through instruments of its own choice: under Article 29 it "may establish such subsidiary organs as it deems necessary for the performance of its functions"; under Article 98 it may entrust "other functions" to the Secretary-General.

It is not necessary for the Court to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operations of ONUC did not include a use of armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve "preventive or enforcement measures" against any State under Chapter VII and therefore did not constitute "action" as that term is used in Article 11.

For the reasons stated, financial obligations which, in accordance with the clear and reiterated authority of both the Security Council and the General Assembly, the Secretary-General incurred on behalf of the United Nations, constitute obligations of the Organization for which the General Assembly was entitled to make provision under the authority of Article 17.

In relation to ONUC, the first action concerning the financing of the operation was taken by the General Assembly on 20 December 1960, after the Security Council had adopted its resolutions of 14 July, 22 July and 9 August, and the General Assembly had adopted its supporting resolution of 20 September. This resolution 1583 (XV) of 20 December referred to the report of the Secretary-General on the estimated cost of the Congo operations from 14 July to 31 December 1960, and to the recommendations of the Advisory Committee on Administrative and Budgetary Questions. It decided to establish an *ad hoc* account for the expenses of the United Nations in the Congo. It also took note of certain waivers of cost claims and then decided to apportion the sum of \$48.5 million among the Member States "on the basis of the regular scale of assessment" subject to certain exceptions. It made this decision because in the preamble it had already recognized:

"that the expenses involved in the United Nations operations in the Congo for 1960 constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations and that the assessment thereof against Member States creates binding legal obligations on such States to pay their assessed shares".

By its further resolution 1590 (XV) of the same day, the General Assembly authorized the Secretary-General "to incur commitments in 1961 for the United Nations operations in the Congo up to the total of \$24 million for the period from 1 January to 31 March 1961". On 3 April 1961, the

General Assembly authorized the Secretary-General to continue until 21 April "to incur commitments for the United Nations operations in the Congo at a level not to exceed \$8 million per month".

Importance has been attached to the statement included in the preamble of General Assembly resolution 1619 (XV) of 21 April 1961 which reads:

"*Bearing in mind* that the extraordinary expenses for the United Nations operations in the Congo are essentially different in nature from the expenses of the Organization under the regular budget and that therefore a procedure different from that applied in the case of the regular budget is required for meeting these extraordinary expenses."

However, the same resolution in operative paragraph 4:

"*Decides further* to apportion as expenses of the Organization the amount of \$100 million among the Member States in accordance with the scale of assessment for the regular budget subject to the provisions of paragraph 8 below [paragraph 8 makes certain adjustments for Member States assessed at the lowest rates or who receive certain designated technical assistance], pending the establishment of a different scale of assessment to defray the extraordinary expenses of the Organization resulting from these operations."

Although it is not mentioned in the resolution requesting the advisory opinion, because it was adopted at the same meeting of the General Assembly, it may be noted that the further resolution 1732 (XVI) of 20 December 1961 contains an identical paragraph in the preamble and a comparable operative paragraph 4 on apportioning \$80 million.

The conclusion to be drawn from these paragraphs is that the General Assembly has twice decided that even though certain expenses are "extraordinary" and "essentially different" from those under the "regular budget", they are none the less "expenses of the Organization" to be apportioned in accordance with the power granted to the General Assembly by Article 17, paragraph 2. This conclusion is strengthened by the concluding clause of paragraph 4 of the two resolutions just cited which states that the decision therein to use the scale of assessment already adopted for the regular budget is made "pending the establishment of a *different scale of assessment* to defray the extraordinary expenses". The only alternative—and that means the "different procedure"—contemplated was another *scale* of assessment and not some method other than assessment. "Apportionment" and "assessment" are terms which relate only to the General Assembly's authority under Article 17.

At the outset of this opinion, the Court pointed out that the text of Article 17, paragraph 2, of the Charter could lead to the simple conclusion that "the expenses of the Organization" are the amounts paid out to defray the costs of carrying out the purposes of the Organization. It was further indicated that the Court would examine the resolutions authorizing the expenditures referred to in the request for the advisory opinion in order to ascertain whether they were incurred with that end in view. The Court has made such an examination and finds that they were so incurred. The

Court has also analyzed the principal arguments which have been advanced against the conclusion that the expenditures in question should be considered as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations", and has found that these arguments are unfounded. Consequently, the Court arrives at the conclusion that the question submitted to it in General Assembly resolution 1731 (XVI) must be answered in the affirmative.

For these reasons,

THE COURT IS OF OPINION,

by nine votes to five,

that the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960 and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

Judge Spiropoulos accompanied his concurrence in the majority opinion by a brief declaration.⁵ Judges Sir Percy Spender, Sir Gerald Fitzmaurice and Morelli appended statements of their separate opinions. President Winiarski and Judges Basdevant, Moreno Quintana, Koretsky and Bustamante y Rivero each gave a dissenting opinion.

In his concurring opinion, Sir Percy Spender urged that the Court "ought not . . . go beyond the limits of what is reasonably necessary to permit it to answer the question," and concluded that it was not "necessary to express any opinion upon the validity or regularity of the resolutions pursuant to which the operations in the Congo and the Middle East were undertaken." Looking at Article 17 of the Charter, he stated:

⁵ Judge Spiropoulos declared that the General Assembly resolutions authorizing the financing of the operations in the Middle East and the Congo created obligations on the Members, but declined to express an opinion on the conformity with the Charter of the several resolutions relating to the United Nations operations in the Middle East and the Congo, because the General Assembly rejection of the French amendment offered to the resolution asking the advisory opinion showed "the desire of the Assembly that the conformity or non-conformity of the decisions of the Assembly and of the Security Council concerning the United Nations operations in the Congo and the Middle East should not be examined by the Court."

The word "budget" in Article 17 (1) covers all finance requirements of the Organization and the word "expenses" in Article 17(2) covers all expenditure which may be incurred on behalf of the Organization, which gives effect to the purposes of the United Nations. There is, upon the proper interpretation of Article 17, no legal basis for confining these words to what has been described as "normal", "ordinary", "administrative" or "essential" costs and expenditure, whatever precisely these terms may denote. The expenditures referred to in the question put to the Court were of a character which could qualify them as incurred in order to give effect to the purposes of the Organization. It was in these circumstances for the General Assembly, and for it alone, to determine, as it did, whether these expenditures did qualify as those of the Organization and to deal with them pursuant to its powers under Article 17(2).

Once the General Assembly has passed upon what are the expenses of the Organization, and it is apparent that the expenditure incurred and to be incurred on behalf of the Organization is in furtherance of its purposes, their character as such and any apportionment thereof made by the General Assembly under Article 17(2) of the Charter cannot legally be challenged by any Member State. . . .

It is, moreover, evident that once the Secretary-General, who, under Article 98 of the Charter, is bound to perform such functions as the General Assembly or the Security Council may entrust him with, is called upon by either organ to discharge certain functions, as he was in respect to the operations in both the Congo and the Middle East, and in discharging them he engages the credit of the Organization and on its behalf incurs financial obligations, then, unless the resolution under which he acts, or what he does, is unconnected with the furtherance of the purposes of the Organization, the moneys involved may properly be dealt with by the General Assembly as "expenses of the Organization". Once they have been, the action of the General Assembly would not be open to challenge by a Member State even if the resolutions under which he was called upon to act were not in conformity with the Charter and even if he should exceed the authority conferred upon him. . . .⁶

⁶ Explaining his ideas of interpretation, Sir Percy Spender said: "The cardinal rule of interpretation that this Court and its predecessor has stated should be applied is that words are to be read, if they may so be read, in their ordinary and natural sense. If so read they make sense, that is the end of the matter. If, however, so read they are ambiguous or lead to an unreasonable result, then and then only must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really meant when they used the words under consideration. . . ."

He pointed to the difficulties in looking to the intention of the parties, particularly when a multilateral treaty, and especially one to which later parties might adhere, is in question. Of such a treaty as the Charter, he said: "It may with confidence be asserted that its particular provisions should receive a broad and liberal interpretation unless the context of any particular provision requires, or there is to be found elsewhere in the Charter, something to compel a narrower and restricted interpretation." He added: "Despite current tendencies to the contrary the first task of the Court is to look, not at the *travaux préparatoires* or the practice which hitherto has been followed within the Organization, but at the terms of the Charter itself. . . . The purpose pervading the whole of the Charter and dominating it is that of maintaining international peace and security and to that end the taking of effective collective measures for the prevention and removal of threats to the peace. Interpretation of the Charter should be directed to giving effect to that purpose, not to frustrate it. . . ."

In his careful concurring opinion, Sir Gerald Fitzmaurice expressed some of his "reservations on certain points of principle having wider implications, though they do not affect the final conclusion reached in the present case." In the majority opinion, he "would have preferred to see less reliance on practice and more on ordinary reasoning." He would examine carefully what expenditures fall within the category of "expenses" and are also "validly incurred, for a purpose which was itself valid and legitimate." He could not accept the position that merely because an expense had been apportioned by the General Assembly, it was automatically validated. But as a "*de facto* solution" he accepted the proposition that

when, on the basis of an item which has been regularly placed on the agenda, and has gone through the normal procedural stages, the Assembly, after due discussion, adopts by the necessary two-thirds majority, a resolution authorizing or apportioning certain expenditures incurred, or to be incurred, in the apparent furtherance of the purposes of the Organization, there must arise at the least a strong *prima facie* presumption that these expenditures are valid and proper ones.

"Expenses of the Organization" would include:

A. All those expenditures, or categories of expenditures, which have normally formed part of the *regular* budget of the Organization, so that a settled practice (*pratique constante*) of treating them as ex-

He added: "The nature of the authority granted by the Charter to each of its organs does not change with time. The ambit or scope of the authority conferred may nonetheless comprehend ever changing circumstances and conditions and embrace, as history unfolds itself, new problems and situations which were not and could not have been envisaged when the Charter came into being. The Charter must accordingly be interpreted, whilst in no way deforming or dislocating its language, so that the authority conferred upon the Organization and its various organs may attach itself to new and unanticipated situations and events."

Although admitting that it is "a general principle of international law that the subsequent conduct of the parties to a bilateral—or a multilateral—instrument may throw light on the intention of the parties at the time the instrument was entered into and thus may provide a legitimate criterion in interpretation," he found difficulty "in accepting the proposition that a practice pursued by an *organ* of the United Nations may be equated with the subsequent conduct of *parties* to a bilateral agreement and thus afford evidence of intention of the parties to the Charter (who have constantly been added to since it came into force) and in that way or otherwise provide a criterion of interpretation. Nor can I agree with a view sometimes advanced that a common practice pursued by an organ of the United Nations, though *ultra vires* and in point of fact having the result of amending the Charter, may nonetheless be effective as a criterion of interpretation." This was particularly true when a minority of members of the organ opposed the decision reached by a majority. He concluded:

"The question of constitutionality of action taken by the General Assembly or the Security Council will rarely call for consideration except within the United Nations itself, where a majority rule prevails. In practice this may enable action to be taken which is beyond power. When, however, the Court is called upon to pronounce upon a question whether certain authority exercised by an organ of the Organization is within the power of that organ, only legal considerations may be invoked and *de facto* extension of the Charter must be disregarded."

penses of the Organization has become established, and is tacitly acquiesced in by all Member States.

B. *In so far as not already covered by head A:*

I. administrative expenditures;

II. expenditures arising in the course, or out of the performance by the Organization of its functions under the Charter;

III. any payments which the Organization is legally responsible for making in relation to third parties; or which it is otherwise, as an entity, under a legal obligation to make; or is bound to make in order to meet its extraneous legal obligations.

Turning to heading "B.II," he said:

There are broadly two main classes of functions which the Organization performs under the Charter—those which it has a duty to carry out, and those which are more or less permissive in character. Peace-keeping, dispute-settling and, indeed, most of the political activities of the Organization would come under the former head; many of what might be called its social and economic activities might come under the latter. Expenses incurred in relation to the first set of activities are therefore true expenses, which the Organization has no choice but to incur in order to carry out a duty, and an essential function which it is bound to perform. . . . Even without Article 17, paragraph 2, the Organization could require Member States to contribute to these expenses.

. . . Even if it should be the case (and on this I do not express any final view) that there is no positive obligation to contribute to the expenses of carrying out social and economic activities of a permissive character (except for Member States supporting or not opposing the activity concerned), I consider that where such an activity is closely connected with, arises out of, and, in short, is basically part of a peace-keeping endeavour, and necessary for, or directly contributory to the success of that endeavour, the activity in question takes on the nature of an essential activity, the expenses of which are expenses of the Organization to which all Member States are bound to contribute, irrespective of their votes.

Consequently, my concurrence in the Opinion of the Court extends no less to the civil than to the military expenditures incurred under the Resolutions specified in the Request.

Judge Morelli summarized his concurring opinion as follows:

(1) "Expenses of the Organization", within the meaning of Article 17, paragraph 2, of the Charter are expenses which have been *validly* authorized by the General Assembly under paragraph 1 of that Article;

(2) The resolutions in which the General Assembly authorized the expenditures relating to the Emergency Force and the operations in the Congo are *valid* resolutions, irrespective of the validity of the General Assembly and Security Council resolutions by which the Emergency Force was established and the operations in the Congo decided upon;

(3) Consequently, the expenditures relating to the Emergency Force and the operations in the Congo constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.

In his dissenting opinion, President Winiarski thought it necessary to examine the conformity with the Charter of the resolutions authorizing the

expenditures. He stated:

The Charter has set forth the purposes of the United Nations in very wide, and for that reason too indefinite, terms. But—apart from the resources, including the financial resources, of the Organization—it does not follow, far from it, that the Organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action.

The intention of those who drafted it was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being. . . .

Reliance has been placed upon practice as providing justification for an affirmative answer to the question submitted to the Court. The technical budgetary practice of the Organization has no bearing upon the question, which is a question of law. . . . if a practice is introduced without opposition in the relations between the contracting parties, this may bring about, at the end of a certain period, a modification of a treaty rule, but in that event the very process of the formation of the new rule provides the guarantee of the consent of the parties. In the present case the controversy arose practically from the beginning in 1956. . . .

In respect of the financing of the United Nations operations in the Congo, the General Assembly resolutions decided that the expenses should be apportioned among the Member States according to the ordinary scale of assessments, but these resolutions . . . were not followed and the number of Member States which refuse to pay is too large for it to be possible to disregard the legal significance of this fact. I would recall that the military operations in Korea were paid for by voluntary contributions as were a number of “civilian” operations in which there is also to be discerned a certain connection with international peace and security. It is therefore difficult to assert, in the case before the Court, either that practice can furnish a canon of construction warranting an affirmative answer to the question addressed to the Court, or that it may have contributed to the establishment of a legal rule particular to the Organization, created *præter legem*, and, still less, that it can have done so *contra legem*.

. . .

. . . in the case referred to the Court, it is established that some at least of the Member States refuse to comply with the decisions of the General Assembly because they dispute the conformity of those decisions with the Charter. Apparently they are of opinion that the resolutions cannot be relied upon as against them although they may be valid and binding in respect of other States. What is there-

fore involved is the validity of the Assembly's resolutions in respect of those States, or the right to rely upon them as against those States.

. . .

A refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid; in such a case it constitutes a grave symptom indicative of serious disagreement as to the interpretation of the Charter. . . .

A serious legal objection to the validity of the General Assembly resolutions authorizing and apportioning the expenses may be briefly formulated as follows: these resolutions ignore the fact that the resolutions authorizing the operations have the character of recommendations. By levying contributions to meet the cost of the operations from all States in accordance with Article 17, paragraph 2, the resolutions of the General Assembly appear to disregard the fundamental difference between the decisions of the Security Council which are binding on all Member States (Chapter VII of the Charter) and recommendations which are not binding except on States which have accepted them.

. . .

The difference between binding decisions and recommendations constitutes one of the bases of the whole structure of the Charter. Decisions are the exception in the system of the means provided for the maintenance of international peace and security; they are taken in grave cases and it is only in those cases that Member States have consented to accept the necessary limitation of the exercise of their sovereignty. Recommendations are never binding and the United Nations must in all its activities ever have in view that its means of action are thus limited.

. . . it is apparent that the resolutions approving and apportioning these expenses are valid and binding only in respect of the Member States which have accepted the recommendations.

It is difficult to see by what process of reasoning recommendations could be held to be binding on States which have not accepted them. It is difficult to see how it can be conceived that a recommendation is partially binding, and that on what is perhaps the most vital point, the financial contribution levied by the General Assembly under the conditions of paragraph 2 of Article 17. It is no less difficult to see at what point in time the transformation of a non-binding recommendation into a partially binding recommendation is supposed to take place, at what point in time a legal obligation is supposed to come into being for a Member State which has not accepted it.

In an elaborate dissenting opinion Judge Koretsky explained his dissent, believing that the Court should not have given any advisory opinion, that it reached the wrong conclusions, and that the validity or compatibility with the Charter of the several actions was crucial.⁷ He criticized the

⁷ Judge Koretsky criticized in detail the U.N. actions with respect to the Middle East and the Congo, beginning with the Nov. 4, 1956, General Assembly resolution, which he found at fault in that it directed the Secretary General to secure the cessation of hostilities, and that the General Assembly "has assumed a task of setting up the United Nations Force. One should state that the Charter does not include such a

majority opinion because it "limits the powers of the Security Council and enlarges the sphere of the General Assembly. The Opinion achieves this by (a) converting the recommendations that the General Assembly may make into some kind of 'action', and (b) reducing this action, for which the Security Council has the authority, to 'enforcement or coercive action', particularly against aggression." After long discussion of the practice of the United Nations, he stated:

Even the fact that those expenses have never been included in the regular budget proves that it is impossible to argue that these expenses might be apportioned under Article 17, paragraph 2, of the Charter. It has been said more than once that peace-keeping operations should be financed in another way.

At the San Francisco Conference the necessity was at any rate realized of establishing a special procedure for assessment of eventual expenditures for operations of this kind. It is the Security Council which has, first of all, to decide about the financial implications of concrete peace-keeping operations. Article 43 gave directives as to how to arrange financial questions which might arise from these operations. Article 17 has nothing to do with these questions unless the Security Council should ask that necessary measures be taken by the General Assembly.

One cannot consider that decisions of the Security Council regarding the participation of any Member State in concrete peace-keeping operations are not obligatory for a given Member. Its obligation to participate in a decided operation was based on Articles 25 and 48 of the Charter. Agreements envisaged in Article 43 proceed from this general obligation. Article 43 says that all Members undertake to make available to the Security Council *on its call* armed forces, etc. Agreements must (not may) specify the terms of participation, the size of armed forces to be made available, the character of assistance, etc., envisaging all the ensuing financial consequences as well. The General Assembly may only *recommend* measures. Expenses which might arise from such recommendations should not lead to an obligatory apportionment of them among all Members of the United Nations. That would mean to convert a non-mandatory recommendation of the General Assembly into a mandatory decision; this would be to proceed against the Charter, against logic and even against common sense.

This applies even more to resolutions adopted not in conformity with the Charter. It is not within the power of the General Assembly

notion as a United Nations Armed Force. Even the Security Council itself is not authorized to set it up."

He pointed out further that "The whole history of financing the United Nations operations in the Middle East, mentioned above, shows that in no case could it have been carried out according to the regular scale of assessments, as those operations had an anti-Charter but at the same time a peace-keeping character." He added that "if, in regard to the operations in the Middle East, one could state that they were implemented *ultra vires*, beyond the powers permitted to the General Assembly by the Charter, then, regarding the operations in the Congo, we may say that they were carried out *ultra vires* as well as *ultra terms* of the mandates given to the Secretary-General."

Explaining his views on interpretation, he said: "I am prepared to stress the necessity of the strict observation and proper interpretation of the provisions of the Charter, its rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: 'The ends justify the means'."

"to cure" the invalidity of its resolutions enumerated in the Request by approving the financial provisions of these resolutions.

Judge Basdevant dissented because of his "conviction that the request for opinion has not been presented in a proper fashion." He pointed out that, under Article 65 of the Court's Statute, requests asking an advisory opinion must contain "an exact statement of the question upon which an opinion is required." The request did not specifically ask whether the expenditures had been properly authorized; no criteria were laid down by which the Court might determine whether "expenditures authorized" were "expenses of the Organization." Furthermore, the request related only to expenditures authorized prior to December 31, 1961, and did not ask the Court for "guidance to the other principal organs of the United Nations on what should be done in respect of their undertakings in the Congo and in the matter of the Emergency Force. Where it would have been possible to obtain from an opinion requested of the Court collaboration in the present work of the United Nations, it has been sought to obtain from the Court only a retrospective evaluation of what was done up to the end of 1961."

Judge Moreno Quintana emphasized in his dissenting opinion that:

The exercise of the right to administer world affairs goes together with the duty of furnishing the necessary means for the accomplishment of that duty. It is therefore the obligation of the Members of the Security Council to pay the expenses incurred by such operations as those in the Middle East and the Congo.

Hence, a legal interpretation of the provision in question leads to the view that the expenses referred to in Article 17, paragraph 2, of the Charter are the current administrative expenses of the Organization, and not other expenditure such as that resulting from the undertaking of operations by military forces.

He concluded also that "The circumstances in which the question put to the Court in the request for an advisory opinion is worded do not, in view of the resulting limitation of its competence, permit the Court conscientiously to accomplish its task in the present case."

Judge Bustamante's dissenting opinion starts with the view that it is essential to determine whether the resolutions with respect to action in the Middle East and the Congo conform to the Charter, and in general he appears to believe that they do. However, he would require that appropriate organs of the United Nations determine the legality of these actions before the Court could answer the question properly. He said, in part:

... in principle, I am of opinion that expenditures validly authorized by the competent organ for the carrying out of an armed action with the purpose of maintaining international peace and security constitute "expenses of the Organization". But in the case of the expenditures authorized for the operations in the Middle East and the Congo, it is for the competent organ of the United Nations to pronounce on the legal objections put forward by certain States against the relevant resolutions. Only after this pronouncement on the legality or the non-legality of these resolutions would, in my opinion, a reply to the request be possible.

In consequence, I conclude that the expenditures referred to in the request for an advisory opinion would constitute expenses of the Organization if, after consideration of the legal objections raised by

certain Member States, the competent organ of the United Nations succeeds in determining as *legal* and *valid* the resolutions by virtue of which the expenses in question were incurred.

Since this definition has not been given and having regard to the limitations of the request, the Court—in my view—cannot declare whether the expenditures in question are or are not expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter. But if the Court must in voting reply categorically “yes” or “no” to the question put in the request, my reply can only be negative for, according to the foregoing, I am not in a position to assume the responsibility for an affirmative characterization of the legality of the expenditures.

European Coal and Steel Community—principle of free movement of goods—Article 4 (a)—goods imported from third countries—right of importer to demand compensation where principle disregarded

SOCIÉTÉ COMMERCIALE ANTOINE VLOEBERGHES v. HIGH AUTHORITY.¹
Joint Cases Nos. 9 and 12-60. 7 *Sammlung der Rechtsprechung des Gerichtshofes* 427 (1961).

Court of Justice of the European Communities. Judgment of July 14, 1961.

The controversy underlying this litigation dates back to 1953. In that year the plaintiff, a Belgian importer of liquid and solid fuels and operator of a budding plant located in the port of Antwerp, where its imported solid fuels are processed, addressed the first of many complaints to the High Authority of the European Coal and Steel Community. In this and its subsequent petitions plaintiff called the High Authority's attention to the import restrictions and difficulties which plaintiff encountered in attempting to export anthracite coal to France. Thus, in 1957, the French Government consented to one shipment of 30,000 tons of American anthracite coal imported by plaintiff and processed in its budding plant, but refused the necessary import licenses for an additional shipment of 75,000 tons of American anthracite coal.

Since plaintiff's repeated requests that the High Authority intercede on its behalf proved futile, the instant action, consisting of two separate appeals joined by the Court, was instituted in 1960. The first appeal (Case No. 9-60), an action for damages under Article 40 of the Coal and Steel Community Treaty, charged the High Authority with the commission of an “official fault” allegedly resulting from its failure to compel the French Government to adhere to the principle of the free movement of goods established in Article 4 of the treaty. The second appeal (Case No. 12-60) sought the annulment of the High Authority decision rejecting as inadmissible plaintiff's petition based on Article 35 of the treaty, wherein it had requested the High Authority to compel the French Government to permit plaintiff's French customers to purchase the anthra-

¹ Reported by Thomas Buergethal, Assistant Professor of Law, University of Buffalo School of Law.

cite coal imported by plaintiff from third countries as soon as it was duly released for trade within Belgium.

In its opinion the Court first disposed of the appeal for annulment by holding that plaintiff had no standing to institute such an appeal, because it was not an enterprise within the meaning of the treaty; in other words, that it was neither a coal nor steel producer. Turning to the damage action (Case No. 9-60) under Article 40 of the treaty, the Court ruled that it was admissible, since such an appeal could properly be instituted by anyone, alleging to have been injured by an official fault of the Community committed in the execution of the treaty.

As to the merits of this appeal, the Court first acknowledged the validity of the general proposition advanced by the plaintiff that the principle of the free movement of goods between member states also applies to goods emanating from third countries duly admitted into the territory of a member state. However, before examining the question whether the High Authority's failure to compel adherence to this principle amounted to an official fault, it was necessary, the Court asserted, initially to ascertain whether plaintiff suffered an injury to any legally protected rights for which it could claim compensation. Addressing itself to this question the Court made the following determinations:

Article 4(a)² of the Treaty must be interpreted by reference to Articles 2 and 3(b), especially by taking into account the aims of these provisions, *i.e.*, the progressive establishment of "conditions which will in themselves assure the most rational distribution of production. . . ." and "assure to all consumers . . . within the common market equal access to the sources of production." The principle of the free movement of goods laid down in Article 4(a) was adopted primarily in the interest of the Community. While it was also designed to encompass goods duly imported from third countries, it was not intended for the protection of these products or their producers, but in order to prevent a possible decrease in or impairment of the free movement of Community goods by imposing restrictions upon the free movement of goods from third countries.

This leads to the following conclusion: If the High Authority does not discharge its obligations by assuring that the member states and the enterprises comply with Article 4(a), then those subject to its jurisdiction may rightly consider themselves injured and demand compensation for the damage caused thereby. Where goods from third countries are involved, however; the situation is different because, even if the provisions of Article 4(a) are under certain circumstances applicable to such goods, this legal benefit is nothing but a reflex effect resulting from the guaranties which the Treaty intended to establish for goods produced within the Community. The producers from third countries and their dealers cannot consequently predicate a claim for compensation by asserting that they suffered

² Art. 4 provides: "The following are recognized to be incompatible with the common market for coal and steel, and are, therefore, abolished and prohibited within the Community in the manner set forth in this Treaty: (a) import and export duties, or taxes with an equivalent effect, and quantitative restrictions on the movement of coal and steel; . . ."

an injury to any legally protected rights, even if the failure to apply the provision referred to above was detrimental to them.

Article 73 delegates the administration of import licenses in relation with third countries to the governments on whose territory the point of destination for imports is located. It is apparent from plaintiff's contentions and the documents annexed to the complaint in Case No. 9-60 that the contested coal was never intended for trade within Belgium or the Community in general but solely for shipment to France. The fact that this coal was subjected to budding processes in Belgium did not affect its original and ultimate point of destination. Its release for trade in Belgium could be accomplished without any expense or effort. Under these circumstances, plaintiff cannot claim a possible breach of duty on the part of the High Authority and demand compensation for the injury caused thereby.

It is true, as above recognized, that member states are prohibited, in accordance with the principle of the free movement of goods, to exclude from their territory goods duly imported into other member states from third countries. On the other hand, however, Article 73 provides that the administration of import licenses rests with the government of the state on whose territory the point of destination for imports is located. In reality, as already indicated, the present case is an attempt to disguise a direct import into France as an import into Belgium.

Even if one proceeds from the assumption that member states may protect themselves against such practices by seeking the assistance of other member states in accordance with the provisions of Article 71, it must be remembered that the obligation to utilize these measures was not imposed to protect the interests of outsiders but to safeguard the interests of the Community. The failure to invoke the provisions for mutual assistance cannot, therefore, give outsiders the right under Article 40 of the Treaty to claim judicial protection in order that they may engage in practices which this very procedure for mutual assistance was designed to prevent. Accordingly, plaintiff is not entitled to claim compensation for the injury which supposedly resulted from the High Authority's failure to take the action requested by the plaintiff.

As a result of the foregoing, the appeal must be rejected. It becomes unnecessary, therefore, to examine plaintiff's other contentions.

Nationalization—Cuba—suit by nationalizing government for conversion of proceeds of nationalized property—act of state doctrine—sufficiency of executive branch indication of no objection—invalidity of taking under international law—remedy therefor in municipal court

BANCO NACIONAL DE CUBA v. SABBATINO, et al.

U. S. Court of Appeals, 2nd Cir., July 6, 1962.¹ Waterman, Cir. J.

The plaintiff, the financial agent of the Government of Cuba, appeals from a summary judgment entered in the United States District Court for

¹ Opinion in full, except for portions dealing with issues of Federal jurisdiction created by proceedings previously begun in the courts of the State of New York, as to which see 56 A. J. I. L. 216 (1962). The decision of the District Court, herein affirmed, is reported in 193 F. Supp. 875, and is digested in 55 A. J. I. L. 741 (1961).

the Southern District of New York, dismissing its complaint against the defendant Peter L. F. Sabbatino, the New York Temporary Receiver, who is holding the proceeds of a certain shipment of sugar, and against the defendant Farr, Whitlock & Co., the commodity broker which negotiated the sale of the sugar in this country, for the conversion of the bills of lading and the sales proceeds of this sugar shipment.

In February and July 1960, Farr, Whitlock entered into contracts with General Sugar Estates, Inc., a wholly-owned Cuban subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C. A. V.) for the purchase of Cuban sugar. C. A. V. is organized under the laws of Cuba, but over ninety per cent of its shareholders are residents of the United States. Pursuant to these contracts, between 6:00 A.M. on August 6, 1960, and 1:00 P.M. on August 9, 1960, 22,000 bags of sugar were loaded aboard the German vessel S.S. Hornfels standing offshore at the Cuban port of Jucaro. The exact distance offshore is not known.

On the first day of that loading, August 6, the Castro Government, at the seat of the government in Havana, issued Executive Power Resolution No. 1 under Law No. 851. The resolution proclaimed:

In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby,

RESOLVE:

FIRST: To order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, as listed below, * * *

Followed a list of the twenty-six companies to be seized, number 22 on the list being C. A. V. The purpose of Law No. 851 and the resolution of expropriation was set forth in the resolution as follows:

WHEREAS, Law No. 851, of July 6, 1960, published in the Official Gazette of July 7, 1960, authorized the undersigned to provide, through joint resolutions, whenever they deem it advisable in order to defend the national interests, for the nationalization through compulsory expropriation, of the property or enterprises owned by physical and corporate persons who are nationals of the United States of North America, and the enterprises in which such persons have any interest or participation, even though they have been organized under the Cuban laws.

WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression, for political purposes, against the basic interests of the Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, whereby exceptional powers were conferred upon the President of said nation to reduce the participation of Cuban sugars in the sugar market of said country, as a weapon of political action against Cuba, was considered as the fundamental justification of said law.

WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.

WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America, intended to prevent the exercise of its sovereignty and its integral development by our people thereby serving the base interests of the North American trusts, which have hindered the growth of our economy and the consolidation of our political freedom.

WHEREAS, in the face of such developments the undersigned, being fully conscious of their great historical responsibility and in legitimate defense of the national economy are duty bound to adopt the measures deemed necessary to counteract the harm done by the aggression inflicted upon our nation.

After August 6 the consent of the Cuban government was required before sugar-carrying ships could leave Cuban waters. To obtain this consent, on August 11 Farr, Whitlock entered into contracts with Banco Para el Comercio Exterior de Cuba, as the representative of the Castro government. The terms of these contracts were identical with those in the earlier contracts between Farr, Whitlock and the subsidiary of C. A. V. With the permission of the Cuban regime the sugar-laden S.S. Hornfels sailed for its destination, Casablanca, Morocco.

Banco Para el Comercio Exterior assigned the bills of lading for this sugar shipment to the plaintiff, which in turn sent them to Societe Generale, a French bank which acted as the plaintiff's agent in New York. The plaintiff instructed Societe Generale to deliver the bills of lading and a sight draft in the sum of \$175,250.69 to Farr, Whitlock in return for payment of the draft. On August 26, 1960, as instructed, Societe Generale presented the documents to Farr, Whitlock for payment, but the broker refused to accept them, giving as its reason the fact that one of the three necessary copies of the shipping documents was missing.

Meanwhile, on August 16, a shareholder of C. A. V. brought an action in the New York Supreme Court, Kings County, pursuant to N. Y. Civ. Prac. Act §977-b for the appointment of a receiver for the assets of C. A. V. in New York.² That same day the New York court *ex parte* appointed the present defendant Sabbatino as Temporary Receiver. A certified copy of the order appointing the Temporary Receiver was served on Farr, Whitlock on August 23.

² N. Y. Civ. Prac. Act. § 977-b provides in pertinent part:

§ 977-b. Receivers to liquidate local assets of foreign corporations.

1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized * * *

[This and following footnotes are by the court.—Ed.]

On Friday, August 26, the same day on which Societe Generale first tried to make delivery of the shipping documents and receive payment for the plaintiff, officers of C. A. V. advised Farr, Whitlock orally and in writing that C. A. V., not the Cuban government or its agencies, was the true owner of the sugar covered by the bills of lading in the hands of Societe Generale.³ C. A. V. enclosed in its letter to Farr, Whitlock a notice of the appointment of the Temporary Receiver. Later that day Farr, Whitlock and C. A. V. entered into an agreement by which Farr, Whitlock promised to retain any proceeds it might receive from the sugar shipment here involved until it was compelled by a court order to turn them over to the Receiver or anyone else. C. A. V. promised to indemnify Farr, Whitlock against any claims with respect to the sugar, except a claim by the Receiver; to defend any suit against Farr, Whitlock involving the sugar or the proceeds therefrom, except a proceeding by the Receiver; and to pay Farr, Whitlock ten per cent of the sum of \$175,000 if C. A. V. ever obtained that sum.

Monday morning, August 29, 1960, Societe Generale again presented the draft to Farr, Whitlock, this time with all the necessary documents. The plaintiff claims that Farr, Whitlock informed Societe Generale that it would take the documents for inspection and that a representative of the French bank might return later that day for payment. Farr, Whitlock claims, on the other hand, that Societe Generale presented the documents in the usual manner and that no conversation took place. In either event, the same day Farr, Whitlock negotiated the bills of lading to its customer and received payment of the purchase price in the amount of \$175,250.69.

A representative of Societe Generale returned to Farr, Whitlock's office at 3:00 P.M. that day to receive payment of the draft. He was informed, the plaintiff maintains, that the bills of lading had been negotiated and that Farr, Whitlock had received the proceeds but that it would not turn over the proceeds to Societe Generale because C. A. V. claimed them.

About two hours later Farr, Whitlock was served with an order of the Supreme Court of New York, Kings County, enjoining it from taking any action which might result in removing assets claimed by C. A. V. out of the State of New York. That same day Farr, Whitlock notified the French bank by letter that the sugar broker had notice of the appointment of the receiver for C. A. V.'s New York assets, that C. A. V. claimed the sugar proceeds here involved, that the broker had received formal notification of a motion in the New York court to vacate the receivership,⁴ and that Farr, Whitlock had been served with the order mentioned in the preceding sentence. Therefore, the letter stated, Farr, Whitlock was obliged to retain the proceeds until directed by a competent court to give them up. Societe Generale formally protested the non-payment of the draft.

On October 24, 1960, the Supreme Court of New York, Kings County,

³ It is not clear whether Societe Generale on August 26 presented documents to Farr, Whitlock before or after C. A. V.'s warning to Farr, Whitlock on that day.

⁴ This motion was subsequently denied by the New York court. See *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 12 A. D. 2d 506, 207 N. Y. S. 2d 288 (1960).

ordered Farr, Whitlock to transfer the proceeds less \$1,314.38, commissions due the broker, or a total of \$173,936.31, to Sabbatino, the Temporary Receiver, to await the court's determination as to the rightful owner of the proceeds. The commodity broker transferred the proceeds as the state court ordered.

The plaintiff filed its complaint in the present action in the United States District Court for the Southern District of New York on October 10, 1960, and amended it on October 31 in the light of the New York court's order of October 24, referred to in the preceding paragraph. In the amended complaint, the Cuban bank alleged that Farr, Whitlock's refusal either to return the bills of lading or to pay over the proceeds of the sale to Societe Generale was a conversion of the bills and of the proceeds. The plaintiff asked the federal court to enter judgment for it against Farr, Whitlock in the amount of \$175,250.69 and to enjoin Sabbatino from exercising jurisdiction over the sums paid to him.

The defendant Farr, Whitlock answered, and filed a cross-claim for judgment over against the defendant Sabbatino in the amount of \$173,936.31, being the sum which the broker had paid to the Receiver, should the plaintiff recover judgment against Farr, Whitlock. The commodity broker also raised a counterclaim in the amount of \$412,807.12 based on an unrelated shipment of Cuban sugar.

Sabbatino moved to dismiss the plaintiff's complaint as to him and the broker's cross-claim for failure to obtain permission to sue him from the court which appointed the Receiver. Farr, Whitlock moved to dismiss the Cuban bank's action against it because of alleged lack of jurisdiction over the subject matter. The plaintiff moved for summary judgment against both defendants. Farr, Whitlock moved for summary judgment against the Receiver in the event that the plaintiff obtained summary judgment against Farr, Whitlock. The district court below treated all these motions in a single scholarly opinion, reported at 193 F. Supp. 375 (1961). It denied the broker's motion to dismiss, holding that it had jurisdiction over the subject matter and, on the plaintiff's motion for summary judgment, granted judgment for the defendant, thereby rendering the other motions moot. The plaintiff then appealed to this court.

Inasmuch as they are presently involved in several cases with issues similar to those in this case, we allowed the Cuban-American Sugar Company and its wholly-owned subsidiary, the Cuban American Sugar Mills Company, to file a brief as *amici curiae*.

This appeal raises very important and difficult legal questions in the fields of international relations, state-federal relations, and judicial-executive relations.

In its complaint the plaintiff invoked federal jurisdiction on the basis of diversity of citizenship between itself and the defendants, 28 U. S. C. §1332, and on the basis of the presence of a federal question, 28 U. S. C. §1331. As the plaintiff is a Cuban corporation and the defendants are citizens of New York, New Jersey, and Florida, the diversity jurisdiction of the federal court was established. We need not decide whether jurisdic-

tion could have also been grounded on the federal question jurisdiction of the district court.

. . . .

As federal court jurisdiction over the present case rests upon the diversity of citizenship of the parties, we look, initially at least, to the law of the State of New York to determine the litigants' rights. To recover judgment on a theory of conversion, the plaintiff must establish title, possession or right to possession, or some property interest in the subject matter which plaintiff claims the defendants converted to their own use and which provides the basis for the lawsuit. *Kaufman v. Simons Motor Sales Co.*, 261 N. Y. 146, 184 N.E. 739 (1933); *Johnson v. Blaney*, 198 N. Y. 312, 91 N.E. 721 (1910). Since the plaintiff's alleged rights in the bills of lading and in the proceeds received from the sugar depend upon plaintiff's prior ownership of the sugar the determination of whether Farr, Whitlock is a converter depends upon whether C. A. V. or the Government of Cuba owned the sugar when it left Cuba. Under the ordinary rules of conflict of laws, title to this sugar would be determined by the law of Cuba, namely, the decree of expropriation of August 6, 1960.⁵ See Restatement, Conflict of Laws §260 (1934); cf. *M. Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 186 N.E. 679 (1933). The appellees, however, attack this decree as invalid under (1) the municipal law of Cuba, (2) the public policy of the forum, and (3) the rules and principles of international law.

The appellant, on the other hand, asserts that irrespective of the appellees' contentions as to the status of the expropriation decree we must decide in appellant's favor because under the Act of State Doctrine this court may not inquire into the validity of the Cuban decree. The Act of State Doctrine, briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories. The actions of foreign nations accorded this respect may be executive, legislative, or judicial in nature, although court judgments, because they ordinarily involve the resolution of private disputes and do not ordinarily reflect high state policy, do not usually come within this category. Restatement, Foreign Relations Law of the United States §41, comment c (Proposed Official Draft, 1962). This doctrine is one of the conflict of laws rules applied by American courts; it is not itself a rule of international law. *Id.*, comments b, g; Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 837, 844 (1959). But see Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: a Critique of Banco Nacional de Cuba v. Sabbatino*, 16 Rutgers L. Rev. 1, 34-35 (1961).⁶ The act of state doctrine stems from the

⁵ We assume that the district court below was correct in concluding that C. A. V. had an interest in the sugar on the date of the expropriation decree and that the sugar was in Cuban territorial waters on that date.

⁶ The act of state doctrine appears to be well established among British courts. See *Blad v. Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Ch. 1674); *A. M. Luther v.*

concept of the immunity of the sovereign because "the sovereign can do no wrong." See Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1608 (1962).

The act of state doctrine has had a place in American jurisprudence for a very long time. It may date from the Supreme Court's decision in *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293 (1808), in which the Court held that it could not review the correctness of a seizure by a foreign power within the territorial jurisdiction of that sovereign "unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice."

The first case in the Supreme Court clearly to recognize the doctrine was *Underhill v. Hernandez*, 168 U.S. 250 (1897). In that case the plaintiff sued the commander of a revolutionary army in Venezuela for damages suffered from an alleged false imprisonment and assault perpetrated by the

James Sagor & Co., [1921] 3 K.B. 532 (C.A.); *Princess Paley Olga v. Weiss*, [1929] 1 K.B. 718 (C.A.); Re, Foreign Confiscations in Anglo-American Law 128-40 (1951).*

Elsewhere, however, courts have been more willing to inquire into the legality of steps taken by foreign sovereigns. *Anglo-Iranian Oil Co. v. S. U. P. O. R. Co.*, Civil Court of Rome, Sept. 13, 1954, [1955] *Foro Italiano* I. 256, [1955] *Int'l L. Rep.* 23, 49 *Am. J. Int'l L.* 259 (1955). Compare *Societe Potasas Ibericas v. Black*, Supreme Court (France), March 14, 1939, [1939] *Dalloz* I. 257, [1938-1940] *Ann. Dig.* 152 (No. 54); *Union des Republiques Socialistes Sovietiques v. Intendant General Bourgeois Es-Qualite et Societe La Ropit*, Supreme Court (France), March 5, 1928, *Sirey* I. 217, [1927-1928] *Ann. Dig.* 67 (No. 43); and *Volatron v. Moulin*, Court of Appeal of Aix, March 25, 1939, [1939] *Dalloz* I. 329, [1938-1940] *Ann. Dig.* 24 (No. 10), with *Societe Hardmuth*, Court of Appeal of Paris, Dec. 2, 1950, 44 *Rev. Cr. Dr. Int. Priv.* 501 (1955); *De Keller v. Maison de la Pensee Francoise*, Tribunal of La Seine, July 12, 1954, 44 *Rev. Cr. Dr. Int. Priv.* 503 (1955), [1954] *Int'l L. Rep.* 21, 49 *Am. J. Int'l L.* 585 (1955); *Martin v. Banque d'Espagne*, Supreme Court (France), Nov. 3, 1952, 42 *Rev. Cr. Dr. Int. Priv.* 425 (1953), [1952] *Int'l L. Rep.* 202 (No. 42); *Larrasquitu et l'Etat Espagnol v. Societe Cementos Resola*, Court of Appeal of Poitiers, Dec. 20, 1937, [1938] *Sirey* III. 68, [1935-1937] *Ann. Dig.* 196 (No. 70). Compare *Prince Dabitscha-Kotromanics v. Societe Lepke*, Tribunal of Berlin, Nov. 1, 1928, 56 *Clunet* 184 (1929), with *Domke*, Indonesian Nationalization Measures Before Foreign Courts, 54 *Am. J. Int'l L.* 305, 318-19 (1960). Compare *Senembah Maatschappij N.V. v. Republiek Indonesia Bank Indonesia and De Twentsche Bank N.V.*, District Court of Appeals of Amsterdam, reported in *Domke*, *supra* at 307-08, with *United States of Mexico v. Batafsohe Petroleum Maatschappij*, District Court of Middleburg, Aug. 2, 1938, [1938] *W. & N. J. No.* 790, [1919-1942] *Ann. Dig.* 16 (No. 7); *Petroservice & Credit Minier Franco-Roumain v. El Aguila*, Court of Appeals of The Hague, Dec. 4, 1939, [1939] *W. & N. J. No.* 115, *aff'd* on other grounds, Feb. 7, 1941, [1941] *W. & N. J.*, [1919-1942] *Ann. Dig.* 17; and *Dairs et Cy. v. El Aguila*, District Court of Rotterdam, July 31, 1939, [1939] *W. & N. J. No.* 747, [1919-1942] *Ann. Dig.* 19. But see *Propetrol, Petroservice, et Petrolet v. Compania Mexicano de Petroleo*, Civil Tribunal of Antwerp, Feb. 21, 1939, [1939] *Belgique Judiciaire* II. 12, [1938-1940] *Ann. Dig.* 25 (No. 11); *Davis et Cie v. Compania de Petroleo*, Court of Appeal of Rotterdam, 41 *Bull. Inst. Jur. Int.* 256 (1939), [1938-1940] *Ann. Dig.* 25 (No. 12); *Hungarian Soviet Government*, Supreme Court of Austria, Oct. 31, 1922 (*Ob. I.* 1055/22), [1922] *4. E.O.G.Z.* 274 (No. 10), [1919-1922] *Ann. Dig.* 56 (No. 31).

* But see *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] *Int'l L. Rep.* 316, 47 *Am. J. Int'l L.* 325 (Supreme Court of Aden); *Fawcett*, *supra* note 7 [*infra* note 12—Ed.], at 375.

defendant's soldiers during Venezuelan hostilities. The United States subsequently recognized the revolutionary government under which the defendant acted. The Supreme Court refused to consider the plaintiff's contentions on the merits. The Court stated:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves (*Id.* at 252).

Another case in the history of the act of state doctrine was the well-known opinion of Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909). The plaintiff alleged that the defendant conspired with the Government of Costa Rica to deprive the plaintiff of its plantation and railroad in that country. As in *Underhill*, the Court refused to entertain the plaintiff's substantive contentions. Mr. Justice Holmes, for the Court, explained that a sovereign within its territorial jurisdiction could not itself commit an unlawful act because the sovereign's act within its own boundaries was the law there.⁷

The Supreme Court further developed the doctrine in two decisions rendered in 1918. In *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918) the plaintiff, a citizen of Mexico, sought to replevy certain hides which Pancho Villa, General Carranza's "Commander of the North" had seized from the plaintiff during the Mexican Civil War of 1913 and later had sold to the defendant. The Court refused to grant relief to the plaintiff for several reasons: the foreign relations of the United States were committed to the legislative and executive branches of the Government, recognition of Carranza's government *de jure* validated all its acts from the beginning of its existence, the sovereignty of a foreign government must be respected within its jurisdiction, and reexamination of the acts of one nation's government within its own territorial limits by the courts of another nation would interfere with friendly relations between governments. The Court relegated the plaintiff to whatever remedies he might have in the courts of Mexico or to whatever results he might obtain by diplomatic negotiation. Toward the end of its opinion the Court stated:

It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to reexamination by this or any other American court (*Id.* at 304).

The other case of that year was *Ricaud v. American Metal Co.*, 246

⁷ The Justice stated:

[I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law (213 U. S. at 358).

U. S. 304 (1918). Another one of Carranza's generals had seized a large consignment of lead bullion from a Mexican mining company and had sold it to the defendants. Claiming that he had purchased the bullion from the mining company prior to the seizure, the plaintiff, an American citizen, sought to recover it from the defendant. For virtually the same reasons as it had stated in *Oetjen v. Central Leather Co.*, *supra*, the Supreme Court denied the relief which the plaintiff sought.⁸

The act of state doctrine has been recognized and applied by this and other courts. See e.g., *Republic of Cuba v. Pons*, 294 F. 2d 925 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 960 (1962); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2 Cir.), *cert. denied*, 332 U. S. 772 (1947); *United States ex rel. Von Heyman v. Watkins*, 159 F. 2d 650 (2 Cir. 1947); *Banco de Espana v. Federal Reserve Bank*, 114 F. 2d 438 (2 Cir. 1940); *The Claveresk*, 246 Fed. 276 (2 Cir. 1920); *Hewitt v. Speyer*, 250 Fed. 367 (2 Cir. 1919); *Eastern States Petroleum Co. v. Asiatic Petroleum Corporation*, 28 F. Supp. 279 (S. D. N. Y. 1939); *M. Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 186 N. E. 679 (1933); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474, 14 N. E. 2d 798 (1938); *Dougherty v. Equitable Life Assur. Co.*, 266 N. Y. 71, 193 N. E. 897 (1934).

The policies and theories underlying this doctrine of judicial abnegation seem to be these: The desire by the judiciary to avoid possible conflict with or embarrassment to the executive and legislative branches of our Government in our dealings with foreign nations, see, e.g., *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 138 N. E. 24 (1923); a positivistic concept of territorial sovereignty, see e.g., *American Banana Co. v. United Fruit Co.*, *supra*; and a fear of hampering international trade by rendering titles insecure, see e.g., *Banco de Espana v. Federal Reserve Bank*, *supra*. It has also been suggested that the remoteness of American courts from the circumstances surrounding the making of the foreign decree and the provincial attitude taken by most municipal courts make American courts unsuitable tribunals for judging the validity of acts committed by foreign sovereigns within their territorial limits. See Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 Am. J. Int'l L. 141, 144-48 (1960); Falk, *supra* at 10. See, generally, Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 834 (1939); Falk, *supra* at 31-32.

⁸ Another Supreme Court decision should be mentioned in this respect, *Shapleigh v. Mier*, 299 U. S. 468 (1937). That case involved a dispute over title to a tract of land which had formerly been part of Mexico but which had become part of the United States as a result of a change in the course of the Rio Grande River. While under its sovereignty the Mexican state of Chihuahua had expropriated the land in question. At the outset of its opinion in *Shapleigh* the Supreme Court stated:

The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy (299 U. S. at 471).

The Court found it unnecessary to decide whether it could examine the validity of the expropriation under Mexican law because the plaintiff had failed to establish what that law was on the point at issue.

However, when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen and has been recognized both in this circuit and elsewhere. In *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2 Cir. 1954) (*per curiam*), when we received word from the State Department that it was State Department policy to permit American courts to pass on the validity of acts done by Nazi officials, our court rescinded its earlier mandate by which, based upon the act of state doctrine, we had prevented the district court from questioning the validity of the acts of the German Nazi government. See 173 F. 2d 71 (2 Cir. 1949). See also *Bernstein v. Van Heyghen Freres, S.A.*, 163 F. 2d 246, 252 (2 Cir.), *cert. denied*, 332 U. S. 772 (1947); Restatement, Foreign Relations Law of the United States §44 (Proposed Official Draft, 1962); *Kane v. National Institute of Agrarian Reform*, No. 61 L. 730, June 8, 1961 (Fla. Cir. Ct.); Association of the Bar of the City of New York, Committee on International Law, *Report, A Reconsideration of the Act of State Doctrine in United States Courts* 13 (May 1959); Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826 (1959).

This exception is applicable to the case before us. While the case has been pending we have been enlightened, as the court was in the *Bernstein* case, *supra*, as to the attitude of the Department of State. In a letter, dated October 18, 1961, addressed to counsel for the *amici* in this case, the Legal Adviser to the State Department asserted:

"The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction." (Emphasis added.)

In a subsequent letter, dated November 14, 1961, the Under Secretary of State for Economic Affairs stated:

"I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts."

On April 13, 1961, the State Department told the litigants in *Kane v. National Institute of Agrarian Reform*, No. 61 L. 730 (Fla. Cir. Ct.) (1961), a case that involved another confiscation by the Castro Cuban government of American-owned property in Cuba: "Effect in U. S. of Decrees, etc. of Castro regime is question for court in which case heard." These statements are somewhat ambiguous, perhaps intentionally so. But at the least they express a belief on the part of those responsible for the conduct of our foreign affairs that the courts here should decide the status here of

Cuban decrees. Of course, if there is no good reason for abstention, a court should recognize and accept its fundamental responsibility to decide a case before it in accordance with whatever substantive norms may be relevant; and when, as here, the State Department is willing for the court to adjudicate the rights of the parties, one of the basic reasons for the act of state doctrine—the danger that independent judicial decisions might interfere with this country's foreign relations—is inapplicable to support abstention. The broad statements in cases such as *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918) and *Shapleigh v. Mier*, 299 U. S. 468 (1937) could not have been intended by the Supreme Court to require a judicial avoidance of judicial responsibility in a case where the State Department has expressed a lack of concern as to the outcome of the litigation.

But even though we perceive no danger to American foreign policy from a determination by an American court of the merits of this litigation presently before us, perhaps there is some other ground that compels us to accept without question the validity of the Cuban decree here involved. With this in mind we turn to a consideration of the appellees' three-pronged attack upon the validity of that decree of expropriation. The appellees first claim that the decree is invalid under the law of Cuba because the Cuban government failed to comply with the formal requisite of its publication in the Official Gazette of Cuba. But in *American Banana Co. v. United Fruit Co.*, *supra*, and other similar cases, it was apparently held that the acts of a foreign sovereign could not be invalid under its own law. Therefore, we will reject the appellees' contention, based upon Cuban law, that we should hold the decree ineffective because of a claimed invalidity under that law.

Also, we decline to adopt appellees' second contention, that this court should not enforce the Cuban decree because it is contrary to American public policy. Judge (later Justice) Cardozo in his famous opinion in *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918), defined the type of local public policy which requires that the forum not enforce a foreign created right. He said:

"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" (*Id.* at 111).

The right to just compensation in return for property taken by the government is certainly well established in American jurisprudence. It is even protected by the Constitution, Amend. V. Therefore, it is likely that any taking of one's property without provision for adequate compensation is contrary to the public policy of this forum, as Cardozo, *J.* defined that concept. See *Vladikavkazsky Ry. v. New York Trust Co.*, 263 N. Y. 369, 189 N. E. 456 (1934). But we are aware of the admonition that public policy is an "unruly horse." The concept has proved to be a very difficult one to confine when one seeks to apply it. We are not entirely certain what the American public would consider to be the proper policy of the United

States with respect to expropriation of the property of aliens by foreign sovereigns when the property has its situs within the foreign countries. Also, decision of this case based upon the public policy of this forum is undesirable because reliance upon such a basis for decision results in a nationalistic, or municipal, solution of a problem that is clearly international. See Zander, *supra* at 848. Finally, inasmuch as the decision in the present case is reachable by taking advantage of an exception to the long-established act of state doctrine, we find it wiser, when given the opportunity of relying upon alternative grounds for decision, to base our result on the ground which appears to us to be the narrower exception to that doctrine.

Thus we turn to a consideration of the appellees' third contention, that the appellant's title is invalid under international law. Although the law of nations is a hazy concept, its rules are more limited in scope than are the public policy concepts of a particular nation within the family of nations. Moreover, if we apply international law to the present case, we find that the reasons put forward in support of the act of state doctrine are either inapplicable or insufficient to preclude us from inquiring into the validity of the Cuban decree on the limited basis of an inquiry as to the decree's consistency with international rules of law. First, as pointed out earlier in the opinion, the State Department has no desire to interfere here with independent decision by the judiciary. Second, the very proposition that something known as international law exists carries with it the implication that national sovereignty is not absolute but is limited, where the international law impinges, by the dictates of this international law. Eagleton, *Responsibility of States in International Law* 65 (1928). See Sohn & Baxter, *Convention on State Responsibility* art. 2 (Draft No. 12, 1961). Third, when an agency of the expropriating country instead of some third party is the litigant relying upon the expropriation for its title, the problem of preserving the security of the titles to property that is the subject of international trade is not presented. See Falk, *supra* at 15. Fourth, this court is not so unfamiliar with the legal, political, and social circumstances surrounding the Castro government's seizure of C. A. V. as to be incompetent to pass on its validity under international law. Finally, although it can be argued that nationalistic prejudice could affect decision in cases of this sort, it is also often claimed that other biases in various obnoxious forms are present in the minds of judges in other types of cases. Judges are properly admonished when reminded that judicial duty requires that controversies be decided fairly and without passion, but we also have a duty not to excuse ourselves from exercising the duty of decision when parties and subject matter are properly before us. Thus neither reason nor precedent preclude this court from considering the appellees' contentions, based upon international law concepts, that the court below should be affirmed.

Farr, Whitlock contends that the decree of August 6, 1960, nationalizing the Cuban property owned by American corporations was a violation of international law on three grounds: Adequate compensation was not provided; the purpose of the seizure was retaliation against the United States; and the expropriation was discriminatory in operation.

The Supreme Court has said:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. (*The Paquete Habana*, 175 U. S. 677, 700 (1900).)

See *The Nereide*, 13 U. S. (9 Cranch) 388 (1815); *United States v. Smith*, 18 U. S. (5 Wheat.) 153 (1820); *The Scotia*, 81 U. S. (14 Wall.) 170 (1871); 1 Oppenheim, *International Law* 41-42 (8th ed. 1955). In the absence of any relevant treaty, enactment of the legislature, act of the executive, or controlling judicial decision, we have been told to draw the guiding concepts of international law from the customs and usages of civilized nations. *The Paquete Habana*, *supra*. It would seem that this statement requires at least one qualification. International law is derived indeed from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality whether most men live by these principles or not. See Statute of the International Court of Justice art. 38, 1946-47 U. N. Yearbook 843. But see *The Antelope*, 23 U. S. (10 Wheat.) 66 (1825). Judges of municipal courts, the bulk of whose decisions involve questions under a domestic law derived from a long-established and increasingly elaborate national legal system, will often find themselves unfamiliar with the ratiocination necessary for decision in this area, where recognized precedent and accepted authority are scant. Anyone who undertakes a search for the principles of international law cannot help but be aware of the nebulous nature of the substance we call international law. See Rado, *Czechoslovak Nationalization Decrees: Some International Aspects*, 41 Am. J. Int'l L. 795, 797 (1947). The lack of effective international remedies doubtless contributes to this state of affairs. See Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: a Critique of Banco Nacional de Cuba v. Sabbatino*, 16 Rutgers L. Rev. 1, 2 & n. 3 (1961). But until the day of capable international adjudication among countries, the municipal courts must be the custodians of the concepts of international law, and they must expound, apply, and develop that law whenever they are called upon to do so. See Lauterpacht, *Re Helbert Wagg: A Further Comment*, 5 Int'l & Comp. L. Q. 301 (4th Ser. 1956); Falk, *supra* at 2.

One pitfall into which we could stumble would be the identification as a fundamental principle of international law of some principle which in truth is only an aspect of the public policy of our own nation and not a principle so cherished by other civilized peoples. In avoiding such an identification we must take a more cosmopolitan view of things and recognize that the rule of law which we municipally announce must be a rule applicable to sovereignties with social and economic patterns very different from our own. See Sorensen, *The International Court of Justice: Its Role in Contemporary International Relations*, 14 Int'l Org. 261, 273 (1960). Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 Int'l Org. 38-44 (1961); Isaacson, *International Law and Public*

Policy, 1961 (unpublished paper in Yale Law School Library). With these principles in mind, we proceed to a consideration of whether the decree under which the appellant claims it received good title to the sugar was in violation of international law.

The appellant argues that the Cuban decree against C. A. V. did not violate international law because C. A. V. was organized under the laws of Cuba. It is generally accepted, as appellant says, that acts of a state directed against its own nationals do not give rise to questions of international law. Zander, *The Act of State Doctrine*, 53 Am. J. Int'l Law 826, 836 (1959); 1 Oppenheim, *International Law*, 268 n. 2 (8th ed. 1955); Friedman, *Expropriation in International Law* 163 (1953); see *M. Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 186 N. E. 679 (1933). But over ninety per cent of C. A. V.'s shareholders were United States nationals; and the Cuban decree which expropriated C. A. V.'s property clearly indicated that the property was seized because C. A. V. was owned and controlled by Americans. When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the "nationality" of the corporate fiction. The more frequent practice in international litigation and negotiation seems to be that the nationality of the corporation is disregarded when it is different from the nationality of most of the corporation's shareholders. See *El Triunfo*, 2 Moore, *International Law* 649-51, [1902] *Foreign Rel. U. S.* 859-73; Tlahualilo, 5 Hackworth, *International Law [Digest]* 842, [1913] *Foreign Rel. U. S.* 993; *Alsop* [1910] *Foreign Rel. U. S.* 138-89, [1911] *id.* 38; *Charbonnage Frederic Henri S. A. v. Germany*, [1919-22] *Ann. Dig.* 227; *Baron de Neuflize v. Germany*, [1927-28] *Ann. Dig.* 323-24; *Romano-Americana*, 5 Hackworth, *International Law [Digest]*, 702-05, [1926] 2 *Foreign Rel. U. S.* 313, [1928] 2 *Foreign Rel. U. S.* 957, [1929] 3 *Foreign Rel. U. S.* 757; Friedman, *op. cit. supra* at 171; *Delagoa Bay*, 2 Moore, *International Arbitration* 1865, 1874, [1902] *Foreign Rel. U. S.* 848, 849. Thus we shall place no significance for present purposes on the fact that C. A. V. was chartered in Cuba.

The first aspect of the nationalization of C. A. V.'s property which the appellees ask us to consider is the fact that the decree authorizing the seizure did not provide for the payment of adequate compensation.⁹ The patent inadequacy of the remuneration for the property seized is set forth in the provisions of Law 851, under which the decree of expropriation was issued. See State Dept. Note No. 397, July 16, 1960 (to Cuban Ministry of Foreign Relations). An illusory compensation took the form of an issue of Cuban Government Bonds having terms of not less than thirty years and bearing interest at less than two per cent per annum. This interest was to be paid exclusively out of a fund to be set up by the appellant bank, which fund would consist of twenty-five per cent of the foreign exchange received by Cuba from its annual sales to the United States of Cuban sugar in excess

⁹ If there had been adequate compensation for the seizure, regardless of the other circumstances surrounding the expropriations, it would be very difficult to find any violation of international law.

of three million Spanish long tons at a price of not less than 5.75 cents per English pound (f.a.s.). The bonds were also to be amortized out of this fund under authority vested in the President of Cuba to decide to what extent the bonds would be amortized over a period of not less than thirty years. The Cuban President and Prime Minister were to select the appraisers who would value the expropriated property for compensation purposes. It is unclear whether the bonds would be paid at maturity if the fund were insufficient to cover payment. The possibility that there would be any fund at all was little more than a travesty. For the ten years immediately preceding the nationalization of C. A. V.'s property the average price this country paid to Cuba for raw sugar never exceeded 5.50 cents per English pound (f.a.s.), see H. R. Rep. 1746, 86th Cong., 2d Sess. 16 (1960); but to finance the fund the Cuban Government demanded 5.75 cents per pound, only one quarter of which would go into the fund. Moreover, in only one of the immediately preceding ten years had Cuba sold this country more than three million Spanish long tons of 2,272 English pounds each and in only three years out of the whole period from 1934 through 1959 had she sold us that much sugar, see H. R. Rep. 1746, *supra* at 5; but contributions would be made into the fund only out of yearly sales to the United States in excess of three million Spanish tons. In short, there would be no interest and no amortization, full compensation at maturity of the bonds would be highly unlikely, and there would be no market value for the bonds.

But is the failure to provide adequate compensation for the compulsory taking of the property of a domestically chartered corporation owned by alien stockholders a violation of international law? The constitutions of most of the states in the Western Hemisphere contain language which appears to uphold the right of the owner to receive just compensation upon a governmental taking of private property. Lord McNair stated as one postulate of international law:

"The nationalization must be accompanied either by contemporaneous payment of adequate compensation or effective measures which ensure and make certain its prompt payment."

McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 *Netherlands Int'l L. Rev.* 218, 243 (1959).

The United States Department of State has asserted this proposition to foreign countries on numerous occasions.¹⁰ The Restatement, Foreign Relations Law of the United States §190(b) (Proposed Official Draft 1962) is to the same effect:

§190. When Taking is Wrongful Under International Law

The taking by a state of property of an alien is wrongful under international law if * * *

¹⁰ E.g., Note of August 22, 1938, to Mexico in 3 Hackworth Int'l Law [Digest] 658-59 (1942); Note of July 21, 1938, to Mexico in 3 Hackworth, *op. cit. supra* at 656; Note of April 3, 1940, to Mexico in 3 Hackworth, *op. cit. supra* at 662; Note of August 28, 1953, to Guatemala in 29 Dep't State Bull. 357 at 359 (1953).

(b) it is not accompanied by payment of just compensation or, under the law and practice of the state in effect at the time of taking, there is not reasonable provision for the determination and payment of just compensation * * *

A number of decisions by international tribunals have upheld the principle that just compensation should be provided.¹¹ And it appears that most of the writers on the subject have asserted that just compensation for governmental taking is a requirement of international law.¹²

¹¹ E.g., *Chorzow Factory Case* (Indemnity), P.C.I.J. Judgment No. 13, September 13, 1928, ser. A., No. 17, 1 Hudson, World Court Reports 646, 677; *German Interests in Polish Upper Silesia* (Merits), P.C.I.J. Judgment No. 7, May 25, 1926, ser. A., No. 7, 1 Hudson, World Court Reports 510, 523-24; *Norwegian Shipowners' Claims* (Norway/United States), 1 U.N. Rep. Int'l Arb. Awards, 307, 334 (Perm. Ct. Arb. 1921); *Arabian-American Oil Company v. Saudi Arabia*, Award of Arbitral Tribunal, Geneva, 1956, at 61, 101-02, 109, 127, portions of award quoted in 6 Netherlands Int'l L. Rev. 233-34 (1959); *Marguerite de Joly de Sabla* (United States/Panama), 6 U.N. Rep. Int'l Arb. Awards 358, 366 (1933); *Arbitral Award Between Portugal and Germany*, June 30, 1930, 2 U.N. Rep. Int'l Arb. Awards 1035, 1039 (1930); *Shufeldt Claim* (United States/Guatemala), 2 U.N. Rep. Int'l Arb. Awards 1079, 1095 (1930); *Affaire Goldenberg* (Germany/Rumania), 2 U.N. Rep. Int'l Arb. Awards 901, 909 (1928); *Spanish Zone of Morocco Case* (Great Britain/Spain), 2 U.N. Rep. Int'l Arb. Awards 615, 647 (1925); *Landreau Claim* (United States/Peru), 1 U.N. Rep. Int'l Arb. Awards 347, 365 (1921); *Schwyn's Case* (United States/Venezuela), Ralston, Venezuelan Arbitrations of 1903, at 322 (1904).

¹² See Restatement, Foreign Relations Law of the United States, § 190, comment a (Proposed Official Draft, 1962); Anderson, Title to Confiscated Foreign Property, 20 Am. J. Int'l L. 528-29 (1926);—Basis of the Law Against Confiscating Foreign-Owned Property, 21 Am. J. Int'l L. 525 (1927); Baxter & Sohn, Convention on State Responsibility, art. 10 (Draft No. 12, 1961); Bindsechler, Verstaatlichungsmassnahmen und Entschadigungspflicht nach Volkerrecht 111 (1950); Doman, Postwar Nationalization of Foreign Property in Europe, 48 Colum. L. Rev. 1125, 1130-31 (1948); — Compensation for Nationalized Property in Post-war Europe, 3 Int'l L. Q. 323 (1950); Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305 (1960); Fachiri, Expropriation and International Law, 6 Brit. Yb. Int'l L. 159 (1925); — International Law and the Property of Aliens, 10 Brit. Yb. Int'l L. 32 (1929); Fauchille & Sibert, 32 Revue Generale de Droit Int'l Public 5, 22 (1925); La Loi Agraire Lithuanienne; Fawcett, Some Foreign Effects of Nationalization of Property, 27 Brit. Yb. Int'l L. 355 (1950); Friedmann, Some Impacts of Social Organization on International Law, 50 Am. J. Int'l L. 475, 505 (1956); 1 Hyde, International Law Chiefly as Interpreted and Applied by the United States 710-25 (2d rev. ed. 1947); Kaufman, Regles Generales du Droit de la Paix, 54 Hague Recueil 313, 429 (1935); Kunz, The Mexican Expropriations, 17 N. Y. U. L. Rev. 327, 344 (1940); Peselj, International Aspects of the Recent Yugoslav Nationalization Law, 53 Am. J. Int'l L. 428 (1959); Rado, Czechoslovak Nationalization Decrees: Some International Aspects, 41 Am. J. Int'l L. 795 (1947); Re, The Nationalization of Foreign-Owned Property, 36 Minn. L. Rev. 323, 328 (1952); Scelle, 2 Precis de droit des gens 113 (1934); Scheuner in Report of 48th Conference of the Int'l Law Association, 164 (1958); Schindler, Besitzen konfiskatorische Gesetze ausserterritoriale Wirkung?, 3 Schweizerisches Jahrbuch fur Internationales Recht 65, 94 (1946); 1 Schwarzenberger, International Law 205 (3d ed. 1957); Schwebel in Report of 48th Conference of the Int'l Law Association 150 (1958); Verdross, Die Nationalisierung Niederlandischer Unternehmungen in Indonesien im Lichte des Volkerrechts, 6 Netherlands Int'l L. Rev. 278 (1959); Weiss-Tessbach in Report of 48th Conference of the Int'l Law Association 179-80 (1958); 2 Whiteman, Damages in International Law 1386

But some writers have asserted that the payment of adequate compensation is not required by international law. Friedman, *Expropriation in International Law* 206 (1953); Baade, *Indonesian Nationalization Measures before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801, 803-04 (1960); Williams, *International Law and the Property of Aliens*, 9 Brit. Yb. Int'l L. 1 (1928); see Brierly, *Law of Nations* 178 (2d ed. 1936); Isaacson, *International Law and Public Policy* 1961 (unpublished paper in Yale Law School Library). Cf. Baade, *supra* at 834. Tremendous social and cultural changes are occurring in many parts of the world today. Many countries have acted upon the principle that, in order to carry out desired economic and social reforms of vast magnitude, they must have the right to seize private property without providing compensation for the taking. They argue that because of the paucity of funds in their governmental coffers it would be impossible to carry out large-scale measures in the name of social welfare if they had to provide immediately, or even delayed, compensation. The Reporter of the Restatement, *Foreign Relations Law of the United States* frankly admits that some states including ones in Latin America other than Cuba, do not recognize any requirement to pay compensation.¹³ It is commonplace in many parts of the world for a country not to pay for what it takes. See Falk, *supra* at 32. Since it is unnecessary for this court in the present case to decide whether a government's failure, in and of itself, to pay adequate compensation for the property it takes is a breach of international responsibility, we decline at this time to attempt a resolution of that difficult question.

Instead, we narrow the question for decision to the following: Is it a violation of international law for a country to fail to pay adequate compensation for the property it seizes from *a particular class of aliens, when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result of such seizure is to discriminate against them only*. To answer this more limited question we must now consider the retaliatory purpose and the discriminatory operation of the nationalization decree here involved. It should appear obvious that these two features of the decree are closely related to one another.

(1937); Wortley, *Observations on the Public and Private International Law Relating to Expropriation*, 5 Am. J. Comp. L. 577, 591 (1956). See generally Wortley, *Expropriation in Public International Law* 33-36 (1959).

¹³ *Position of Latin-American states*. The rule stated in this Section is questioned by some states, especially in Latin America. Not only do they maintain the general position, explained in Comment *a* to § 169, that aliens are entitled to no better treatment than nationals, but they have insisted specifically that international law imposes no duty to pay compensation when property is taken pursuant to a general program of social or economic reform. See, e.g., Mexican Minister of Foreign Affairs to Secretary of State of the United States, August 3, 1938, 3 Hackworth, *Digest of International Law*, 657 (1942). § 190 Reporters' Notes.

See also U.N. Gen. Ass. Off. Rec. 7th Sess., 2d Comm. 286 (1952) (remarks of representative of Iran); *id.* at 287 (remarks of representative of Mexico); see generally Brandon, *Nationalization Before the United Nations*, Fifth International Conference of the Legal Profession 38 (1954).

The history of the relations between the United States and the Castro government in the period immediately preceding the decree of expropriation, as well as the words of the decree itself, demonstrate that one of the fundamental purposes of the confiscation was retaliation against this country. On July 6, 1960, Congress amended the Sugar Act of 1948, 61 Stat. 922 (1947), as amended, 7 U. S. C. §1100-61 (1958, Supp. III, 1962), so as to permit the President to reduce the sugar quota allotted to Cuba for the period extending through March 31, 1961. 74 Stat. 330 (1960); as amended, 7 U. S. C. §1158 (Supp. III, 1962). Under the law as it stood before this amendment, Cuba would have had the option to supply sugar to this country in excess of the basic quota allotted to her, since sugar growers in this country were finding it impossible to fill the quota allotted to them. 70 Stat. 219 (1956), 7 U. S. C. §1114(a) (1958). See 106 Cong. Record 14680 (1960) (remarks of Senator Long). The Secretary of State testified before the House Committee on Agriculture that the purpose of the amendment was to secure an adequate supply of sugar. He said that Cuba, which had in the past provided about one-third of the sugar consumed in the United States, might not remain a reliable source of sugar because of the increasing diversification of her economy, and because of her commitments to supply sugar to certain Communist countries. He added that "other circumstances" also made it appropriate for Congress to pass the legislation. *Hearings Before House Committee on Agriculture on H. R. 12311, H. R. 12534, and H. R. 12624*, 86th Cong., 2d Sess. 3-5 (1960). Other legislative history made it abundantly clear that the main purpose of the amendment was to impose a sanction against an unfriendly nation. *E.g.*, 106 Cong. Record 15228-48, 15711-29 (1960). On the day following the passage of this legislation, July 7, 1960, the President greatly reduced the sugar quota allotted to Cuba. Proclamation No. 3355, 25 Fed. Reg. 6414 (1960).

In Havana on the same day that the Congress of the United States passed the amendment to the Sugar Act of 1948 by which a reduction in Cuba's sugar quota was authorized, the Cuban Council of Ministers promulgated Law No. 851, which gave the President and Prime Minister of Cuba joint authority to expropriate American property in Cuba. That this law was promulgated as an answer to the amendment to the American Sugar Act is clear from its preamble.¹⁴ Then, on August 6, 1960, pursuant to Law No. 851, Executive Power Resolution No. 1 was issued, expropriating the

¹⁴ The first paragraph of the preamble to Law No. 851 states as follows:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

Cuban assets of C. A. V., along with the assets of twenty-five other corporations owned by United States nationals. The preamble of the executive resolution included language almost identical with that in Law No. 851. See *supra* at 2434. Thus we have no doubt that one of the basic reasons for the seizure here involved was to retaliate against the reduction by the United States in the sugar quota it had allotted to Cuba.

Several authorities have announced that confiscation of the property of the nationals of a particular country without the payment of compensation when done as an act of retaliation is contrary to international law. The American Branch of the International Law Association's Committee on Nationalization of Property has stated: "[U]nder International law, a State may not take foreign interests as a measure of political reprisal." American Branch of the International Law Association, Proceedings and Committee Reports 68 (1957-58). Restatement, Foreign Relations Law of the United States §205 & Ill. 1 (Proposed Official Draft, 1962) supports this proposition. Lord McNair declared in regard to Indonesian seizures of Dutch property during the dispute between the Netherlands and Indonesia over control of Dutch New Guinea:

"In my opinion the absence of a *bona fide*, social or economic purpose involving the property nationalized is vital and alone suffices to render unlawful the [Indonesian] Nationalization Act of 1958 * * *"

McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 Netherlands Int'l L. Rev. 218, 243 (1959).

And in *Anglo-Iranian Oil Co. v. S. U. P. O. R. Co.*, Italian Civil Court of Rome, 1954, [1955] Int'l L. Rep. 23, 42, the court stated:

"Italian courts must refuse to apply in Italy any foreign law which decrees an expropriation, not for reasons of public interest, but for purely political persecutory, discriminatory, racial and confiscatory motives."

See Seidl-Hohenveldern, *Title to Confiscated Foreign Property and Public International Law*, 56 Am. J. Int'l Law 507, 509-10 (1962); Falk, *supra* at 9; see also Netherlands note to Indonesia, December 18, 1959, 54 Am. J. Int'l L. 484, 485-86 (1960); *Senembah Maatschappij N.V. v. Republiek Indonesie Bank Indonesia and De Twentsche Bank N.V.*, Court of Appeals of Amsterdam, [1959] Nederlandse Jurisprudentie 218 (No. 73), *aff'd*, [1959] Nederlandse Jurisprudentie 855 (No. 350). Unlike the situation presented by a failure to pay adequate compensation for expropriated property when the expropriation is part of a scheme of general social improvement, confiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country. And despite our best efforts to deal fairly with political and social doctrines vastly different from our own, we also cannot find any reasonable justification for such procedure. Peacetime seizure of the property of nationals of a particular country, as an act of reprisal against that country, appears to this court to

be contrary to generally accepted principles of morality throughout the world.

The appellant seeks to justify retaliatory confiscation by the Cuban government by asserting that the United States was the first offender against international law by an attempt to coerce Cuba through the reduction of American purchases of Cuban sugar. If the United States had seized Cuban assets in this country without compensating the owners, we might find some merit in this contention, for then Cuba would be treating American nationals exactly as the United States was treating Cuban nationals. *Cf.* Restatement, Foreign Relations Law of the United States, §205 (Proposed Official Draft, 1962). But, whether she was wise or unwise, fair or unfair, in what she did, the United States did not breach a rule of international law in deciding, for whatever reason she deemed sufficient, the sources from which she would buy her sugar. We cannot find any established principle of international jurisprudence that requires a nation to continue buying commodities from an unfriendly source. Accordingly it follows that the amendment to the Sugar Act of 1948 did not excuse Cuba's *prima facie* breach of international law.

We come now to the issue of whether this retaliation involved a discrimination against United States nationals of such a nature as to render the expropriation invalid under international law. By referring only to United States nationals, Law No. 851 and the decree of expropriation issued thereunder would appear to be discriminatory, since retaliation against a person's homeland is not a reasonable basis for a distinction in treatment. But the appellant points out that under the Agrarian Reform Law and the Urban Reform Law, the Castro government confiscated the property of persons who were not United States nationals; and that the sugar enterprises owned by Cubans were expropriated on October 13, 1960, under yet another law, Law No. 890. Under the Agrarian Reform Law and the Urban Reform Law all large land holdings and multi-family dwellings were nationalized. These latter two pieces of legislation are of little relevance to the present case because of the substantial differences, in both policy and effect, between the nationalization of real estate as such, and the nationalization of the means of production as such. But the seizure of Cuban-owned sugar enterprises on October 13, 1960, does bear directly upon whether the Cuban government discriminated against American-owned corporations, for it is obvious, of course, that the confiscation of Cuban-owned enterprises was not part of an effort by the Cuban government to retaliate against the United States. If the ultimate effect of all the expropriations by the Castro Cuban government was to treat Cuban-owned enterprises and American-owned enterprises exactly alike, it would be difficult for this court to find discrimination against American nationals. And, perhaps, international law is not violated when equal treatment is accorded aliens and natives, regardless of the quality of the treatment or the motives behind that treatment. See Williams, *International Law and the Property of Aliens*, 9 Brit. Yb. Int'l L. 1, 15 (1928). *But see* Restatement, Foreign Relations Law of the United States §169 & Comment a (Proposed Official Draft,

1962). Fachiri, *Expropriation and International Law*, 6 Brit. Yb. Int'l L. 159, 160 (1925); Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 17 Brit. Yb. Int'l L. 1, 16 (1936); 2 Hyde International Law 876 (1945).

But there was a difference between the treatment of American-owned sugar enterprises and Cuban-owned sugar enterprises. American-owned sugar enterprises were expropriated on August 6, 1960; Cuban-owned sugar enterprises were not seized until October 13, 1960. A short lapse of time between similar provisions in the same program, standing alone, would not create discrimination. But the difference in time here is quite significant, because the shipment of sugar involved in this case left Cuba and was sold abroad between August 6 and October 13. And this difference of ten weeks' time stems directly from the efforts of the Cuban government to retaliate against the United States and its sugar-buying policy. Since we have held above that seizure of the assets of nationals of an unfriendly sovereign as part of a scheme of reprisal against that country is illegal under international law, it follows that a difference in the treatment accorded those nationals based upon reprisal is discriminatory. Therefore, at least with respect to the shipment of sugar here in question, the Cuban government discriminated against United States nationals.

When a state treats aliens of a particular country discriminatorily to their detriment, that state violates international law. Restatement, Foreign Relations Law of the United States, §170 & Ill. 2 (Proposed Official Draft, 1962); *British Claims in the Spanish Zone of Morocco* [1925] 2 U. N. Rep. Int'l Arb. Awards 615, 647 (Britain/Spain); *Standard Oil Tankers Case*, 22 Am. J. Int'l L. 404, 419-20 (1928); United States note to Romania, 19 Dep't State Bull. 408 (1948); Netherlands note to Indonesia, December 18, 1959, 54 Am. J. Int'l L. 484, 485-87 (1960); Rolin, 6 Netherlands Int'l L. Rev. 260, 269 (1959); Foighel, *Nationalization: A Study in the Protection of Alien Property in International Law*, 47 (1957); Van Hecke, *Confiscation, Expropriation and the Conflict of Laws*, 4 Int'l L. Q. 345 (1951); Sohn, in *Proceedings and Committee Reports of the American Branch of the International Law Association 1959-1960*, at 31; Verdross, *Die Nationalisierung Niederländischer Unternehmungen in Indonesien im Lichte des Völkerrechts*, 6 Netherlands Int'l L. Rev. 278 (1959). See also *The Oscar Chinn Case*, P. C. I. J. ser. A/B, No. 63 [1934], 3 Hudson, World Court Reports 416, 438. Certain circumstances may exist which would permit a state to treat all aliens differently from its own citizens, but those circumstances are not present in this case. See Restatement, Foreign Relations Law of the United States §170, comment a (Proposed Official Draft, 1962).

Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law.

But that is not the end of the matter. We must consider whether the one whose property has been thus expropriated has no recourse except

against the expropriator to obtain the just compensation not paid to him, or whether he may attack in the courts of the United States the validity of the expropriator's title. Compare Domke, *Foreign Nationalizations*, 55 Am. J. Int'l L. 585, 610-15 (1961), and Wortley, *Indonesian Nationalization Measures—an Intervention*, *id.* at 680, with Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801 (1960). If the appellant's title was not rendered void, Farr, Whitlock was guilty of conversion of the bills of lading and the proceeds of the sale even though C. A. V. has not been compensated for the taking. It has been argued that the wrong under international standards is not in the taking but in the failure to pay compensation for the taking. It has been pointed out, moreover, that international tribunals have never granted restitution of the property taken. Therefore, the argument runs, the expropriator possesses good title to the property seized subject to a duty to pay damages for the injury caused. But international tribunals are not the sole custodians of international law. As we stated, earlier in this opinion, municipal courts also play a part in the development of that body of law. See Coerper, *The Act of State Doctrine in the Light of the Sabbatino Case*, 56 Am. J. Int'l L. 143, 147 (1962); Falk, *supra* at 2. Furthermore, municipal courts are competent to give a restitutory remedy. In fact, the New York court which holds the proceeds from the sale of sugar involved in the present case is in such a position. We need not at present go into the question whether the granting of this type of remedy is a feature of international law or of domestic law. But we do suggest that the failure of an international tribunal to give a remedy of this type results from the inability of that kind of court to enforce its awards and is not a result of the dictates of substantive international law principles.¹⁵

Refusal by municipal courts of one sovereignty to sanction the action of a foreign state done contrary to the law of nations will often be the only deterrent to such violations. More important, the only relief open to persons injured by a confiscation will often be the invalidation of the confiscating country's title to the confiscated goods by decree of a court of another country. See Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1617-18 (1962). This is particularly true in the present case because Art. 6 of Law No. 851 explicitly precludes review of the confiscation by the Cuban courts. And no aid appears to be available through diplomatic channels to the injured parties. Therefore, we conclude that, since the

¹⁵ This court does not hope to resolve this legalistic analogue to the dispute over whether the chicken or the egg came first. If one believes legal rights exist separate from and prior to the existence of legal remedies, he may interpret our holding to mean that we have recognized an international wrong and have then fashioned an appropriate remedy. If, on the other hand, the reader believes legal rights cannot exist in the absence of legal remedies, he is free to interpret our words as meaning that since municipal courts can grant a remedy which divests an international title, the appellant's title is invalid.

Cuban decree violated international law, the appellant's title is invalid and the district court was correct in dismissing the complaint.¹⁰

Judgment affirmed.

NOTES

Nationality—contest of ruling that citizen at birth had lost nationality—procedures provided in Immigration and Nationality Act not exclusive

Plaintiff was refused a passport (after his older one had expired) by the American Embassy at Prague on the ground that he had lost his citizenship under §349(a)(10) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1481(a)(10), by remaining outside the United States for the purpose of avoiding military service. Plaintiff then brought a proceeding for declaratory judgment and injunctive relief against the Secretary of State. A three-judge Federal court held that the procedural route used by plaintiff was appropriate and that the deprivation of citizenship under the above legislation was unconstitutional. The Supreme Court affirmed on the first issue and ordered the case set for re-argument on others, holding specifically that subsections (b) and (c) of §360 of the Immigration and Nationality Act do not state an exclusive procedure for determining claims to American citizenship. Harlan, Frankfurter, and Clark, JJ., dissented, on the ground that §360(b) and (c) state the exclusive procedure available to a foreign resident, citing and relying, *inter alia*, upon *U. S. v. Ju Toy*, 198 U. S. 253 (1905). *Rusk v. Cort*, 369 U. S. 367 (April 2, 1962).

Extradition—principle that person extradited must not be tried for a different offense—not violated under circumstances of case

The defendant was indicted for conspiracy to violate the narcotics law of the United States, ordered extradited by Lebanon for "trafficking in nar-

¹⁰ We mention one further problem related to this case which we find unnecessary to settle but which may arise to torment some future court with a case similar to the present one. That problem is whether the law governing this case involves elements of federal law or whether the case is governed solely by New York law. Cf. *Bergman v. De Sieyes*, 170 F. 2d 360 (2 Cir. 1948). It has been said that the act of state doctrine is part of the law of conflict of laws. If that is so, it would seem that under the rule in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), it is New York law which we are applying. On the other hand, certain cases have indicated that international law is part of the body of federal law. See, e.g., *The Lusitania*, 251 Fed. 715, 732 (S. D. N. Y. 1918). Perhaps *Erie R.R. v. Tompkins* has changed the rule in these latterly mentioned cases. But see 1 Oppenheim, *International Law* 41 n. 4 (8th ed. 1955). For our purposes here we do not have to resolve these questions because it appears to us that a New York court would reach the same result we reach. Cf. *Frenkel & Co. v. L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 167 N. E. 430 (1929) (alternative holding); *Fred S. James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 146 N. E. 369 (1925); *Sulyok v. Pensintezeti Korpont Budapest*, 279 App. Div. 528, 111 N. Y. S. 2d 75, modified on other grounds, 304 N. Y. 704, 107 N. E. 2d 604 (1952) (*per curiam*); *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 208 N. Y. S. 2d 833 (Sup. Ct. 1960). See also Falk, *supra* at 11.

otics," and tried and convicted in the United States for unlawfully receiving and concealing a narcotic drug and for conspiracy to import such drug. He contended that the variances involved violated the principle laid down in *U. S. v. Rauscher*, 119 U. S. 407 (1886). The contention failed; the test for "separate offense" is whether the extraditing country would consider the offense actually tried as "separate." In this case Lebanon would not. *U. S. v. Paroutian*, 290 F. 2d 486 (U. S. Ct. A., 2nd Cir., Feb. 9, 1962).

International agreements—interpretation—process of interpretation

In a tax case involving the issue whether a long-term capital gain to a Connecticut trust with British beneficiaries was exempt from United States taxation by the Income Tax Convention between the United States and the United Kingdom, the court found its interpretative task to include not only the language of the agreement but its entire context, citing the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §129 (Tent. Draft No. 3, 1959). *Maximov v. U. S.*, 299 F. 2d 565 (U. S. Ct. A., 2d Cir., Feb. 14, 1962).

Time—effective date of application of Uniform Code of Military Justice in Korea

The defendant contends that the Uniform Code of Military Justice was not in effect when the offense was committed in Korea and hence that the court-martial was without jurisdiction to try him there. The statute enacting the Code contains no provision on the time at which it should go into effect in various time zones. A general statute, 15 U. S. C. §262, provides that "the time [a statute becomes effective] shall be the United States standard time of the zone within which the act is to be performed." The court found in this statute "a general congressional intent that zoned variations in time shall be observed in determining the time when statutory rights or liabilities accrue. . . ." Hence, the Code, bearing an effective date of May 31, 1951, became effective in Korea at midnight, May 30–31, 1951, Korean standard time, although not effective in the United States until 14 hours later. "[The] anomaly is but an unavoidable by-product of the circumstance that the international date line is located at the 180th meridian in the Pacific Ocean, rather than in the District of Columbia. . . ." *Sunday v. Madigan, Warden*, 310 F. 2d 871 (U. S. Ct. A., 9th Cir., May 30, 1962).

Jurisdiction—order to defendant to turn over property localized in the Bahamas—order modified to require consent of Bahamian foreign exchange control

Following a jeopardy assessment against the defendant for alleged income tax deficiencies, the District Court appointed a receiver and directed the defendant, personally served, to turn over stock located in the Bahamas to the receiver. This action was attacked on appeal as an invalid invasion of the sovereignty of the Bahamas. The court held that the order below was

not invalid and did not “*per se*” involve any invasion of the sovereignty of the Bahamas; but: “Of course no court should order the performance of an act in a foreign country when that act will violate the foreign country’s laws. . . .” The only possible violation would be of the Bahamian foreign exchange control laws. “[I]t seems to us wiser to . . . modify the order to require that Ross apply for the required consent before transferring the stock certificates.” *U. S. v. Ross*, 302 F. 2d 831 (U. S. Ct. A., 2nd Cir., May 3, 1962).

Jurisdiction—foreign-flag vessel owned by foreign subsidiary of United States corporation—authority of National Labor Relations Board

The National Labor Relations Board ordered an election for collective bargaining representatives by foreign seamen on a Honduran-flag vessel owned by a Honduran corporation that is a subsidiary of the United Fruit Company, an American corporation. Plaintiff, the bargaining agent for the seamen under the laws of Honduras, sued to enjoin the Board from conducting the election. The plaintiff’s motion for a preliminary injunction was granted and the defendant’s motion to dismiss was denied. The Honduran Ambassador protested to the Board under a provision in the U. S.-Honduran Commercial Treaty to the effect that merchant vessels flying the flag of either should be deemed vessels of that nationality, both on the high seas and within the territory of the other; he also relied on general international law. Through the Department of Justice the Department of State declared, at the invitation of the court, that, although it did not support all the statements in the Honduran protest, it agreed “with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case.” The Labor Relations Board disagreed with the two Departments. The court found these expressions of differences anomalous; ordinarily the Department of Justice is the sole source for the expression of Executive viewpoints to the courts. After taking into account judicial practice of avoiding Constitutional issues if possible, repeal by implication, and of giving a territorial reach to legislation unless the contrary is clearly indicated, the court concluded that under the Labor Management Relations Act of 1947 the Board had no authority or power to conduct the elections. *Marine Cooks and Stewards, etc. v. Panama S. S. Co.*, 362 U. S. 365 (1960),¹ was distinguished. *Sociedad Nacional de Marineros de Honduras v. McCulloch*, 201 F. Supp. 82 (U. S. Dist. Ct., D. C., Jan. 18, 1962).

Nationality—loss by citizen by birth—challenge of deportation proceeding by habeas corpus

Herbert Marks, a native-born citizen of the United States, was held for deportation as an alien because he had served in the armed services of (Castro) Cuba (allegedly as firing-squad Captain in many political executions) without the consent of the Secretaries of State and of Defense. It was also contended that, as an alien, Marks was excludable: (1) for failure to have the requisite documents on re-entry and (2) for conviction within

¹ Noted in 54 A.J.I.L. 895 (1960).

the United States previous to his going to Cuba of a crime involving moral turpitude. Habeas corpus raised here the issue whether Marks was properly under detention; the holding was that he was not, and release was ordered. The court held that Marks' service with Castro had been voluntary and that such service after the Castro Rebel Army became "de facto the exclusive armed force" in Cuba was service in "the armed services of a foreign state" within the meaning of the Immigration and Nationality Act of 1952, §349(a)(3), 8 U. S. C., §1481(a)(3). Dictum was that service "before Castro's rise to power had, of course, no expatriatory consequences because the Rebel Army was at that time merely a revolutionary force with no official status. . . ." The expatriation statute was found Constitutional, as well as factually applicable; hence Marks had expatriated himself. But the court then found that the legal grounds for Marks' deportation, given now as (1) and (2) above, were not applicable to a citizen by birth. Hence he was not deportable; and having lost American nationality without acquiring Cuban nationality, he was stateless. *U. S. ex rel. Marks v. Esperdy*, 203 F. Supp. 389 (U. S. Dist. Ct., S. D. N. Y., March 29, 1962).

Nationality—naturalization—temporary deferment from draft at request of applicant who later served does not bar naturalization

An Irish national of military age requested, and received, a deferment from military service in the United States until he should improve his economic situation somewhat before entering military service. Subsequently he did serve. However, the deferment form that he signed contained the statement that he claimed deferment as a treaty alien, and the United States contended in the lower State court naturalization proceeding and here on appeal that deferment under these circumstances would forever bar the applicant from naturalization under the Immigration and Nationality Act of 1952, §315, 8 U. S. C. §1426. The Supreme Court of Pennsylvania disagreed with the Government's contention and affirmed the trial court. *In re Petition for Naturalization of Browne*, 180 A. 2d 911 (Sup. Ct. Pa., May 21, 1962).

*International claims—pilot decisions of the Foreign Claims Settlement Commission of the United States under the Polish Claims Agreement of 1960*²

CLAIM OF PIETRZAK, Decision No. PO-1, May 24, 1961. Non-payment of contractual obligations by the Government of Poland does not constitute a nationalization or other taking of property; failure to pay dollar bonds issued or guaranteed by it is not compensable under the Polish Claims Agreement of 1960.

CLAIM OF ZAKRZEWSKI, Decision No. PO-83, July 13, 1961. A claimant who, at the time of filing his claim, had made a declaration of intention to

² Abstracted from mimeographs of the decisions supplied by the Honorable Edward D. Be, Chairman of the Commission. To date budgetary stringencies have prevented any official printing of the decisions of the Commission and its predecessor, the International Claims Settlement Commission.

become a citizen of the United States was not eligible for an award under the Polish Claims Agreement of 1960, due to failure to qualify as a national of the United States within the meaning of that agreement and the International Claims Settlement Act of 1949, as amended. Continuous ownership of a claim by a United States national is required from the date of the taking to the date of the agreement. See also *Claim of Meisler*, Decision No. PO-286, April 25, 1962.

CLAIM OF HALE, Decision No. PO-180, December 20, 1961. Under international law a state is not liable for fluctuations in value of its currency or for losses stemming therefrom so long as its measures are non-discriminatory between nationals and aliens. A claim based on devaluation of Polish currency was not compensable under the Polish Claims Agreement of 1960.

NOTES ON UNITED KINGDOM DECISIONS

International agreement—conflict with later legislation—interpretation of the latter

A company organized in the Republic of Ireland acquired all the shares of two United Kingdom companies, and by a process known as "dividend stripping" had very large dividends (*e.g.*, £174 10s per £ 1 par common) declared by these companies out of earnings and profits accumulated prior to the acquisition of the shares. The Irish company contended that these dividends were exempt from the British income tax under the authority of international agreements made between the United Kingdom and Ireland from 1926 to 1947 and incorporated in a 1952 provision in the revenue law. The Crown contended that the dividends were taxable under a 1955 Act directed specifically to the prevention of tax avoidance by "dividend stripping." To this the taxpayer replied that the 1955 legislation should be construed so as to avoid conflict with international law and comity. This latter argument was rejected on the general ground, common to the several opinions, that the 1955 statute was clearly intended to apply to prevent a gross abuse of the revenue law and that the courts should not look beyond the terms of exemption as stated in the British Revenue Act as amended in 1955. *Collco Dealings Ltd. v. Inland Revenue Commissioners*,⁸ [1962] A. C. 1 (House of Lords, March 2, 1961).

Extradition—request of Israel to the United Kingdom—offense committed in Jerusalem—effect of nature of recognition of Israeli authority in Jerusalem

The extradition-defendant contended that the Extradition Act of 1870, in force between the United Kingdom and Israel under a 1960 international agreement, did not authorize his extradition to Israel for an offense allegedly committed in Jerusalem, because the United Kingdom did not recognize *de jure* the authority of Israel there. The contention was rejected. As Israel was recognized as having *de facto* authority in Jerusalem, and

⁸ Earlier proceedings noted in 54 A.J.I.L. 412, 899 (1960); 55 *ibid.* 990 (1961).

no other state was recognized as having *de jure* authority there, Jerusalem was "within the territory" of Israel within the meaning of the international agreement. *Regina v. Governor of Brixton Prison, ex parte Schtraks*, [1962] 2 W. L. R. 976 (Queen's Bench, May 4, 1962).

FRENCH CASES ON IMMUNITIES FROM JURISDICTION *

Immunity of a foreign state—necessity for a finding as to the circumstances surrounding the transaction

In two cases decided together, the Court of Cassation reversed the lower court's application of immunity in a suit against the Turkish state on its guaranty of certain bonds floated by the City of Constantinople, and affirmed the finding of immunity in another involving a commercial debt claim against the Vietnamese state for tobacco furnished for its armed forces. In the first case the court found that the decision was erroneous for having failed to give the legal basis upon which it was decided, in a situation where the guaranty agreement and the surrounding circumstances would be decisive as to immunity. In the second case, the court considered that the findings below clearly justified the classification of the transaction as one involving the state in its public, rather than in its commercial, capacity. *Sté Bauer, Marchal et Cie c. Min. Finances République Turque; Guggenheim c. Etat du Viet-Nam*, *Semaine Juridique*, II Jurisprudence (1962), par. 12489 (Court of Cassation, December 19, 1961).

Immunity of a foreign state—Art. 169 of Code of Civil Procedure inapplicable to valid plea

Raynal, discharged chef of an American officers' club, sued its manager for breach of contract, and the United States intervened to assert immunity. The plaintiff claimed that, under Article 169 of the Code of Civil Procedure, the defendant, in order to establish a plea of lack of competence of the instant court, would have to indicate what court did have competence. The court held that Article 169 was not applicable to a lack of jurisdiction arising from the immunity of a foreign state from suit. The court explained that the immunity of a foreign state is, in effect, a plea in bar which requires the French judge to renounce the exercise of judicial power in response to the commands of international law; hence it is distinguishable from rules of internal law relating to the organization of the judicial system. *Gouvernement des Etats-Unis c. Raynal*, *Semaine Juridique*, II Jurisprudence (1962), par. 12421 (Nancy, Social Chamber, May 18, 1961).

Diplomatic immunity—"Minister of State" and delegate to 1948 General Assembly meeting at Paris

The defendant in a housing suit claimed immunity on the grounds of his official position as "Minister of State" in the Government of Saudi Arabia, his designation as a member of the Saudi Delegation to the Third (1948) General Assembly at Paris, his diplomatic passport, and his usual titles of

* Suggested by Martin Domke, Esquire. Translated and digested by Covey Oliver.

address ("excellency," "minister plenipotentiary"). These claims to diplomatic immunity were all rejected, the court noting that the rupture of relations between France and Saudi Arabia did not of itself affect the situation. The court stressed that the defendant had the office of Minister of State, not of Foreign Affairs, of his government, and found the former office insufficient in and of itself to support the claimed immunity. His membership on the Saudi Delegation to the 1948 General Assembly was ineffectual, because the immunities given to such delegations by the French decree of April 26, 1947, were restricted to acts, words, and writings related to official functions as members of delegations. The delegate immunity is totally inoperative as to a private contract made before the session and continuing in effect after its end. The other two grounds asserted were not sources of any privilege as to jurisdiction. The court found that the defendant had made his claims to immunity in good faith; hence he is not subject to the indemnity provided by Article 169 of the Code of Civil Procedure. *Alireza c. Grimpel et autres*, Semaine Juridique, II Jurisprudence (1962), par. 12423 (Paris, 1st Chamber, April 28, 1961).

BOOK REVIEWS AND NOTES

Académie de Droit International. Recueil des Cours, 1959. Tomes I, II, III (Vols. 96, 97, 98 of the Collection.) Tome I: pp. 664; Tome II: pp. 593; Tome III: pp. 597. Indices. Leiden: A. W. Sijthoff, 1960. Fl. 50 each.

The 1959 Hague Academy Lectures which, as in the previous year, fill three large volumes, reveal the diversity of approach and method characteristic of contemporary international law. In these volumes one is struck particularly by the relatively high quality of the contributions dealing with problems of an economic character, whether in the field of public or private international law; one finds in this area not only more analytic rigor, but also more originality and inventiveness in handling practical problems. In the other fields, several of the lectures are largely summaries and restatements of material published elsewhere; these may be useful to the Academy student, but they hardly warrant publication in volumes devoted to original scholarship. Even with this reservation, the three volumes as a whole will be of substantial value both to the scholar and the practitioner in the international legal field.

The first of the contributions, "Money in Public International Law," is by Dr. F. A. Mann of London, a practicing solicitor who has distinguished himself as one of the most productive and stimulating scholars in the international field. His lectures cover four principal subjects. First he deals with the legal implications of international monetary institutions such as the International Monetary Fund, the General Agreement on Tariffs and Trade, the Organization for European Economic Co-operation and the European Common Market. He includes an analysis of bilateral clearing and payment agreements and the arrangements for currency areas such as the sterling area. The second main heading covers the conventional international law of money, such as treaty obligations providing for consultation and co-operation in maintaining monetary stability. He shows the difficulties in definitions of "convertibility," "current transactions" and "exchange restrictions." His third principal subject is entitled "Monetary Sovereignty and State Responsibility" and deals with customary international law. He discusses the *Norwegian Loans* case and has some interesting comments on the problems of vested rights and abuse of rights in regard to monetary legislation. His final heading is "Monetary Law and Inter-State Obligations," which deals with questions of determining the money of account, the principle of "nominalism," revalorization, gold clauses, problems of payment conversion and rate of exchange. The lectures are noteworthy for their clear and concise treatment of a complex series of problems, and they constitute a solid contribution to the clarification of important questions increasingly faced by international lawyers in this field.

The legal problems of international economic activities are also the subject of lectures by Professor A. P. Sereni, an Italian and American scholar well known for his previous contributions to both public and private international law. In contrast to Dr. Mann, Professor Sereni lays stress on the municipal law of states, and is of the opinion that national law is generally better suited than international law for the regulation of the status and transactions of international economic institutions. By the latter term he includes all public and private "corporate entities which are engaged in economic activities not limited in scope to the territory of a single state." His lectures are devoted mainly to an analysis of the problems of choice of law arising out of the activities of these institutions. He is skeptical of proposals to determine applicable law by reference to "common principles" or "general principles of law recognized by civilized nations." He also considers it premature to attempt codification or unification through international agreements, but he does propose drawing up sets of standard rules and provisions to be incorporated in different types of agreements and other instruments to be used by the international economic institutions. It is surprising that he does not mention the work done in this field by the European Economic Commission, which has been described by L. Kopelmanas and Peter Benjamin in several informative articles.

The third contribution is a series of lectures by Professor Alan Philip of Copenhagen on the five Scandinavian conventions relating to private international law. These conventions are of special interest because, unlike other multilateral treaties in this field, they have been drafted to fit the specific substantive law of the individual Scandinavian countries in an attempt to bring their laws into mutual harmony. Professor Philip suggests that the methods and techniques used in preparing these conventions should be of general interest to non-Scandinavian lawyers, particularly in showing how solutions can be reached between countries following the principle of nationality and those adhering to the principle of domicile. The lectures will surely be of great utility to lawyers working with similar problems and to scholars engaged in drafting new conventions on conflicts of law.

"General Principles of International Responsibility According to Doctrine and Cases" is the title of the lectures given (in French) by the late Professor Hildebrando Accioly of Brazil. Professor Accioly succinctly covers virtually the entire field of state responsibility, summarizing with disarming lucidity the main concepts and principles expressed by leading scholars, but presenting only a fragmentary account of the case law promised by the title. While maintaining the traditional Latin American position opposed to a higher standard of protection for foreigners, Professor Accioly, like Garcia-Amador, qualifies this by asserting the responsibility of states to accord all persons, whether foreigners or nationals, the basic human rights recognized by international "declarations."

A French professor, Yvon Loussouarn, also contributes a series of lectures in private international law, his subject being the "Condition of

Corporations in Private International Law." The lectures contain an historical account of the cases and doctrine on nationality of corporations, and deal in some detail with the problem of change in nationality. In a second part there is an examination of the problems raised by the activity of corporations on the international level and the attempts to reach solutions through conventions and judicial application.

The field of sociology of international law is explored by Dr. Antonio Truyol y Serra, Professor of the Universities of Madrid and Lisbon, under the broad title of "Origins and Structure of International Society." The lectures deal both with the historical development of national states and with the forces that influence international relations. In contrast to much of contemporary writing, little is said about the significance of nuclear weapons and population pressures in international relations; the emphasis is placed rather on the religious, spiritual, intellectual and cultural influences, an area which has perhaps been unduly neglected by present-day legal scholars.

Volume II opens with a study on the "Fisheries Convention of 1959" by Professor André Gros, Legal Adviser of the Quai d'Orsay and representative of France at the Geneva Conference on the Law of the Sea of 1958. The lectures summarize the historical, scientific and economic conditions relevant to the convention, the specifically legal provisions and the relation of the convention to state practice. Professor Gros is well pleased with the convention, considering that it meets both the demands of the "progressives" for new rules in the interests of conservation as well as the desires of the "conservatives" for maintaining and harmonizing the rights of states. His optimism is qualified, however, by his apprehension that the demands of the littoral states for larger areas of exclusive domain—a subject still unregulated by treaty—imperils the success of the Convention on Fisheries.

Judge Ricardo J. Alfaro, presently Vice President of the International Court and one of the outstanding jurists and statesmen of Latin America, discusses a subject with which he has been closely identified: "The Rights and Duties of States." Judge Alfaro is one of a distinguished group, starting with Jeremy Bentham in 1789, who have dedicated themselves to the task of formulating a single succinct and "precise" document of principles covering the whole field of international relations. His lectures show the degree to which this task has preoccupied private and public organizations dealing with international law. Judge Alfaro does not share the illusion, which he attributes to Bentham, that the adoption of a code of this kind would be sufficient to ensure international peace, but it is apparent that he considers that formulation on a highly general level of agreed precepts similar to those already contained in the Charter of the United Nations would influence national conduct. However, his own account indicates that the process of formulation of "rights and duties" has become a syntactical exercise which has done little to make the principles more specific and precise, and which has almost completely ignored

the institutional means for translating these highly abstract norms into effective decisions.

Francis Vallat, Legal Adviser of the British Foreign Office, discusses under the heading of "The Competence of the General Assembly" several major issues of United Nations law: the significance of practice in Charter interpretation; the relation of the General Assembly and the International Court; the limits on Assembly competence; the peace-keeping rôle of the Assembly, and lastly, the attitude of the International Court toward interpretation of the Charter. The analysis reflects the author's rôle as an experienced delegate and legal adviser sympathetic to flexible interpretation, yet aware of the risks in accepting practice as decisive in all cases. Although the subjects he deals with have been often described in accounts of United Nations developments, and are certainly familiar to the student of international organization, Vallat has skillfully and with deceptive simplicity included a number of observations which neatly summarize basic legal questions and dispel the fog that has often surrounded the subject.

"The Rights of Man and International Relations" is the broad subject chosen by Professor Ernest Hamburger, who was for many years a senior official in the Division of Human Rights of the U.N. Secretariat and well-known for his scholarly contributions to the study of constitutional law in Germany and France. That conceptions of human rights and international relations have reciprocally involved one another since 1789 is demonstrated by Professor Hamburger in a comprehensive historical analysis of changing developments in the field of human rights. Despite their wide sweep, the lectures include a number of specific points especially relating to constitutional and treaty provisions in the 19th century which should be of interest to students of human rights.

The final contribution in Volume II is a systematic exposition of "Principles of Private International Law" by the leading French scholar in this field, Professor Henri Batiffol of Paris. After an introductory analysis of methodology, Professor Batiffol discusses the co-ordination of internal law; then the co-ordination of rules of private international law; and lastly, in some detail, the "opposition of nationality and domicile." Although the lectures are relatively brief, they encompass the major issues of principle, and on many points bring out subtleties and insights which only a master of the subject can do.

Volume III opens with a nearly 300-page treatise by Professor Quincy Wright entitled "The Strengthening of International Law." Containing 15 chapters and somewhat over 100 subsections, the lectures are a distillation of Professor Wright's analytic and programmatic ideas on virtually every significant aspect of contemporary international law. He wears his extraordinary learning lightly, but it is evident from his pointed illustrations that there is a wealth of erudition and a hard substratum of fact beneath his conclusions. Professor Wright is not one to ride doctrine too hard; for him, international law is not a theory but a practical method of dealing with international relations, and no doctrine "has the eel of truth

by the tail." But he does not permit skepticism and pragmatism to weaken his conviction that a strengthened legal order is an essential and feasible alternative to the insecurity of a "jungle world."

The practicality of international law, albeit in a specialized arena, is brought out in the series of lectures entitled "The International Legal Aspects of the Operation of the World Bank" by the Bank's distinguished General Counsel, Dr. Aron Broches of The Netherlands. Dr. Broches concerns himself with what he calls the "external" law of the Bank, which in the main refers to the problems involved in its loan and guarantee agreements. Because the Bank is an "executive" institution engaged in operations, it has had to deal with a number of practical problems in a complicated legal framework which have required a hard-headed and often creative use of legal techniques and concepts for novel situations. Although the subject may appear of interest chiefly to specialists in World Bank affairs, Dr. Broches' wide erudition and practical understanding illuminate a much wider range of questions so that both the general scholar and the practitioner in international matters cannot fail to be enlightened.

The last two contributions in Volume III both deal with subjects which have been extensively discussed in recent literature. The first is on the controversial problem of "The Effects of Nationalization Abroad," by Professor Fritz Münch, Director of the Berlin Department of the Max Planck Institute of Foreign Public and International Law. Although Professor Münch's conclusions are not novel, they are a useful survey of recent developments and opinions, and are presented with clarity and welcome brevity.

Professor Rolando Quadri of the University of Naples deals with the currently fashionable subject of "International Space Law" in the tradition of Italian legal positivism, laying stress on juridical analysis rather than political objectives. Professor Quadri shows a refreshing lack of reverence for the pieties of the subject, and is critical both of high-sounding governmental declarations and legal commentaries. His observations are frequently incisive and trenchant, although one wishes that he were a little more positive about solutions to the problems he poses.

OSCAR SCHACHTER

Diritto Internazionale. Vol. III: *Relazioni Internazionali*. By Angelo Piero Sereni. Milan: Dott. A. Giuffrè, 1962. pp. xvi, 1227-1565. L. 2500.

Professor Sereni's treatise on *International Law* consists of four parts covering five volumes. The first part, Vol. I (pp. 1-232 (1956)), reviewed by this writer in this JOURNAL,¹ is the general part. The second part, dealing with the subjects of international law, consists of two volumes: Vol. II (pp. 235-770 (1958)), also reviewed by this writer in this JOURNAL,² treats of states; Vol. III (pp. 771-1225 (1960)) treats of international organiza-

¹ Vol. 51 (1957), pp. 441-443.

² *Ibid.*, Vol. 53 (1959), pp. 199-201.

tions (reviewed in this JOURNAL by Professor Sohn).³ This scheme also shows the way in which the author tries to solve the problem of presenting the totality of present-day international law as a system. The first three volumes, the author tells us, show the subjects of international law in their structure, so to speak, from a static point of view. The third part (Vol. IV), here reviewed, dealing with international relations, begins the study of states and international organizations from a dynamic point of view. The fourth part (Vol. V), treating international conflicts, will complete the treatise.

The author's intention is to produce a practical work, based primarily on reality revealed in practice and international jurisprudence, without ignoring the historical background and theoretical problems. His effective use of the practice of states and international organizations, of the decisions of arbitral tribunals and international courts, his wealth of literature, his completeness, and inclusion of the most recent problems and developments in international law, make his treatise a very up-to-date and interesting work. In matters of international law, also, his knowledge of both the common law and of Roman law does him excellent service.

The first part of the present volume deals with the "co-existence" of states. While correctly rejecting the natural-law theory of the "inherent" rights of states, and stating that general international law places no duty of all-out co-operation on states, there are principles of general and particular international law which oblige states to respect, by omission and commission, the existence and independence of other sovereign states. General international law, the author states, prohibits the all-out use of armed force against states in times of peace; here the use of armed force is only allowed on the basis of a particular right recognized by international law. On the other hand, under general international law, there is an unlimited right to go to war not only in self-defense, as a sanction for the violation of a right, but also for the sake of political interests. Sereni explains this "apparent contradiction" by saying that to gain this unlimited right to the use of armed force one must go to war and observe the laws of war and neutrality. We believe this explanation is inadequate, particularly in the light of the ambiguity of the concept of "war" under general international law and of the uncertainty of the dividing line between "war" and "methods short of war." The real explanation is that international law, as a weak and primitive law, was simply unable to deal with the problem of war; war was a frontier problem; the law tried to regulate the *jus in bello*, but left the *jus ad bellum* unlimited, not from any policy consideration but *faute de mieux*. As Kelsen has pointed out, a legal order which allows the unlimited use of armed force against other subjects of the same legal order is not only primitive, but hardly a legal order at all. It was therefore strictly logical that modern development first of all tried to restrict and to eliminate all unlimited use of force in international relations, whether called war or not. Naturally the author gives a complete exposé of the present law under the United Nations Charter. Of particular interest is the author's searching

³ *Ibid.*, Vol. 55 (1961), pp. 1015-1016.

examination of the principle of non-interference in the domestic and international affairs of another state, and especially of the difference between "non-interference" and "non-intervention" in the law of the Organization of American States.

The second part of the volume deals with acts, including illicit acts, of states and international organizations. In Chapter 30 the author starts with a general theory of facts, acts, organs, imputation and legal effects of imputation. In this general theory Sereni is close to the Vienna School of international law. Chapter 31 deals in a very detailed fashion with "unilateral acts," an often neglected subject, particularly notification, recognition, protest, renunciation, and authorization. His comments on the importance of time, prescription and acquiescence are very interesting.

Chapter 32 deals with plurilateral acts, collective acts (here interesting notes, following Mme. Bastid, on acts of ascertainment, declarative acts and programmatic acts—so-called "declarations of intention"). Chapter 33 presents a full-fledged theory of international treaties; this section is very rich and up to date. The author is correct in rejecting the former theory of "contractual" and "legislative" treaties; he holds rightly that the treaty is a procedure for the creation, modification and extinction of rules of general and particular international law. Nevertheless, in introducing the distinction between particular and general rules, one should distinguish between treaties, whether bilateral or multilateral, creating special rules, and those, whether bilateral or multilateral, creating general international principles or even constitutions of regional or quasi-universal organizations. If that is done, then some of the distinctions made by the author between contract and treaty will lose their importance. Contracts in municipal law also create rules, mostly individual ones; on the other hand, there are examples in modern labor law of private contracts creating general rules. All the many problems of the international law of treaties, on which the International Law Commission is now working, are investigated in this book with great comprehension and in an up-to-date manner. Finally, Chapter 34 presents a complete treatment of illicit acts and of the so-called responsibility of states.

We congratulate the author on this fourth volume of his treatise. Nevertheless, scientific honesty demands that we also express our profound regret that the author, however American, has remained in one fundamental point so much Italian, namely, in the retention of the dualistic doctrine. How much harm this has done to his work will be shown when the completed work is before us.

JOSEF L. KUNZ

Field Administration in the United Nations System. The Conduct of International Economic and Social Programs. By Walter R. Sharp. New York: Frederick A. Praeger, 1961. pp. xiv, 570. Index. \$9.50.

Professor Sharp's book provides the first study of the entire process of United Nations management of overseas field programs from the point of

view of the scholar trained to identify the methodology of public administration as part of an orderly discipline. He describes the United Nations system for providing economic and social aid as a "congeries of quasi-autonomous agencies bound together loosely by freely consented but weakly sanctioned agreement and inter-secretariat consultation." In his study of administering the aid programs Professor Sharp reports on some of the political factors and special characteristics of the United Nations system as these affect the process of international administration and must be considered in the judgment of whether it has worked well or poorly. It is refreshing to find in this book a well-documented and satisfactorily complete analysis of these very complex international operations. It provides a framework as well as a penetrating insight into international administration which has hitherto been unavailable to the student who attempts to explore the voluminous documentation flowing from the confusing array of United Nations organizations and programs.

The full title, *Field Administration in the United Nations System: The Conduct of International Economic and Social Programs*, gives a better idea of the scope of this work, as it is more than simply a study of field administration. The chapters in Parts I and II are descriptive of the field organization patterns of each of the international agencies co-operating in the Expanded Program of Technical Assistance (EPTA) through the Technical Assistance Board (TAB). The field staffing arrangements and the problems of headquarters-field relationships which have developed over the decade as a result of the expansion of these operations provides an insight into the manner in which the structure of international organs can be altered to meet new demands. These chapters provide an appreciation of the political aspects of policy decisions which exist as the background for organization and management problems in the international aid program. The excellent chapter on the "human element," which reviews the problems of recruiting, assigning and managing the several thousand persons in the field staff, might have benefited from references to the judgments of the United Nations Administrative Tribunal. Reference to decisions of the Tribunal regarding the staff of UNICEF, TAA, UNWRA, and TAB, as well as other judgments of the Tribunal defining principles of administrative practice, would have fortified the author's opinion in his comment that the tendency of the overseas staff to regard themselves as "the forgotten children" is probably an exaggerated view.

Part III dealing with the Program Process provides a succinct account of programming by the agencies and its impact on national policies and administrative practices. Regional and country projects are described to illustrate these effects, along with an evaluation of the interrelation of United Nations to bilateral and other multilateral aid programs. The author has carefully surveyed a significant part of the total field operations and has been able to identify and document trends and unresolved problems in this developing field of international relations.

In the chapters dealing with headquarters-field relationships, Professor Sharp's study brings the developments to 1959. The descriptive chapters

(in Part II) provide the basis for his searching analysis of "a proper adjustment between centripetal and centrifugal pulls in programme-making and administration," which form the core of the concluding section. The suggestions for further research in the Appendix are timely in light of the United Nations General Assembly Resolution 1709 (XVI) of December 19, 1961, which requested the Secretary General to "take immediate steps toward implementing fully the policy of decentralization through appropriate administrative arrangements." Similarly the creation in 1961 of a new clearing-house instrument, the Industrial Development Center and the proposed United Nations Capital Development Fund will add to the challenges facing the scholar dealing with the dynamics of international administration.

The final chapter, "The Road Ahead," examines the postulate that any increase in the trend toward the greater use of United Nations machinery, as an instrumentality through which public aid programs will be channeled requires some hard thinking about United Nations administrative organization, especially regarding integration at both the center and the field levels of operation.

WILLIAM J. BRUCE

Consular Law and Practice. By Luke T. Lee. New York: Frederick A. Praeger; London: Stevens & Sons, Ltd., 1961. pp. xxii, 431. Index. \$17.50.

The book is a scholarly study on consular practice and law in the modern age, particularly as affected by the political, social and economic changes of the past three decades. It is divided into five parts: an introduction, consular functions, privileges and immunities, consuls in time of war, and recent trends of the consular institution.

The author has performed a remarkable task of assembling an impressive amount of information and presenting it in a clear manner for easy reading. He considers the various rules, their rationale and application in divergent state practice as reflected in general or customary international law, municipal law, treaties, judicial decisions, consular regulations and instructions, doctrine and draft codes. While certain consular functions under international custom or usage, such as protection and promotion of trade, supervision of shipping, assistance to warships, and the protection of nationals, are firmly established, there is no agreement on the nature and extent of the rest of the consular functions. States are not in agreement on whether consular functions should be defined in accordance with municipal law or whether they should be exhaustively defined in multilateral conventions and by codification.

The observations and suggestions of the author are sober and judicious. Distinct patterns in consular practice are emerging in certain regional and other groups of states. The customary international practice in the acquisition of consular status by the issuance of a commission by the sending state and the receipt of an *exequatur* or authorization from the receiving state is now varied by the Soviet treaty practice requiring the prior consent

of the receiving state before the actual appointment of a consul, similar to the diplomatic practice of obtaining *agrément* for the head of a mission. On the highly controversial question of termination of consular status and unrecognized governments, the author concludes that in logic and practice an unrecognized regime in *de facto* control of a territory has the same right as the "recognized regime" at all times to withdraw its consent to a person exercising consular functions within that territory. The undesirable trend in expelling consuls not for personal fault but because of political reasons or retaliation is deplored. With respect to estates involving aliens, there is emerging an additional basis for a consul's intervention, namely, the nationality of the beneficiary irrespective of the nationality of the decedent. In the reviewer's opinion the consul's rôle in probate proceedings should be analyzed in relation to the legal requirement of notice.

The author concludes that, notwithstanding the East-West ideological and economic conflicts and with due allowance for the Communist state ownership of property and state monopoly of trading, *et cetera*, there exist basic similarities in the consular practice of the Communist and the Western nations and that there has been no alteration in the basic features of consular institutions.

Without intending to detract from the fine qualities of the book, a caveat should be noted with respect to technical legal matters. It is not precisely clear at times whether a particular rule or state practice discussed is declaratory of, or in derogation from, general or customary international law. Also, sometimes a general discussion may be misleading because of incompleteness. For example, in discussing the law of the United States (p. 146), while it is generally true that treaties constitute a part of the supreme law of the land, it is also true that later inconsistent legislation may supersede prior treaty provisions. A vexing practical situation may result in which there is an outstanding international legal obligation which cannot be honored under the domestic law. Similarly, the author discusses (pp. 100-103) the desertion of certain Spanish sailors under the 1902 Treaty with Spain and the Spanish consul's rôle in connection therewith. There is also involved, but not discussed, a vexing legal problem. Article XXIV of that treaty in question continues to apply to naval deserters, but there are no express statutory procedures implementing it in United States law for the apprehension and return of such naval deserters.

Concerning consular privileges and immunities, while the reviewer can agree in principle with the author's views on the functional approach, further discussion of legal problems in the application of the principle is limited. The author states that if an act "is performed by a consul in the performance of his official functions, he should be exempt from local jurisdiction," and that the *Girard* case should be applied in determining what acts constitute the performance of official duties. The determination of official duty status in military matters is controversial in the absence of express agreement. Who makes the conclusive authoritative determination whether a particular act of a consul was done in the performance of official duty? The consul, the sending state or the local courts? In the reviewer's

opinion, the preferred rule should be that consuls are amenable to the jurisdiction of the local court as a matter of procedure, and if the court decides that the act in question was done in the performance of official duty, the consul would not be personally liable as a matter of substantive law. Parenthetically, the United States consular regulations in "2 FSM" discussed in the book are now contained in "7 FAM," new *Foreign Affairs Manual on Special Consular Services*.

The present book makes a distinct contribution to the knowledge and literature on the subject. Because of its merit it should prove valuable to all teachers and students in international law, international relations and political science. It would also constitute an extremely precious source of information for consular officials, foreign service officers and others who, for practical reasons, have to familiarize themselves with consular functions.

THOMAS T. F. HUANG *

Curso de Derecho Internacional Público. Vols. I and II. By Eduardo Jiménez de Aréchaga. Montevideo: Centro Estudiantes de Derecho, 1959 and 1961. Vol. I: pp. ii, 279; Vol. II: pp. xix, 280-793. \$15.00.

The Law Students' Center of the University of Uruguay, in undertaking to publish this work, continues its tradition of making available the basic course texts of the instructional staff of the Law School. The author, who occupies the international law chair at Montevideo and has just been re-elected to the International Law Commission of the United Nations, is a well known member of the Society. He has published in this JOURNAL and elsewhere in English, and has lectured at The Hague. His last book, *Derecho Constitucional de las Naciones Unidas*, was published in Madrid in 1958 and widely acclaimed.¹ He serves his country often in responsible positions of diplomacy and state. Thus, this textbook for the standard required year in the Latin American curriculum appears as the maturation of an already distinguished career of research, experience and teaching in the field.

Dr. Jiménez's over-all syllabus for the course is rather orthodox, but his discussion is fresh and timely, even though he dips frequently into the classics in all languages for the identification or representation of a particular position. The continuous appearance in the notes of foreign writers (French, Russian, Italian, American and others) with citation of their *recent* works is something not often seen in English-language counterparts. The leading cases are, of course, worked into the analysis and cited. There is manifest fairness and breadth; all schools are heard. Particularly well balanced are his chapters on the relationship between international and municipal law—"The Problem of the Autonomy of Legal Orders" (pp. 179-205) and the "Problem of the Hierarchical Relationship Between the Two Systems" (pp. 207-243). Volume I is subtitled "General Theory";

* The opinions expressed herein should not be attributed to the Department of State.

¹ Reviewed by C. G. Fenwick in 54 A.J.I.L. 445 (1960).

Volume II, "The States and Their Domain." At a later date a third and final volume should appear to complete the subject matter.

It is always instructive to see United States (and other major Power) practice and policy scrutinized by a responsible specialist who stands at some distance, without hostility or his own axe to grind. Examples in this work are: the illustrations and discussion in connection with recognition of governments, belligerency and insurgency (pp. 321-368), the treatment of air and "radioelectric" jurisdiction (pp. 711-793), and the presentation on territorial waters, contiguous zones and continental shelf (pp. 549-638) and on the high seas, fisheries and conservation of sea resources (pp. 639-710). Recent developments, such as the Geneva Conferences, are expounded in detail, including quotations from documents and from the positions taken by various states.

Even *international* law courses almost invariably devote considerable attention to problems bearing directly on the country of the students being trained. Although a provincial outlook is always the danger, student motivation and colleague respect may be in direct relationship to the amount of such local application the international law professor can demonstrate. In this text this "necessity" is present chiefly in the section on international boundaries (pp. 431-483), elevated to independent chapter status but dealing—except for about a page of introduction—only with Uruguay's frontiers. Major space is accorded the Río Plata system (pp. 512-523) in the chapter on "*Dominio Fluvial*," but only after an ample examination of the topic generally, and illustrations from other parts of the world.

Every international law collection should include a recent statement of the field by a Latin American. This text, though incomplete, is recommended as most able and most respectable.

ROBERT D. HAYTON

Progress in Nuclear Energy. Series X: Law and Administration. Vol. 1.
Edited by Herbert S. Marks. London and New York: Pergamon Press,
1959. pp. xiii, 994. Index. \$26.50.

This fine volume is a tribute to the editorial efforts of the late Herbert S. Marks, whose death was a grievous blow to those who had been privileged to work with him on legal aspects of nuclear energy. The one-time General Counsel of the United States Atomic Energy Commission has assembled a collection of leading articles and national legislation which affords a rich panorama of developments in the fast-moving atomic area.

The work is divided into two parts or "volumes" dealing with law and administration. The first part consists of eleven chapters or papers by recognized authorities, of which four deal with atomic energy law and administration in the United States, one with the atomic energy approach adopted by the United Kingdom, five with the various forms of international co-operation in this field, and a final paper with a proposal for nuclear power development in Israel.

Part (or "Volume") II, which is, in turn, divided into two parts, is a compilation of the laws and decrees adopted by twenty-five representative countries, accompanied by an introductory, explanatory commentary, which is helpful to an understanding of the legislation itself. In many instances these commentaries constitute short, separate papers of a specialized nature. To select one example, the French legislation is introduced by two brief, but informative, discussions of "Liability for Atomic Incidents in France" by Pierre Lepaulle, and "The Atomic Energy Commission" by Jacques Martin. Part II of "Volume" II reproduces the texts of various multilateral treaties, bilateral agreements and documents relating to the agencies discussed in the papers of "Volume" I. The papers comprising the first part of the volume are of a high order of scholarship, and provide within a space of 277 pages a highly useful monograph on nuclear energy legal and administrative problems.

The volume opens, appropriately, with Mr. John Palfrey's study of "Atomic Energy Law in the United States," which is not only an exposition of its development, but also a critical reappraisal of Congressional, Executive and public attitudes then dominant. This is followed by Mr. William Krebs' survey of "Activities of U. S. State Governments in Atomic Energy Affairs," dealing with the efforts of the then 48 States to assume regulatory responsibilities in the protection of the public from radiation hazards. Mr. Krebs' exposition has been overtaken by a 1959 amendment to the Atomic Energy Act and developments thereunder, authorizing the exercise by the several States of regulatory functions previously within the exclusive province of the Atomic Energy Commission. One of the best, as well as most concise, papers in the collection is Mr. Arthur Murphy's treatment of "Liability for Atomic Accidents and Insurance against Them," a subject which continues to receive a high priority of consideration on the national as well as international level. Recognition that the consequences of nuclear catastrophes could not be handled satisfactorily on a purely local basis has already led to the conclusion, on July 29, 1960, of an OEEC Convention on Third Party Liability,¹ and the formulation of further drafts by the IAEA on this subject as well as on the liability of nuclear ship operators.

The subject of "Patents on Inventions in the Field of Atomic Energy" is competently handled by Mr. Oscar Ooms, a distinguished patent lawyer, whose study explains, while wryly lamenting, the legislative motivation which introduced into the law a departure from traditional treatment of patent rights. Mr. Blom-Cooper's survey of United Kingdom atomic energy legislation furnishes a provocative contrast to the esoteric course which United States concepts of controls and restrictions gave to the development of this new source of energy, so well described by Mr. Palfrey.

Five of the remaining six chapters are devoted to a review of the principal agencies and arrangements for international co-operation in the peaceful use of atomic energy. EURATOM is lucidly discussed by Michel Gaudet; The OEEC European Nuclear Energy Agency, by Pierre Huet; The Statute of the International Atomic Energy Agency, by Max Isen-

¹ Reprinted in 55 A.J.I.L. 1082 (1961).

bergh; the work of that Agency's First General Conference, by Jerry Weinstein; and the United States bilateral program by Robert Von Mehren. In the final chapter—which this reviewer found out of place in the publication—Mr. Philip Sporn discusses, in the light of current conventional fuel costs and other factors, a suggested program for nuclear power development in Israel.

Unhappily, as Mr. Marks' penetrating introduction attests, the dizzying "Progress in Nuclear Energy" only accents more sharply the defeated hopes and frustrations which history has left in the wake of efforts to achieve sanity in the international control of nuclear weapons. With the stakes so high for all nations and the menace to mankind so real, success or failure in resolving this maddening dilemma of our generation may well be the measure of man's right to continued existence.

ALWYN V. FREEMAN

La Corte di Giustizia delle Comunità Europee. By Alessandro Migliazza. Milan: Dott. A. Giuffrè, 1961. pp. 459. Index. L. 2600.

The Court of Justice of the European Communities and its predecessor, the Court of Justice of the European Coal and Steel Community, have been, since their creation, an irresistible center of attraction for scores of scholars in the field of law and its sister disciplines. Obviously, a study of a court of such stature may be approached from a wide range of perspectives. Professor Migliazza, who holds a chair at the University of Urbino, has chosen to remain in the rarefied atmosphere of the strictly juridical end of the spectrum and has focused chiefly on the systematic and conceptual aspects of his subject, rather than on the problems of ideology, policy and, last, but not least, political prudence facing the statesmanship of the Court. As a result his book might appear to some readers of the JOURNAL to be dry and scantily nutritious, if not indigestible, fare. Actually, however, the rigorously analytical and technical framework of his study serves to underscore the institutional singularity and the functional uniqueness of the tribunal in question, as well as the variety of responsibilities which are entrusted to its judicial wisdom.

After an introductory chapter centering on the general characteristics of the Court, Professor Migliazza analyzes the nature and categories of its functions and the ambit of its jurisdiction in general (Chapters II and III). The Court is a court of limited jurisdiction and, according to the author, the contours of this jurisdiction are determined by resort to two basic procedural notions: *action* and *controversy*. In other words, the scope of the Court's adjudicatory functions and powers is the composite result of a catalogue of specified actions enumerated in the three governing treaties, and of a circumscribed group of controversies, likewise to be gleaned from the organic instruments. The questions of who are the proper parties, what kind of relief is available, and what are the substantive and procedural requirements for resort to the Court are examined in detail in the light of the fundamental bifurcation (Chapters IV and V). The presentation then

turns to the procedure before the Court, including the process of proof (Chapters VI and VII). A separate chapter is devoted to proceedings for annulment of unauthorized acts performed by the Community organs, a jurisdiction which is roughly comparable to that traditionally exercised by the Anglo-American courts upon a writ of certiorari and which, at least so far, has been the mainstay of the work of the Court. This discussion, which forms the longest chapter in the book, is followed by an analysis of the rôle and attitudes of the Court in the interpretation of the governing organic treaties. The concluding portion analyzes the varying position of the Court vis-à-vis the other governmental organs in each of the three Communities and its status in the legal systems of the individual Member states.

As this account of the content of the work indicates, the author has endeavored to present a comprehensive, systematic and doctrinal analysis of the legal status and functions of the Court. He has taken careful account of the emerging decisional law as enshrined in the mounting number of opinions handed down by the Court¹ and of the copious Italian and foreign literature on his topic. Scholars interested in, and practitioners faced with, problems of that sort will certainly benefit from the author's careful and penetrating, though often quite formalistic, exegesis.

STEFAN A. RIESENFELD

Fragen der Nichtigkeits- und Untätigkeitsklagen nach dem Recht der Europäischen Gemeinschaft für Kohle und Stahl. By A. Bonaert, F. M. Frowein, J. Galland, M. J. R. Houben, F. Michotte, H. A. Wieacker. Frankfurt-am-Main: Vittorio Klostermann, 1961. pp. 136. DM. 18.50, paper.

The Treaty establishing the European Coal and Steel Community grants Member states and enterprises the right to contest administrative acts of the Community (suit for annulment) and to seek declaratory relief when the Community institutions have failed to act in violation of a treaty mandate (suit for inaction). The present study by a group of well-known European lawyers undertakes to review these treaty provisions in the light of the case law of the Community's Court of Justice.

The study is in five parts. First, the authors inquire into the nature of the decisions of the High Authority, the Community's executive organ, which may be subject to a suit for annulment; the inquiry is important because the treaty gives enterprises a much narrower right of appeal if the decision were "general," i.e., in the nature of general legislation, than if it were "individual," i.e., an administrative act directly concerning them. The second and third parts of the study review two of the four grounds on which an appeal may be based: violation of procedural requirements and misapplication of power (*détournement de pouvoir*). The fourth part of the study concerns the Court's power to review the economic facts and circumstances underlying the contested administrative act, that is, the question whether the Court may only review the lawfulness of the act or may

¹ See note reviewing published decisions of the Court in 56 A.J.I.L. 724 (1962).

make an independent evaluation in the exercise of *pleine juridiction*. The last part reviews the cases in which a suit for inaction has been brought.

This volume is No. 15 of the same series of publications of the *Institut für Ausländisches und Internationales Wirtschaftsrecht* in which Professor Steindorff's now classic comparative analysis of the suit for annulment appeared in 1952.¹ In this respect, the present volume is a supplement, re-evaluating prior analysis in the light of the case law. This is done in the study by subdividing each part into (1) an account of the relevant cases, and (2) a critical evaluation. The first objective has been accomplished well: while not as detailed as some studies of individual cases, the book brings together all cases decided by the Court and, in addition, provides a list of the cases, arranged by subject matter, in its Appendix II. The second objective, however—the evaluation of the cases—has resulted in little that is new when compared with existing literature.² Thus, the analysis and criticism of the Court's restrictive interpretation concerning the right of enterprises to appeal general decisions (pp. 28–30) and the analysis of misapplication of power as a ground for appeal (pp. 63–65)³ merely summarize earlier comments. In connection with the interesting *Meroni* case (p. 70),⁴ one would have wished for more than the conclusion that the Court did not consider misapplication of power because of the decision's invalidity on other grounds (itself debatable), for instance, at least some indication whether there exists an answer under the treaty to the question of improper delegation of power.⁵ Finally, the study lacks any definition of the term "enterprise," which is given a technical meaning in the treaty for purposes of the right of appeal, even though this important question has long been the subject of scholarly debate in Europe.⁶

The foregoing observations are not intended to depreciate the value of this volume as a reference book. As such it fills a need and is of value especially because of its two appendices, of which the first represents an analytical survey of the jurisdiction of the Court in suits for annulment

¹ Steindorff, *Die Nichtigkeitklage im Recht der Europäischen Gemeinschaft für Kohle und Stahl* (1952).

² See, particularly, Bebr, "The Development of a Community Law by the Court of the European Coal and Steel Community," 42 *Minnesota Law Rev.* 845 (1958); Daig, "Die Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaft für Kohle und Stahl in den Jahren 1956–1957," 13 *Juristenzeitung* 204 (1958); Lagrange, "Le Rôle de la Cour de Justice des Communautés Européennes tel qu'il se Dégage de sa Jurisprudence," 1961 *Revue du Marché Commun* 33; Stein, "The European Coal and Steel Community: The Beginning of Its Judicial Process," 55 *Columbia Law Rev.* 985 (1955); Stein, "The Court of Justice of the European Coal and Steel Community: 1954–1957," 51 *A.J.I.L.* 821 (1957); and the recent study by Buergenthal, "Appeals for Annulment by Enterprises in the European Coal and Steel Community," 10 *A. J. Comp. Law* 227 (1961).

³ See Stein and Hay, "Legal Remedies of Enterprises in the European Economic Community," 9 *A. J. Comp. Law* 375, 384–386 (1960), and literature cited there.

⁴ Case No. 9-56, 4 *Sammlung der Rechtsprechung des Gerichtshofes* 9 (1958).

⁵ Stein and Hay, note 3 above, at 385, notes 55 and 56.

⁶ E.g., Steindorff, "Montanfremde Unternehmen in der Europäischen Gemeinschaft für Kohle und Stahl," 8 *Juristenzeitung* 718 (1953); Schüle, "Grenzen der Klagebefugnis vor dem Gerichtshof der Montanunion," 16 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 227 (1955–1956).

and inaction, and the second reproduces subject matter, names of parties, and holdings of the cases decided by the Court. With respect to both appendices, however, it would have been useful to have references to the pages of the text where the topic or case is discussed.

PETER HAY

Le Statut Personnel des Étrangers Ennemis et la Convention de Genève du 12 Août 1949 Relative à la Protection des Civils. By Roland Seeger. Zofingue, Switzerland: Éditions Ringier & Co. S.A., 1958. pp. 166. \$4.00; £1 8s.; N.Fr. 18.20; DM. 15.40; Sw. Fr. 16.80; S. 100.

While much has been written with regard to the status of enemy civilians under belligerent occupation, Dr. Seeger's scholarly work is concerned with a hitherto little-touched field—the status of the enemy alien found in the territory of a belligerent at the outbreak of war. In his monograph devoted to this problem the author reviews the evolution of the applicable municipal and customary international law prior to 1949 and then discusses the changes brought about by the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹ a novel piece of international legislation to which more than 75 nations have already bound themselves.

The author points out that, prior to 1914, customary international law did not include a norm permitting the mass internment of enemy aliens during the course of a war, the last occasion of such an action having been the general internment in 1803 of British citizens resident in France, which Napoleon had ordered solely as a reprisal; and that this situation had, in effect, been affirmed by occurrences at the 1907 Hague Conference. On the other hand, the right of mass expulsion of enemy aliens (or the right of voluntary departure) had been long recognized and frequently exercised. Seeger ascribes the reversal of these two practices which occurred during both World Wars to two social changes: the great increase in the number of resident aliens; and universal military training, which made every male enemy alien of military age a potential enemy combatant. He finds that the pertinent provisions of the 1949 Civilians Convention (Articles 35–46), while constituting an over-all improvement, contain serious defects. Thus, he notes that, although Article 35 purports to authorize voluntary departures by enemy aliens upon the outbreak of war, it permits the belligerent Power of residence to prohibit such departures when it considers them to be “contrary to the national interests”—an undefined term which he believes, with considerable justification, gives the state concerned a blank check. (In the working draft used by the 1949 Diplomatic Conference, the right to prohibit departure depended upon “urgent grounds of security,” a term which Seeger prefers. This reviewer considers the two terms equally susceptible of misuse.) On the other hand, he believes that the provisions of the convention (Article 42) limiting internment to those cases where “the security of the Detaining Power makes it absolutely necessary,” while not a forward step in international law, is a definite improvement over the practices followed by the belligerents in the two World Wars.

¹ 6 U. S. Treaties 3516; 75 U.N. Treaty Series 287; 50 A.J.I.L. 724 (1956).

Dr. Seeger complains that frequently, in drafting international legislation, well-recognized principles are included in general, or even vague, terms which are not clearly defined as they would be in municipal statutes—a fault which he finds present in the Civilians Convention. This is a valid criticism, but unfortunately, all too often, only by resorting to the use of some undefined generalities is it possible to obtain agreement on a multilateral treaty.

Dr. Seeger has made a searching analysis of war-created problems concerning the status of enemy aliens in the territory of a belligerent and a valuable contribution to their solution.

HOWARD S. LEVIE

International Law. By U.S.S.R. Academy of Sciences, Institute of State and Law. English translation by Dennis Ogden. Moscow: Foreign Languages Publishing House; New York: Four Continent Book Corp., 1961. pp. 477. \$2.25.

"American jurists," among whom "are to be found the most energetic defenders of imperialism" (p. 56), will welcome the opportunity to acquaint themselves with this standard Russian text, hitherto available only in the original Russian or in translations into other foreign languages. The volume has been twice translated into German, into Rumanian and Bulgarian, and doubtless into other languages as well. Since the original Russian version was reviewed by Professor Hazard in this JOURNAL, Vol. 52 (1958), pages 804–807, it should not be necessary to dwell upon the contents of this volume, other than to warn readers that they may have some difficulty in recognizing some familiar legal landmarks.

The price of this volume undoubtedly makes it the cheapest general textbook on international law available in the English language. The book can be expected to have wide appeal in countries where scholars, students, libraries, and practitioners do not have the means of buying the existing, generally expensive texts in English. Is it too much to hope that the common-law world might respond with a book of equally low price and ample proportions, calculated to present an objective and accurate view of international law?

R. R. BAXTER

Dag Hammarskjöld and Crisis Diplomacy. By Richard I. Miller. New York: Oceana Publications, 1961. pp. 344. Index. \$2.25, paper; \$6.00, cloth.

Dag Hammarskjöld: Custodian of the Brush-Fire Peace. By Joseph Lash. New York: Doubleday and Co., 1961. pp. 304. Index. \$4.50.

These two books, though both devoted to the former Secretary General of the United Nations and his work, have different purposes and are of different qualities.

The Miller book is obviously a hurry-up job, done under considerable pressure in response to current public interest in Mr. Hammarskjold and his diplomatic activity as the result of the Congo crisis. It serves a useful purpose for the person who wishes to have in convenient and compact form the story of Dag Hammarskjold's activities as Secretary General. For the serious scholar it suffers from being essentially a scissors-and-paste job, relying heavily on newspaper reports and information picked up in United Nations offices and corridors. It does not have the touch of authentic detail or thoughtful analysis based on access to authoritative sources. Rather one gets the impression of a public information assignment, well done on the whole.

It is not surprising, in view of the nature of the book and the apparent haste with which it was done, that there are some errors of fact and some questionable generalizations. These detract from the book's value, but they are not so serious as greatly to reduce its usefulness to one who is primarily interested in having a detailed and fairly readable factual survey of Hammarskjold's work. It should be regarded more as a factual reference book than as a reliable guide either to Hammarskjold's conception of his office or the manner in which he discharged it.

The Lash book is of a quite different quality. This is a study in depth, both of the man and his work. It is based on extensive interviews with the former Secretary General and his collaborators and friends. The author is not only sympathetic with his subject, but the subject apparently had great confidence in the author and confided to him thoughts not widely shared. These private conversations could not be documented, but they help give the book the quality of authority. One cannot read the Lash book without feeling that it gives an excellent understanding not only of Hammarskjold's conception of the office but of Hammarskjold himself. In fact the author's great achievement is in weaving together the stories of his life and his major life work with such skill and understanding as to give complete unity to the whole.

This is not a critical work. The author has not felt called upon to subject to critical analysis some of Hammarskjold's conceptions, such as his analogy between the office of President and that of Secretary General, which are undoubtedly open to serious question. The sole purpose of the book is to illuminate Hammarskjold's views regarding the office of Secretary General and his manner of filling it. This he does with great clarity and style. The book has many striking statements, many of them direct quotes. Only one will be given here. In a message to the Geneva United Nations staff in 1953, Hammarskjold used these words which go far to clarify his high conception of the office to which he had just been called:

Countries are arming in order to be able to negotiate from a position of strength. The Secretariat, too, has to negotiate, not only in its own interest, but for the cause of peace and a peaceful development of our world. The weight we carry is not determined by physical force or

the number of people who form the constituency. It is based solely on trust in our impartiality, our experience and knowledge, our maturity of judgment. (p. 50.)

LELAND M. GOODRICH

The International Status of the United Nations. By Guenter Weissberg. New York: Oceana Publications, 1961. pp. xii, 228. Index. \$7.50.

The author's primary concern is not with the question of the status, that is the international juridical personality, of the United Nations. This question was answered affirmatively and unanimously by the International Court of Justice. His purpose is rather to demonstrate the range of United Nations activities which can be understood better with, or which cannot be understood at all without, the aid of the concept of international juridical personality. He surveys accordingly the impressive number and variety of agreements entered into by the United Nations with states and other entities, its action in Korea ("one of the major nuggets in the development of the international legal personality of the United Nations" (p. 29)), and Egypt, particularly in connection with UNEF, its privileges and immunities, and finally its capacity to press international claims. Developments in these areas, whether based on explicit provisions of the Charter or custom, are harnessed by the author to support his conclusion that the United Nations is possessed of "a high degree of international legal personality."

It could be easy to take issue with some of the points made in the book. In discussing the Korean experience he appears to be so keen on exploiting it as evidence of the United Nations' capacity to apply collective military measures and to make peace, that he fails to distinguish between the propagandistic use of the United Nations ("United Nations Command") and the actions which juridically can and should be attributed to the United Nations ("Unified Command"). Inspired by the best motives, he suggests in a different context that the United Nations "may become a member of the Permanent Court of Arbitration," which is doubtful, and "that the International Court of Justice cut through the legal maze, and consider an organization such as the United Nations a State for the limited objective of Article 34(1) of its Statute" (p. 200). No doubt this is a praiseworthy, but hardly realistic, proposal.

It is safe to assume that Dr. Weissberg was aware that on occasion he overshot the bounds of legal analysis. This is no accident, but part of the design, for to him the concept of personality is also "an ideological principle"; properly exploited it may allow "the Organization to enter areas as yet unexplored" (p. 211). In short, it is a principle of future growth and not merely a hallmark of growth achieved. The book as a whole shows good craftsmanship and promise of scholarly work in the

future. It is a competent survey and analysis of the pertinent literature and a convenient starting point for further thought on the subject.

LEO GROSS

European Yearbook, 1959. Volume VII. (Published under the Auspices of the Council of Europe.) The Hague: Martinus Nijhoff, 1960. pp. xx, 800. Index. Gld. 49.75.

The editors of this latest volume of the *European Yearbook*, Dr. B. Landheer and W. Horsfall Carter, have again produced what is unquestionably the most comprehensive and generally useful collection of materials bearing upon current developments in the European unity movement. Following previous patterns, this number contains seven articles of a scholarly nature, succeeded by eleven chapters containing chronologies, summaries of activities, texts of resolutions or agreements, lists of publications, and other information on each of the principal European organizations. There is also a bibliographical section of 29 pages, including reviews.

International lawyers will find M. René Cassin's discussion of the European Court of Human Rights and Mr. Alexander Elkin's examination of the structure and working of the European Monetary Agreement of particular interest. M. Cassin believes that the spirit of collaboration prevalent in Europe affords more room for flexibility in handling human rights problems and more prospect for advancement of the law than does the universal approach through the United Nations, where so many interests and views must be compromised. He sees one hazard in the arrangements for the functioning of the European Court, namely, that in setting it up as a chamber of less than the full Court, with judges drawn by lot for each adjudication, various interpretations of the convention and the law may emerge. He also foresees the possibility that some of the 15 judges elected by the Consultative Assembly, including the president of the tribunal, may never be drawn for an actual sitting, while others may be repeatedly called upon. Although M. Cassin indicates that over 800 appeals had already been made to the European Commission on Human Rights, which must examine all cases for admissibility before they may be taken before the Court, he fails to tell us how many have thus far been referred to the Court or what actions have been taken on them. Notwithstanding this the article gives a fruitful insight into the constitution and functional arrangements for dealing with human rights issues in Europe.

Alexander Elkin provides a penetrating examination of the legal aspects of the structure and working of the European Monetary Agreement. His purpose is to reveal the growth of a treaty system aiming to establish a new type of monetary order in which the binding power of international agreements and the authority of international organizations are called upon to implement and complement national policies. This is a groundbreaking study of the law of international payments.

This volume is substantial testimony to the on-going impetus for community within Europe.

NORMAN J. PADEL FORD

Staatslexikon. Recht, Wirtschaft, Gesellschaft. Volumes 1-6. 6th ed. Edited by the Görres-Gesellschaft. Freiburg im Breisgau: Verlag Herder; New York: Herder Book Center, 1957-1961. Indices. DM. 76; \$21.50 each.

Ever since its first publication in 1878, the *Staatslexikon* of the Görres-Gesellschaft has held a peculiar and highly respected place among German lexicographical works. It was meant to be a Catholic lexicon based upon and applying Catholic doctrine to the problems and questions of state and law, and it has faithfully maintained this tradition up to the present. At the same time it has observed and used strictly scholarly standards and methods in the presentation of views and in the analysis of issues. In fact, there are a great many non-Catholic authors among the contributors to the current sixth edition. The content of the fifth edition of 1932 has been completely revised in the present edition. Moreover, as the new subtitle of the *Staatslexikon* indicates, legal, economic and social problems, as well as questions of sociology and social ethics, are given much greater attention in the present than in previous editions. Indeed, the *Staatslexikon* has grown by now into a veritable encyclopedia of the social sciences. While the fifth edition consisted of only five volumes, the present one will comprise eight volumes, each of them running up to around 1250 columns or 625 pages. So far six volumes have appeared; the two remaining ones are expected to be published within the current year. Professors Clemens Bauer, Frhr. von der Heydte, Heinz Müller, Max Müller and Helmut Ridder are the editors of the volumes.

This reviewer must confine himself to some scanty comments from the point of view of international law and international politics. Since the *Staatslexikon* is not intended to be a legal dictionary, one should not look in it for enlightenment on such questions as one may expect to find discussed only in a legal reference work proper. In particular, he who wants to inform himself quickly on technical issues of international law and is anxious to consult German sources, will better turn to the *Wörterbuch des Völkerrechts*, recently reviewed in this JOURNAL.¹ The chief value of the *Staatslexikon* for those interested in international law and politics, be they experts or laymen, lies indeed somewhere else. First of all, the editors have assembled therein a host of highly instructive articles on fundamental concepts and problems of law and politics, including international law and politics. Secondly, a great many entries—philosophical, historical, geographical, sociological and economic—contain background information indispensable for a clear understanding of current international legal and political affairs.

Of the articles that deal with principal issues, there should be mentioned especially the one on natural law. It is divided into six sections and

¹ See 56 A.J.I.L. 231 (1962).

covers no less than fifty-six columns. One can hardly think of a better introduction to the subject of natural law than that offered in this article. Very elaborate also is the entry on the nature, history and function of law in its positive forms (twenty-eight columns). No less commendable is the discussion of such items as politics, justice, equity, customary rules and general principles of law, and legislation. Other central political concepts and problems are dwelt upon in articles on authority, power, legal and political philosophy. Entries of basic significance that are of particular interest for the student of international law and politics are peace and war, war crimes, foreign politics, nation, nationalism and imperialism. Articles surveying countries or states are foremost among those that supply the international lawyer with useful background information. They cover practically the entire globe. Much attention has also been paid to recent political and economic developments and events, especially those of the postwar period. It is by no means surprising that the political, legal and economic problems that have faced the German people after 1945 are most thoroughly treated (Germany (two hundred and eight columns), Yalta Conference, Potsdam Agreement, Oder-Neisse Line, Occupation, Control Council, Mass Expulsion and Genocide, Nuremberg Trials). These subjects are discussed on the whole in a remarkably sober tone. The American reader will greatly appreciate the entries on the relations between the divided parts of present-day Germany (Berlin, Interzonal Trade, Interzonal Commerce). He will also welcome the abundance of material bearing upon the integration of Western Europe. The article on Europe is fifty-eight columns long.

It would hardly be fair to expect that the authors and editors of the *Staatslexikon* should not have committed any sins of commission and omission. Nevertheless they must be mentioned. First of all, quite a few articles are all too sketchy. To give only two or three examples: In discussing the International Court of Justice and the Optional Clause, the respective authors fail to refer to the practice of adding reservations to the acceptance of the compulsory jurisdiction of the Court. In the entry on peace the treatment of modern pacifism is inadequate. So is the section on the Korean War in the article on Korea. Nor are the dates there stated altogether correct. Secondly, there is sometimes a noticeable lack of co-ordination of substance and views, as in various passages relating to the status and function of war under current international law. More serious are some omissions. There are, strangely, no entries on diplomacy, balance of power in international politics, and intervention, not to mention the omission of special articles on subject matters that are dealt with under other headings as, e.g., the Monroe Doctrine and Pan Americanism (under America), Kellogg Pact (under Briand) and alliances (under collective security). In the latter cases, cross-references could have partly remedied the defects. The listing of foreign, non-German literature in the bibliographical notes is, by and large, satisfactory as far as entries on questions of international law are concerned.

To repeat once more, these critical remarks are by no means intended to detract from the great merits of the *Staatslexikon*. The interest with which

the international lawyer is expecting the last two volumes is the greater, as they will contain most important entries, as, *e.g.*, international law, League of Nations and United Nations.

ERICH HULA

Actes et Documents de la Neuvième Session, Conférence de la Haye, de Droit International Privé, 5 au 26 Octobre 1960. The Hague: Permanent Bureau of the Conference, 1961. Vol. I: *Matières Diverses*. pp. 344; Vol. II: *Légalisation*. pp. 193; Vol. III: *Forme des Testaments*. pp. 180. Indices. Fl. 10 each; Fl. 36, 4 vols.

L'Unification des Règles de Conflits de Lois en Matière de Forme de Testaments. By Alfred E. von Overbeck. Fribourg: University of Fribourg Press, 1961. pp. xviii, 139. Fr./DM. 16.

These books are concerned with the Ninth Session of the Hague Conference on Private International Law which was held in October, 1960. Volume I of the *Actes et Documents* contains the proceedings and miscellaneous documents of the Conference. Volumes II and III each deal with a separate convention, Volume II with the Convention on the Authentication of Documents (*Légalisation*), and Volume III with the Convention on the Form of Wills. At the beginning of each volume is found the draft of a proposed convention, together with an accompanying report which was prepared by a special committee for submission to the Conference. There follows a summary of the discussions that took place during the course of the Conference with respect to each provision of the draft. Then, at the end of each volume, one finds the convention which finally emerged from the discussions and which received the formal approval of the Conference. Almost invariably, a convention in its final form will differ in many material respects from the draft which was originally submitted by the special committee.

This is not the place for a detailed description of the provisions of the two conventions or of the discussions that concerned them. Suffice it to say that the member nations send their best men to the Conference. The discussions are conducted on a high plane and make good reading for any person interested in the subject with which they deal. The United States Observers who attended the Conference in 1956 and again in 1960 profited much from their experience. It is to be hoped that the United States will soon enter into a closer relationship with the Conference so that Americans will be privileged to attend not only the formal Conference sessions but may also have the opportunity to participate in the work of the special committees which are charged with the task of preparing draft conventions for consideration by the Conference.

Alfred von Overbeck is a member of the Permanent Bureau of the Conference. He prepared the basic study for use by the special committee charged with the task of preparing a draft convention on the form of wills. The book under review brings his work up to date. It begins with an excellent comparative study, supplemented by an invaluable statistical

table, of the rules in force in the principal countries of the world. Discussion is next directed to the earlier efforts of the Hague Conference to draft conventions on the form of wills. Then the latter, and major part, of the book is devoted to a consideration of the draft convention that was prepared by the special committee and to the actual Convention on the Form of Wills that was approved by the Conference.

The book is a valuable addition to present learning. Conflict of laws covers an immense and complicated area. No man can hope to deal thoroughly with the subject in all its aspects. There is particular need for a multitude of studies, each of which deals in depth with a relatively narrow question. Von Overbeck's book is a study of this sort. No one who reads it can fail to obtain fresh insights into the conflict of laws problems posed by the form of wills.

The book is further welcome because of its lucid discussion of a significant convention. Perhaps the most remarkable feature of the Convention on the Form of Wills is that it squarely faces the problems that arise when the reference is to a country which is composed of subdivisions with independent systems of law. A reference, for example, to the United States or to the United Kingdom is meaningless for the purpose of ascertaining the law governing the validity of a will. For neither the United States nor the United Kingdom has a unified law on this subject. Instead, reference must be made to the law of a particular subdivision. For this reason, the convention provides that the reference should be to the "place" rather than to the "state" in which a will was executed or in which the testator was domiciled or had his habitual residence. So in the case of a will executed in the United Kingdom, reference will readily be made to the law of England or of Scotland depending, as the case may be, upon where the will was executed or the testator was domiciled or resided. The convention further provides that when the reference is to the law of the country of the testator's nationality and this country does not have a unified system of law, the governing law shall be determined by the applicable rules of that country, and, in the absence of such rules, by the law of the particular subdivision with which the testator had the most vital connection (*le lieu le plus effectif*).

The convention goes to great lengths to sustain the validity of a will. It provides that a will shall be held valid as to matters of form, if it complies with the local requirements of (a) the place where the will was executed, or (b) the country of which the testator was a national, either at the time of the execution of the will or at the time of death, or (c) the place where the testator was domiciled or had his habitual residence either at the time of the execution of the will or at the time of death, or (d) the situs in the case of immovables.

Provisions of this sort are desirable, if the basic conflicts policy is to sustain the validity of wills with respect to matters of form. Such provisions may be undesirable if, instead, the basic policy is to insure, so far as possible, that movables belonging to an estate shall be distributed in the same way and under a single system of law. So, for example, a court of a country

that has adhered to the convention would be compelled to uphold a will as to matters of form by reference, say, to the law of the place of execution, even though the will would be held invalid as to form by the courts of the country, say that of domicile, whose law governs all substantive matters involving the will, as the question of capacity. Uniformity of treatment is best assured by the American rule that the validity of a will, both as to form and substance, is governed by the law of the domicile at death. This law may in turn provide that a will shall be held valid as to form if it complies with the requirements of any one of a number of enumerated States. If a will would be held valid by the courts of the State of the testator's domicile at death, it will also be held valid by the courts of other States. Dr. von Overbeck supports the rule set forth in the convention. This reviewer prefers the American approach. Disagreements are frequent in conflict of laws. This is one reason why it is so fascinating a subject.

WILLIS L. M. REESE

Völkerrecht und Rechtliches Weltbild. Festschrift für Alfred Verdross.

Herausgegeben von F. A. Freiherr von der Heydte, I. Seidl-Hohenveldern, St. Verosta und K. Zemanek. Vienna: Springer-Verlag, 1960. pp. vii, 345. S. 414; DM. 69; Sw. Fr. 70.60; \$16.45; £5 17s. 6d.

European scholars cherish the commendable tradition of honoring the most distinguished members of the profession by the publication of a *Festschrift*. The present *Festschrift* is dedicated to Alfred Verdross, one of the most prominent international lawyers and legal philosophers of our time. The profound influence on current legal thinking which the writings of this brilliant scholar have exercised far beyond the boundaries of his native Austria is impressively attested by the number, nationality and reputation of the authors who have contributed to the present volume.

In the introductory essay, Stephan Verosta surveys and analyzes Verdross' scientific work. In describing the development of his philosophical and legal thought, Verosta brings out very clearly the independent position Verdross has assumed within Hans Kelsen's school of "the pure theory of law." Verosta's sketch is most elaborate on Verdross' earlier writings, in which he was concerned with the theoretical foundation of international law and its status within the legal system as a whole. Verosta pays particular attention to Verdross' doctrine on the general principles of law as a source of international law and to his formulation of the *Grundnorm* (basic norm) of international law. Verosta then turns to a discussion of Verdross' numerous expositions of questions of positive international law, which culminated in his famous textbook on "*Völkerrecht*." He finally also touches on Verdross' later historical writings on Western legal and political thought from classic antiquity up to the present.

Verdross' chief interests are reflected in the contributions to this volume. Out of altogether twenty-five essays, only a few can be mentioned here. Most numerous are those that deal with specific questions of current international law. Herbert W. Briggs discusses "The Incidental Jurisdiction of

the International Court of Justice as Compulsory Jurisdiction," and Paul Guggenheim weighs the question of what legal significance should be attributed to the Connally Amendment. Josef L. Kunz ventures into "The Law of Outer Space," while Georg Schwarzenberger explores the more old-fashioned question of "Legal Effects of Illegal War." Friedrich A. Frhr. von der Heydte tries to clarify the meaning of "The Principle of Good-Neighborliness in International Law," and Ulrich Scheuner raises the issue of "Norm-Creation by International Organizations." A second group of essays concentrates on theoretical problems of international law. R. L. Bindschedler, Hans Kelsen and L. Pitamic resume the discussion on the *Grundnorm*, and the late Hans Wehberg analyzes on an historical basis the principle of *Pacta sunt servanda*. Luis Legaz y Lacambra devotes his contribution to an examination of the notion of "Security in International Law." G. I. Tunkin's chapter on "The Rôle of International Law in International Relations" is an interesting testimonial to current trends in the Soviet theory of international law. A third group of chapters dwells on problems pertaining to the history of political and legal philosophy. The essays are supplemented by a list of Verdross' scientific publications.

ERICH HULA

Frank B. Kellogg and American Foreign Relations, 1925-1929. By L. Ethan Ellis. New Brunswick, N. J.: Rutgers University Press, 1961. pp. xii, 303. Index. \$7.50.

In chronicling this period of American foreign policy, which to him "frequently appears to be one of hesitancy and vacillation," this historian has made use of the papers, diaries and scrapbooks of the Secretary of State, the open archives, the papers and reminiscences of many officials associated with him, and the contemporary press. Accurate and detailed accounts of negotiations are constantly interlarded with the intimate views, reactions and irritations of the major and minor actors involved. The narrative of public events is thus designed to picture Frank B. Kellogg as a quick-tempered, devoted practitioner operating without support from the President in a period when the country suffered from political inability to face the realities of international life. The dual emphasis was confusing, at least to one who knew both the man and the events at the time. With human addiction to personalia, this reviewer found himself reading a chapter to see how the man was acting and then having to go over it again to see how the affair came out.

Kellogg did not have a happy administration. With an apathetic President offering no, or negative, guidance on one side, and Senator William E. Borah ensconced as dominating Chairman of the Committee on Foreign Relations, able and willing to scotch anything that did not appeal to his egotistic mind on the other side, Kellogg was inevitably cautious. Whatever impression the duality of the relation may make on the activities of the period, Mr. Ellis at the end of each chapter summarizes their significance with admirable clarity.

The adjustment of matters with revolutionary Mexico in 1925-1927 through the perceptive efforts of Ambassador Dwight W. Morrow set the pattern for the subsequent settlement. The *coup d'état* of Emiliano Chamorro in Nicaragua in 1925, following withdrawal of the United States Legation Guard, began a series of revolutionary events in which the presidency changed hands several times. Secretary Kellogg enlisted Henry L. Stimson as personal representative of the President to bring about a free election in 1928, by an intervention which excited considerable Latin American criticism. Both of those matters were complex problems, left in the hands of Morrow and Stimson, to whom the author in one place says the Secretary "virtually surrendered the control of both policy and operations" and in another calls them "proconsuls." Even more tangled were conditions in China, disrupted by provincial generals, insistent on abolishing the "unequal treaties" and gaining tariff autonomy. The Tariff Treaty of July 25, 1928, was the definite product of the period, concluded with the Nanking, rather than the Peking, government. Efforts to deal with extra-territoriality, with or without the United Kingdom, and other matters are recorded in order of time largely in terms of the persons involved.

Secretary Kellogg regarded the Treaty for Renunciation of War (the Briand-Kellogg Pact) as his masterpiece in statesmanship, and the author gives a clear account of its evolution, though he avers that it was doomed "to failure within his own lifetime." An undoubted failure was the Coolidge Conference on Limitation of Naval Armament in 1927, on which Kellogg labored with all diligence as rigidly as the British. On the broader stage of the Preparatory Commission, the United States' antipathy to the League of Nations was expressed in the Secretary's aversion in March, 1927, to giving "too much of an endorsement to League supervision." In his other bout with the League, on accession to the Permanent Court of International Justice on Senate terms, he meticulously sought, with the aid of Elihu Root, to get satisfaction for the Senate. Settlement of war debts fell in Kellogg's tour of duty, Congress having laid down rigid conditions of payment which in every case were unrealized. Mr. Ellis tells the French story as the Secretary of State had to work it out to a conclusion.

The Coolidge Administration which Frank B. Kellogg served as Secretary of State was a do-nothing régime in foreign relations, and Senator William E. Borah was Chairman of the Committee on Foreign Relations throughout his tenure. With those two handicaps, Kellogg perhaps did not do much, but those things he did do, have not had to be undone.

DENYS P. MYERS

BRIEFER NOTICES

Financing International Organization: The United Nations Budget Process. By J. David Singer. (The Hague, Martinus Nijhoff, 1961. pp. xvi, 185. Index. Gld. 14.50.) This monograph is the only full-dress study of the process by which the United Nations sets its budget and appropriates its funds. The book therefore is a real contribution to knowledge. It concen-

trates on the way in which the budget is formed and the multiple influences from the Secretariat departments, the Secretary General and his office, the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee of the General Assembly. Thus, it emphasizes administrative policy issues within the United Nations framework.

Because Singer deals mainly with the period from 1945 to 1955, his monograph contains little insight into the present financial crisis of the United Nations and has little to say about the legal and political effects of the refusal on the part of Member states to contribute funds to the operational programs of the international organization. These effects, which have special interest to the international lawyer in view of the Advisory Opinion of the International Court of Justice,¹ and the whole problem of securing adequate finances for the United Nations deserve a great deal more study than they have had so far.

Singer generally regards the budgetary process as administratively satisfactory, but criticizes the cautious rôle of the Advisory Committee, the passiveness of the Secretariat and the penuriousness of governments. Only this last point is incontrovertible, for it can be argued that the Advisory Committee has beneficially refrained from attempting to become an organ of unlimited competence rather than a specialized arm of the General Assembly. Furthermore, there is much evidence to show that the Secretariat exercises very considerable influence during the examination and appropriation phases of the budgetary process in the Advisory Committee and the General Assembly.

LEON GORDENKER

Annual Review of United Nations Affairs 1960-1961. Edited by Richard N. Swift. (New York: Oceana Publications, 1961. pp. xvi, 207. Index. \$6.00.) This latest version of the useful volume, *Annual Review of United Nations Affairs*, emphasizes two themes: Africa, and the question of the Secretary General's authority. Between them they aptly tell the story of the United Nations in 1960-1961. It is interesting, and not a little depressing in retrospect to read Andrew Cordier's description of the Secretary General as a dynamic and highly active force internationally. Mr. Hammarskjöld was a vital link in the whole multilateral scene between organs, factions and individual countries. It is depressing only because the momentum of that period is, at least for the time being, lost, with untold cost to who knows what sectors of the peace. (One notes with astonished admiration that Mr. Hammarskjöld visited approximately 75 of the then 99 Member states of the United Nations.) William Jordan of the Secretariat reminds the reader of the milestone reached in 1960 with the "Declaration on the Granting of Independence to Colonial Peoples." He supplies a not always remembered reminder of the rejection, by the Afro-Asian sponsors of the resolution, of the various attempts of the Soviets to substitute even more extravagant language than that eventually included in the resolution.

It is in Oscar Schachter's chapter on legal issues that Hamlet finally comes on stage in the shape of the Congo affair; there is something wholly unequivocal about Mr. Schachter's assertion that "The heart of the Congo operation was the use of force by an international organization." From the standpoint of the student of international law, Mr. Schachter develops a highly useful commentary on the legal characteristics of the United Nations' actions in the Congo. He reaches the clear conclusion "that the Council was exercising its peremptory authority under Chapter VII of the Charter." But given the ambiguities, including the lack of specific findings under Article 39, the United Nations found itself using force, but not

¹ Reprinted above, p. 1053.

employing such force in the sense of enforcement measures and sanctions provided for in the Charter.

But in the 1960's the problem was to maintain law and order. A stronger case than has so far been made publicly can well be advanced for both the legal propriety and the political correctness of the basic decisions that involved the United Nations in that unhappy affair.

LINCOLN P. BLOOMFIELD

The Council of Europe: Its Structure, Functions and Achievements. 2nd ed. By A. H. Robertson. (New York: Frederick A. Praeger, 1961. pp. xv, 288. Index. \$9.00.) This is a revised and up-dated edition of Dr. Robertson's authoritative work on the Council of Europe. The work retains the treatment and major conclusions of the first edition,¹ confining itself to the addition of new or enlarged activities of the Council. As such the new edition is even more indispensable to students of European integration and international organizations than its predecessor.

Of special interest for the lawyer is the new and detailed treatment of the operation of the Conventions on Human Rights, the work of the Human Rights Commission and the first cases to be brought to the European Court of Human Rights. A good deal of important detail is also given with respect to the European conventions dealing with establishment, peaceful settlement, extradition and patents.

The value of this work is enhanced by the fact that Dr. Robertson makes no sweeping claims for the impact of the Council of Europe and rigorously eschews advocacy in favor of description.

Der Parlamentarische Charakter Europäischer Versammlungen. By Dietrich Sperling. (European Aspects, Series C, No. 6. Leiden: A. W. Sijthoff, 1961. pp. 80. Index. Fl. 5.25.) This modest work is primarily a factual compilation of the legal basis and evolution of seven European parliamentary assemblies, so designed as to determine the degree to which they depart from the traditional norms of the international conference and approach the practice of national parliaments. On the basis of legal competences and political practices, the author concludes, not unexpectedly, that the European Parliamentary Assembly is the only body which really resembles a national legislature. He accounts for this, not primarily in terms of constitutional norms or the socio-political homogeneity of the members, but by pointing to the functional specificity of that body, acting in a framework of government policy already committed to integration.

ERNST B. HAAS

Recognition of Communist China? By Robert P. Newman. (New York: Macmillan Co., 1961. pp. xii, 318. Index. \$1.95, paper; \$4.95, cloth.) Mr. Newman presents a dispassionate examination of the complex and frequently impassioned issue of whether the United States should accord diplomatic recognition to the Chinese Communist regime. Presenting his case before the "Court of Reason," he assays the moral, political, and legal considerations that either support or challenge the established American policy. In this regard, he asserts that the burden of proof is on those who favor recognition. In general, moral considerations support the conclusion that the established policy is correct and that recognition is unwarranted. However, both political considerations and international law and precedent justify immediate recognition of the Communist regime, with or without its guarantee of reciprocity or renunciation of its claims to sovereignty over Taiwan.

¹ Reviewed in 51 A.J.I.L. 448 (1957).

Although his examination of the international legal rules and precedents is limited to twenty pages, it is refreshing to note that the consideration of legal rules and precedents is not neglected entirely. He finds that "Chen and Lauterpacht, and all other authorities on international law" emphasize effective control of territory as the fundamental, if not the only criterion, for recognition of governments, and that most international lawyers favor recognition of the Communist regime (pp. 252, 260).

It is instructive to note the author's outspoken criticism of the State Department leadership. Instead of guiding American policy in the direction of a rational policy, the responsible officials (primarily at the top levels) fan the flames of hostility and chauvinism. Official policy, predicated on the belief that the Chinese Communists are a passing phenomenon, is not founded on reality (pp. vii, 286).

Although all readers may not agree with the author's interpretations or conclusions, his attempt to assess the problem objectively is welcome. Notwithstanding the book's merit, this reviewer was disappointed with the inadequate citations. Over three hundred references are listed; however, all page citations for the numerous and occasionally extensive quotations are omitted.

DON C. PIPER

Intervention. By Isidro Fabela. (Publications de la Revue Générale de Droit International Public, Nouvelle Série, No. 2. Paris: Editions A. Pedone, 1961. pp. 237. Index.) It is a pity that Dr. Fabela, a former Judge of the International Court of Justice, has attempted to write a scholarly book and a propagandistic pamphlet all in one volume. The result is unlikely to satisfy either the serious reader or the *aficionado* of *anti-Yanqui* tracts.

The documentary parts of the book provide the student of international law and relations with a compilation of the views of European and Western Hemisphere publicists on the right (or lack of right) of one sovereign state to interfere or intervene in the affairs of another. The author has added his own approving or disapproving comments to most of the extracts or summaries. He misses no opportunity to stress that in his view "the law condemns a proven act of intervention" (p. 21). Fabela charges that modern diplomacy has placed at the disposal of the stronger states new means of interfering in the affairs of the states "which are currently called under-developed" (p. 33). He decries "financial imperialism" as well as other forms of intervention, and pours out his wrath against the United States, which he accuses repeatedly as an unregenerate practitioner of all manners of intervention.

ABRAHAM M. HIRSCH *

American-French Private International Law. 2nd ed. By Georges R. Delaume. (Bilateral Studies in Private International Law, No. 2. New York: Oceana Publications, 1961. pp. 221. Index. \$7.50.) The series of bilateral studies undertaken by the Parker School of Foreign and Comparative Law is a real contribution to the growing interest in the international transaction. While not deeply analytical, the ten volumes are a useful tool in investigating the day-to-day private law problems that arise between citizens of the United States and the country concerned. The cover-to-cover revision of the American-French study by Dr. Georges R. Delaume of the Legal Department of the International Monetary Fund is worthy of special note. The wealth of material available makes this the most substantial of

* U. S. A.I.D. Mission to Ceylon, Colombo. The views expressed are those of the reviewer and not necessarily those of the Agency for International Development.

all the studies. References are complete and up to date. One third of the book is devoted to what the author terms "the Establishment Climate" constituted by treaties, including the recently promulgated Convention of Establishment of November 25, 1959.¹ Problems involving determination of nationality, the treatment of aliens, taxation, and exchange control receive succinct textual treatment. This part of the volume is a good reference for instructors teaching a course from the casebook on *International Transactions* by Katz and Brewster. The thumbnail sketches of French legal institutions are, however, only helpful to the beginner.

Part II is devoted to conflict of laws and the topics chosen are those typically found in the field, including domicile, marital property, domestic relations, inheritance, contracts, corporations and judicial assistance. The author does not purport to develop any systematic approach to the troublesome issues. Indeed, it has been suggested that the bilateral concept of these studies does not offer a very promising framework for the analysis and development of basic questions of conflicts law.² Nevertheless, the bilateral treatment does make a special contribution in its emphasis upon the substantive law of the two countries. Choice-of-law problems cannot adequately be dealt with without the knowledge of local institutions and doctrine supplied by this series.

GORDON B. BALDWIN

The Conflict of Laws: A Comparative Study. By Ernst Rabel. Vol. II. 2nd ed. prepared by Ulrich Drobnig. (Michigan Legal Studies Series. Ann Arbor: University of Michigan Law School, 1960. pp. xlii, 716. Index.) The second volume—*Foreign Corporations, Torts, and Contracts in General*—of Rabel's monumental treatise, *Conflict of Laws: A Comparative Study*, was out of print for many years. The production of a second edition of the volume which was originally published in 1947 has brought the calamity to an end. As with the new edition of the first volume,³ Dr. Ulrich Drobnig of the *Max Planck Institut für Ausländisches und Internationales Privatrecht*, Hamburg, former Research Associate, the University of Michigan Law School, was entrusted with the task of re-editing. Again, alteration of the text proper was to be avoided as far as possible and inclusion of new material limited to the addition of new citations and illustrations. The added materials cover publications up to July 1, 1956, but developments up to January 1, 1959, have also been taken into account.

The editing has been done with the same care and skill which could be noted for the editorial work on the first volume. Availability of an edition referring to materials up to 1958 (inclusive) is most helpful. How to keep Rabel's classic up to date in an adequate way, however, remains an unsolved problem. Better ways can be thought of than waiting for exhaustion of the stock of the latest printing.

KURT H. NADELMANN

Personal Responsibility and the Law of Nations. By Elizabeth Thorneycroft. (The Hague: Martinus Nijhoff, 1961. pp. xii, 87. Index. Gld. 8.) As a tract for the times, in which the search is for "world peace through law," this short study takes international sanctions as the area for development, and proposes a new offense, international delinquency, and a psycho-legal remedy for it. According to this proposal, charges of "reckless and unwarrantable defiance of international obligations" could be brought against a government official in a Court of International Delinquency by

¹ 11 U. S. Treaties 2398; T.I.A.S., No. 4625; reprinted below, p. 1160.

² Yntema, review of the first edition, 8 A. J. Comp. Law 375 (1959).

³ Reviewed in 54 A.J.I.L. 206 (1960).

representatives of other governments, of international corporations, or by private persons. The court, modeled after the Permanent Court of Arbitration, and working in conjunction with a *parquet*, would be empowered to recommend to the states that the offender be declared *persona non grata*, in effect making him an international outlaw in that he would no longer be recognized by them as the representative of his state for the purpose of conducting international relations. It is argued that such ostracism would have the beneficial effects of focusing responsibility for international delicts upon decision-makers, providing a new sanction for a legal system which is deficient in effective sanctions short of force, and of giving impetus to the vitiation of the concept of sovereignty in favor of the development of the international responsibility of individuals.

Although no legal impediment to adoption of this proposal is seen, the author is not unaware of certain conspicuous flaws in the scheme, notably the fact that the complexity of the decision-making process in modern government militates against the attribution of responsibility for a given policy decision to any one official, not excluding the effective head of the government. This obstacle to serious consideration of the proposal is implicit in the attempt, in the appendix, to show how legal proceedings on charges of international delinquency could have been brought against government officials in such international crises as the Russian intervention in Hungary in 1956 or "McCarthyism" in the United Nations and its Agencies." Despite the limits imposed by political reality, this book is of interest as affording an imaginative solution to the problem of control of violations of international law.

ALONA E. EVANS

International Enclaves and Rights of Passage. By Frank E. Krenz. (Geneva: Librairie E. Droz; Paris: Minard, 1961. pp. 197.) The *Frontier Land and Right of Passage* cases, decided by the International Court of Justice, have brought the topic of enclaves back into the fore. Hence this dissertation is a timely subject on a much neglected, even if not necessarily major, aspect of international law. Nevertheless, it must be recalled that enclaves have in the past served as *casus belli* and that the most important contemporary one—West Berlin—has on more than one occasion brought the world close to the brink. Unfortunately, the author has excluded this territory from his analysis. Still, an interesting presentation has been submitted. Thus after a chapter on enclaves in history, the present-day enclaves which are described are those of Baerle-Duc, Basutoland, Büsingen and Verenhof, Campione, Dadra and Nagar-Aveli, and Llívia. It should be noted, however, that with the 1961 Indian attack on Goa, Damão and Diu, an event which occurred after the publication of this volume, the Portuguese enclaves of Dadra and Nagar-Aveli have passed into history, although Portugal had actually lost control over these areas in 1954. Right of passage to and from enclaves forms the major part of this study. Specifically, this right is discussed with regard to private persons, officials, police and armed forces, and goods, and the conclusion is reached that, even without a specific treaty, transit exists for the first two categories and for a small number of police. But the situation is said to be different in the case of the traffic of goods, armed forces and large quantities of arms and munitions. While these observations are most pertinent, the issue as to whether it is accurate to state that access should not be termed a "servitude" is by no means clear-cut.

GUENTER WEISSBERG

Great and Small Powers in International Law from 1814 to 1920 (From the Pre-History of the United Nations). By Karol Wolfke. (Warsaw: Prace Wrocławskiego Towarzystwa Naukowego [Travaux de la Société des Sciences et des Lettres], Series A, No. 72, 1961. pp. 139. Zł. 30.) This succinct book is an expansion of an earlier publication in *Państwo i Prawo* in 1949. It is primarily an historical narrative of the treatment accorded the smaller nations of Europe by the great Powers at the more important international conferences, from the Congress of Vienna in 1814 to the Peace Conference at Paris in 1919, with briefer mention of the organizational difficulties of the League of Nations, the Permanent Court of International Justice, and the United Nations. It is concerned with the doctrine, spoken of since the publication of Dr. Edwin D. Dickinson's book in 1920, as the "equality of states."

From the French, German, English, Russian and Polish sources studied, Dr. Wolfke concludes that the great Powers relied primarily on conquest for the purpose of assuming unilaterally the duties and responsibilities of maintaining peace with respect to smaller states. The small states occasionally protested but usually felt obliged, from necessity, to acquiesce. The claims of the latter were supported in varying degrees by international jurists, but received little more than token acknowledgment officially.

The author's analysis ends in 1920. The problem, however, has not yet been satisfactorily resolved. Inequality, he observes, rather than absolute equality of states, was written into the Charter of the United Nations. Equality before the law and its binding force there co-exists with the evident and essential differences which in fact exist between states. This suggests an adjustment of legal principle to international practice.

Skillful use has been made of authoritative source materials. Writing in Poland, Dr. Wolfke is naturally observant of the quality of leadership afforded by the Czar of Russia in international conferences in the 19th century and by the Soviet Government in the 20th. He has obviously given much thought to the problem for a number of years, and his presentation is clear, cogent, and interesting.

MIRIAM THERESA ROONEY

The Political Kingdom in Uganda: A Study in Bureaucratic Nationalism. By David E. Apter. (Princeton, N. J.: Princeton University Press, 1961. pp. xvi, 498. Index. \$10.00.) With Uganda coming to independence in October of this year, this stimulating study is particularly timely. The book is primarily political sociology. Mr. Apter's widely detailed examination of the concrete proposition of the Buganda kingdom in the developing Uganda is set in a somewhat formidable net of statements of general theory of African constitutional development. The carefully described and established identity of the political forms of the Baganda on the one hand, and of their social institutions on the other, permits the Buganda to be described as a "political kingdom" and thereupon to be taken as an example of "the modernizing autocracy" to be compared throughout (pp. 4-9, 22-27, 303, 438-447, 473-478) with "the mobilization systems" and "the consociational systems." Morocco and Ethiopia are categorized as political kingdoms in this sense, Ghana and Guinea as mobilization systems, and Nigeria as a consociational system. Some might doubt that this comparative dimension contributes to the success of the author's tenacious and persistent attempt to assess the Kabakaship with its hereditary charisma, but all readers of this ambitious study will be stimulated by the provocation of the recurrent generalizations and the reach of the theoretical framework.

The basic traditional units of Baganda association, the *miruka*, the

gombolola and the *saza* are intensively examined and the full significance of the land system is developed in inescapable detail. Although the technique shifts for the analysis of the rise of the political parties, the result is to re-emphasize their central rôle in shaping the nationalism of the moment. Clear and candid vignettes of the principal figures and personalities of the crises of 1900, 1945, 1949, and in the deportation and return of the Kabaka add to the liveliness of tracing the interweaving threads of political history.

The lawyer will regret the failure to assess the legal system and the administration of justice. The acute difficulties inherent in the present dual system of justice have made the integration or fusion of the Protectorate and African courts on the one hand, and the applicable bodies of law on the other, a major problem for the emerging state. It is perhaps a measure of Mr. Apter's success in dealing with matters as difficult as the lack of separation in the African courts of the judicial and the executive, and the different standards of justice administered by the African courts, that this reviewer would have liked to see him put his tools and technique to work in this area.

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OFFICIAL DOCUMENTS

FRANCE-UNITED STATES

CONVENTION OF ESTABLISHMENT, WITH PROTOCOL AND JOINT DECLARATION

*Signed at Paris, November 25, 1959; ratifications exchanged November 21, 1960; in force December 21, 1960*¹

The President of the United States of America and the President of the French Republic, President of the Community, desirous of strengthening the ties of peace and friendship traditionally existing between the two countries and of encouraging closer economic intercourse between their peoples, conscious of the contribution which may be made to these ends by arrangements that provide in each country reciprocal rights and privileges on behalf of nationals and companies of the other country, thus encouraging mutually advantageous investments and mutually beneficial commercial relations, have resolved to conclude a convention of establishment and, for that purpose have appointed as Plenipotentiaries:

The President of the United States of America,

The Honorable AMORY HOUGHTON, Ambassador of the United States of America at Paris,

and the President of the French Republic, President of the Community,

M. MAURICE COUVE DE MURVILLE, Minister of Foreign Affairs,

who, having communicated to each other their full powers, found to be in due form, have agreed on the following Articles:

ARTICLE I

Each High Contracting Party shall accord equitable treatment to nationals and companies of the other High Contracting Party, both as to their persons and as to their property, enterprises and other interests, and shall assure them within its territories full legal and judicial protection.

ARTICLE II

1. Nationals of either High Contracting Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other High Contracting Party, to travel therein freely, and to reside therein at places of their choice. They shall in particular be permitted to enter the territories of the other High Contracting Party and to remain therein, for the purpose of:

¹ Treaties and Other International Acts Series, No. 4625; 11 U. S. Treaties 2398.

(a) carrying on trade between the territories of the two High Contracting Parties and engaging in related commercial activities;

(b) developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.

2. Nationals of each High Contracting Party shall enjoy, within the territories of the other High Contracting Party, freedom of conscience, of worship, of information and of the press.

3. The provisions of the present Article shall be subject to the right of either High Contracting Party to take measures that are necessary for the maintenance of public order and for the protection of public health, morals, and safety.

ARTICLE III

1. Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to access to the courts of justice as well as to administrative tribunals and agencies, within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. Companies of either High Contracting Party not engaged in activities within the territories of the other High Contracting Party shall enjoy such access therein without any requirement of registration. Nationals of either High Contracting Party shall be accorded the benefits of legal aid within the territories of the other High Contracting Party under the same conditions as its own nationals.

2. Contracts entered into between nationals and companies of either High Contracting Party and nationals and companies of the other High Contracting Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other High Contracting Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other High Contracting Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either High Contracting Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such High Contracting Party.

ARTICLE IV

1. The lawfully acquired rights and interests of nationals and companies of either High Contracting Party shall not be subjected to impairment, within the territories of the other High Contracting Party, by any measure of a discriminatory character.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall be free from molesta-

tion and other unjustifiable measures. Official searches conducted on such premises, when necessary, shall be carried out in conformity with the law and with every consideration for the convenience of the occupants and the conduct of business.

3. Property of nationals and companies of either High Contracting Party shall not be expropriated within the territories of the other High Contracting Party except for a public purpose and with payment of a just compensation. Such compensation shall represent the equivalent of the property taken; it shall be accorded in an effectively realizable form and without needless delay. Adequate provision for the determination and payment of the said compensation must have been made no later than the time of the taking.

4. Nationals and companies of either High Contracting Party shall in no case be accorded, within the territories of the other High Contracting Party, less than national treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article.

ARTICLE V

1. Nationals and companies of either High Contracting Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain within the territories of the other High Contracting Party, whether directly or through the intermediary of an agent or of any other natural or juridical person. Accordingly, such nationals and companies shall be permitted within such territories:

(a) to establish and to maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business;

(b) to organize companies under the general company laws of such other High Contracting Party, and to acquire majority interests in companies of such other High Contracting Party;

(c) to control and manage the enterprises which they have established or acquired.

Moreover, the enterprises which they control, whether in the form of an individual proprietorship, of a company or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other High Contracting Party.

2. Each High Contracting Party reserves the right to determine the extent to which aliens may, within its territories, create, control, manage or acquire interests in, enterprises engaged in communications, air or water transport, banking involving depository or fiduciary functions, exploitation of the soil or other natural resources, and the production of electricity.

3. Each High Contracting Party undertakes not to intensify, within its territories, existing limitations as regards enterprises belonging to or controlled by nationals and companies of the other High Contracting Party which are already engaged in the activities cited in the preceding paragraph. Moreover, each High Contracting Party shall permit, within its

territories, transportation, communications and banking companies of the other High Contracting Party to maintain branches and agencies, in conformity with the laws in force, which are necessary to the operations of an essentially international character in which they are engaged.

ARTICLE VI

1. Nationals and companies of either High Contracting Party shall be permitted to engage, at their choice, within the territories of the other High Contracting Party, accountants and other technical experts, lawyers, and personnel who by reason of their special capacities are essential to the functioning of the enterprise. But these persons must fulfill the conditions necessary to the exercise of their calling under the applicable legislation.

2. In any event, such nationals and companies shall be permitted to engage accountants and other technical experts, who are not nationals of the other High Contracting Party, without regard to their having qualified to practice a profession within the territories of such other High Contracting Party, but exclusively for conducting studies and examinations for internal purposes on behalf of such nationals and companies.

ARTICLE VII

1. Nationals and companies of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, national treatment with respect to leasing, utilizing and occupying real property of all kinds appropriate to the exercise of the rights accorded them by the other Articles of the present Convention. They shall also be accorded therein, as regards the acquisition and possession of real property, all other rights to which aliens and alien companies are entitled under the legislation of such other High Contracting Party, each High Contracting Party reserving the right to invoke reciprocity in this respect.

2. Nationals and companies of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, national treatment with respect to leasing and acquiring, by purchase or otherwise, as well as with respect to possessing, personal property of every kind, whether tangible or intangible, with the exception of ships. However, either High Contracting Party may impose restrictions on alien ownership of materials dangerous from the viewpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activity, but only to the extent compatible with the enjoyment of the rights and privileges defined in Article V or provided by other provisions of the present Convention.

3. Nationals and companies of either High Contracting Party shall be accorded within the territories of the other High Contracting Party national treatment with respect to the right to dispose of property of all kinds.

ARTICLE VIII

1. Nationals and companies of either High Contracting Party shall be accorded, within the territories of the other High Contracting Party, national

treatment with respect to obtaining and maintaining patents of invention and with respect to rights appertaining to trademarks, trade names and certification marks, or which in any manner relate to industrial property.

2. The High Contracting Parties undertake to cooperate with a view to furthering the interchange and use of scientific and technical knowledge, particularly in the interest of increasing productivity and improving standards of living within their respective territories.

ARTICLE IX

1. The following categories:

(a) nationals of either High Contracting Party residing within the territories of the other High Contracting Party,

(b) nationals of either High Contracting Party not residing within the territories of the other High Contracting Party but engaged in trade or other gainful pursuit within such territories, whether or not through a permanent establishment or a fixed place of business.

(c) companies of either High Contracting Party engaged in trade or other gainful pursuit within the territories of the other High Contracting Party, whether or not through a permanent establishment or a fixed place of business,

(d) associations of either High Contracting Party that are engaged in scientific, educational, religious or philanthropic activities within the territories of the other High Contracting Party, whether through a fixed place of business or otherwise,

shall not be subject to any form of taxation or any obligation relating thereto, within the territories of such other High Contracting Party, which is more burdensome than that to which nationals, companies and associations of such other High Contracting Party in the same situation are or may be subject.

2. Nationals, companies and associations of either High Contracting Party, not falling within one of the categories specified in paragraph 1 above, shall not be subject, within the territories of the other High Contracting Party, to any form of taxation or any obligation relating thereto which is more burdensome than that to which nationals, companies and associations of any third country in the same situation are or may be subject.

3. Enterprises of either High Contracting Party, the capital of which is owned or controlled in whole or in part, directly or indirectly, by one or more nationals of the other High Contracting Party, shall not be subject in the first High Contracting Party to any form of taxation or any obligation relating thereto which is more burdensome than that to which other like enterprises of the first High Contracting Party are or may be subject.

4. The nationals, companies and associations of either High Contracting Party referred to in paragraph 1 (b), (c), and (d) of the present Article shall not be subject, within the territories of the other High Contracting Party, to any form of taxation upon capital, income, profits or any other basis, except by reason of the property which they possess within those

territories, the income and profits derived from sources therein, the business in which they are there engaged, the transactions which they accomplish there, or any other bases of taxation directly related to their activities within those territories.

5. The term "form of taxation," as used in the present Article, includes all taxes of whatever nature or denomination.

6. Each High Contracting Party reserves the right to:

(a) extend to the nationals, companies and associations of third countries, specific tax advantages on the basis of reciprocity;

(b) accord special tax advantages by virtue of agreements with third countries for the avoidance of double taxation;

(c) apply special provisions in allowing, to non-residents, exemptions of a personal nature in connection with income and inheritance taxes;

(d) extend special advantages to its own nationals and residents in connection with joint returns by husband and wife.

7. The foregoing provisions shall not prevent the levying, in appropriate cases, of fees relating to the accomplishment of police and other formalities, if these fees are also levied on other foreigners. The rates for such fees shall not exceed those charged the nationals of any other country.

ARTICLE X

1. Nationals and companies of either High Contracting Party shall be accorded by the other High Contracting Party the same treatment as nationals and companies of such other High Contracting Party in like situations, with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two High Contracting Parties as well as between the territories of such other High Contracting Party and any third country. This treatment shall be not less favorable than that accorded to nationals and companies of any third country in like situations.

2. Neither High Contracting Party shall impose exchange restrictions as defined in paragraph 5 of the present Article except to the extent necessary to prevent its monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. The provisions of the present Article do not alter the obligations either High Contracting Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a High Contracting Party to impose such restrictions.

3. The two High Contracting Parties, recognizing that the freedom of movement of investment capital and of the returns thereon would be conducive to the realization of the objectives of the present Convention, are agreed that such movements shall not be unnecessarily hampered. In this spirit, each High Contracting Party will make every effort to accord, in the greatest possible measure, to nationals and companies of the other High Contracting Party the opportunity to make investments and to repatriate the proceeds of the liquidation thereof. This principle shall apply also to

the compensation referred to in Article IV, paragraph 3, of the present Convention. Each High Contracting Party shall make reasonable provision for the withdrawal of earnings from investments, whether in the form of salaries, dividends, interest, commissions, royalties, payments for technical services, or payments for other current transactions relative to investments. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, a rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either High Contracting Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other High Contracting Party, nor to the competitive position thereof.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, charges and taxes, regulations, or other requirements imposed by either High Contracting Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two High Contracting Parties.

ARTICLE XI

Each High Contracting Party will take the measures it deems appropriate with a view to preventing commercial practices or arrangements, whether effected by one or more private or public commercial enterprises, which restrain competition, limit access to markets or foster monopolistic control, whenever such practices, or arrangements have or might have harmful effects on trade between the two countries.

ARTICLE XII

The provisions of the present Convention shall not preclude the application of measures:

- (a) regulating the importation and exportation of gold and silver;
- (b) regarding fissionable materials, the radio-active by-products of the utilization or manufacture of such materials, or raw materials which are the source of fissionable materials;
- (c) regulating the manufacture of and traffic in arms, munitions and implements of war, as well as traffic in other materials carried on directly or indirectly for the purpose of supplying military establishments;
- (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

ARTICLE XIII

The High Contracting Parties may deny to any company, in the ownership or direction of which nationals of a third country or countries have

directly or indirectly a controlling interest, the advantages of the present Convention, except with respect to recognition of juridical status and access to the courts.

ARTICLE XIV

1. The term "national treatment" means treatment accorded to nationals and companies of either High Contracting Party within the territories of the other High Contracting Party upon terms no less favorable than the treatment therein accorded, in like situations, to the nationals and companies, as the case may be, of such other High Contracting Party.

2. National treatment accorded under the provisions of the present Convention to French companies shall, in any State, territory or possession of the United States of America, be the treatment accorded therein to companies constituted in other States, territories and possessions of the United States of America.

3. As used in the present Convention, the term "nationals" ("ressortissants") means natural persons having the nationality of a High Contracting Party and not domiciled in a non-metropolitan territory thereof to which the present Convention does not extend.

4. As used in the present Convention, the term "companies" ("sociétés") means:

(a) as concerns the United States of America, corporations, partnerships, limited liability companies, and other entities having legal personality, whether or not with limited liability, but for pecuniary profit;

(b) as concerns France, "sociétés civiles," "sociétés en nom collectif," "associations en participation," "sociétés en commandite simple," "sociétés en commandite par actions," "sociétés anonymes," "sociétés à responsabilité limitée" and, in general, entities having legal personality for pecuniary profit.

5. Companies constituted under the applicable laws and regulations within the territories of either High Contracting Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other High Contracting Party.

6. Non-profit associations lawfully constituted within the territories of either High Contracting Party shall have their juridical status recognized by the other High Contracting Party and shall, *inter alia*, be accorded within the territories thereof the rights provided in Article III, paragraph 1, of the present Convention.

ARTICLE XV

1. The present Convention shall apply:

(a) As concerns the United States of America, to all territories under the sovereignty or authority thereof, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands;

(b) As concerns the French Republic, to the metropolitan departments, the Algerian departments, the departments of The Oasis and Saoura, the departments of Martinique, Guadeloupe, Guiana and Reunion.

2. The present Convention may be made applicable, by virtue of exchanges of notes between the Governments of the High Contracting Parties, to the Overseas Territories of the French Republic or to one or several such Territories, under the conditions fixed, in each case, in the said exchanges of notes.

3. The present Convention may be made applicable, in the same manner, to the member States of the Community or to one or several such States.

ARTICLE XVI

1. Each High Contracting Party shall accord sympathetic consideration to such representations as the other High Contracting Party may make with respect to any question affecting the application of the present Convention, and shall afford opportunity for an exchange of views relative thereto.

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Convention, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

ARTICLE XVII

The entry into force of the present Convention shall terminate the Trade-mark Convention signed at Washington April 16, 1869.¹

ARTICLE XVIII

1. The present Convention shall be ratified. It will enter into force one month after the exchange of the instruments of ratification, which will take place at Washington.

2. The present Convention shall have an initial term of ten years. It shall remain in force thereafter until either High Contracting Party terminates it by giving to the other High Contracting Party a written notice one year in advance.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Convention and have hereunto affixed their seals.

DONE in duplicate, in the English and French languages, both equally authentic, at Paris, this twenty-fifth day of November, one thousand nine hundred fifty-nine.

AMORY HOUGHTON

[SEAL]

M COUVE DE MURVILLE

[SEAL]

PROTOCOL

The undersigned Plenipotentiaries, duly authorized by their respective Governments, are further agreed on the following provisions, which shall form an integral part of the Convention of Establishment between the

¹ Treaty Series 94; 16 Stat. 771.

United States of America and France dated the twenty-fifth of November, one thousand nine hundred fifty-nine.

1. (a) The protection provided in Article I engages the competent authorities of each High Contracting Party to inform immediately the consuls of the other High Contracting Party of the arrest or detention of any of its nationals, if the latter so requests. The consul may then be authorized to visit such national, in conformity with the regulations of the institution of detention, and to confer with him. The competent authority will assure the transmission to the consul of all correspondence directed to him by such national.

(b) Such national shall have the right to all guaranties provided in the laws of the High Contracting Party within the territories of which he is detained, and which assure accused persons of humane treatment, the right to be informed immediately of the accusations against them, to be defended by an attorney of their choice, and to be judged as rapidly as possible.

2. (a) Notwithstanding the provisions of the present Convention, the laws and regulations in force within the territories of either High Contracting Party which govern the access of aliens to the professions and occupations, as well as the exercise of such callings and other activities by them, remain applicable as concerns nationals and companies of the other High Contracting Party.

(b) However, the procedures provided for by the above-mentioned laws and regulations, as well as those provided for by the laws and regulations governing the entry and sojourn of aliens, must not have the effect of impairing the substance of the rights set forth in Article II, paragraph 1 (a) and (b).

(c) The provisions of Article II, paragraph 1 (b), shall be construed as extending to nationals of either High Contracting Party proceeding to the territories of the other High Contracting Party for the purpose of occupying a position of responsibility in an enterprise on behalf of nationals and companies of the first High Contracting Party that have invested a substantial amount of capital in such enterprise or that are in the process of making such an investment.

(d) The advantages accorded a national of either High Contracting Party under the provisions of Article II, paragraph 1 (a) and (b), with respect to entry and sojourn in the territories of the other High Contracting Party, shall extend to his spouse and minor unmarried children who accompany or next follow to join him.

3. The provision of Article III, paragraph 1, relating to access to the courts of justice, shall not affect the regulations in force within the territories of either High Contracting Party concerning the *cautio judicatum solvi*.

4. The provisions of the last sentence of Article III, paragraph 2, shall not affect the reservation concerning the place where the award is rendered, made by France in adhering to the Convention of New York of June 10, 1958 for the recognition and execution of foreign arbitral awards.

5. In Article IV, paragraph 3, the term "expropriated . . . for a public purpose" extends *inter alia* to nationalizations.

6. The provisions of Article IV, paragraph 3, providing for the payment of compensation, shall extend to interests held directly or indirectly by nationals and companies of either High Contracting Party in property expropriated within the territories of the other High Contracting Party.

7. The provisions of Article V, paragraph 1, shall not impair the laws and regulations in force within the territories of either High Contracting Party which reserve the practice of certain professions to nationals.

8. The provisions of Article V, paragraph 1, do not preclude the right of either High Contracting Party to apply special requirements to alien insurance companies to the end that they furnish guaranties, in the interest of insured persons and of third parties, equivalent to those required of companies of the country.

9. The provisions of Article VI, paragraph 2, are adopted with regard to accountancy until such time as it may have become possible to conclude an agreement concerning the exercise of this profession.

10. The right to invoke reciprocity as provided in Article VII, paragraph 1, shall permit the French Government, taking into account the treatment accorded French nationals and companies in a State, territory or possession of the United States of America, to apply analogous treatment to nationals and companies of the United States of America, respectively domiciled in such State, territory or possession or constituted under its laws.

11. In the event that a French national or company, having acquired real property by testate or intestate succession, should be precluded by reason of alienage from enjoying rights of ownership in such property in a State, territory or possession of the United States of America, such national or company will be allowed a period of at least five years in which to dispose of it.

12. The provisions of Article VII, paragraphs 2 and 3, shall not prevent the enforcement of regulations governing transactions on the part of non-residents and aliens in foreign stocks and bonds.

13. The provisions of Article X, paragraph 1, shall not preclude differing treatment from being applied to different currencies, as may be required by the state of the balance of payments of either High Contracting Party.

14. Either High Contracting Party, with a view to protecting its currency or facilitating the servicing of the proceeds of investments and the repatriation of capital, may subject to authorization the making of investments by foreign nationals and companies.

15. The phrase, "in the greatest possible measure," employed in Article X, paragraph 3, shall be understood to refer to the conditions cited in Article X, paragraph 2.

16. Residence criteria may be applied for purposes of determining whether or not nationals and companies of either High Contracting Party are in "like situations" as that term is employed in paragraph 1 of Article XIV and in the other provisions of the present Convention.

17. Article XV does not apply to territories which are subject to the authority of either High Contracting Party solely as a military base or by reason of temporary military occupation.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present protocol and have hereunto affixed their seals.

DONE in duplicate, in the English and French languages, both equally authentic, at Paris, this twenty-fifth day of November, one thousand nine hundred fifty-nine.

AMORY HOUGHTON

[SEAL]

M COUVE DE MURVILLE

[SEAL]

JOINT DECLARATION

The two Governments deem it appropriate to clarify, at the moment of proceeding to the signing of the Convention of Establishment between the United States of America and France, the import of the reservations relating, on the one hand, to the enforcement of the laws governing the entry and sojourn of aliens and, on the other hand, to the enforcement of the laws regulating the access of aliens to the professions and occupations.

It is expressly stipulated in the Protocol to the Convention that those reservations shall not impair the substance of the rights granted to the nationals of either High Contracting Party who have invested a substantial amount of capital or are in the process of making such an investment within the territories of the other High Contracting Party, or who proceed thereto for the purpose of engaging in trade between the two High Contracting Parties.

However, the two Governments also have the intention of facilitating, to the greatest possible extent and on a basis of real and effective reciprocity, the establishment of nationals who are not within the above-cited categories and, in particular, of qualified personnel who are indispensable to the conduct of the enterprises created by nationals and companies of either High Contracting Party within the territories of the other High Contracting Party.

Consequently, and in conformity with the spirit which animated the negotiation of the present Convention, the two Governments consider that they should reciprocally exercise the greatest possible liberality consistent with their national laws both with respect to the entry and sojourn of aliens and with respect to their establishment, effective reciprocity being understood by them as pertaining globally to the whole of the two systems of regulation.

The present Declaration shall be annexed to the Convention of Establishment between the United States of America and France dated the twenty-fifth of November, one thousand nine hundred fifty-nine.

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[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BN*, Book Note; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decision; *LA*, Leading Article]

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